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A Complete Collection Of State-Trials And Proceedings For High-Treason And
Other Crimes and Misdemeanours Commencing With The Eleventh Year of the
Reign of King Richard II. And Ending With The Sixteenth Year of the Reign
of King George III. ; With Two Alphabetical Tables To The Whole
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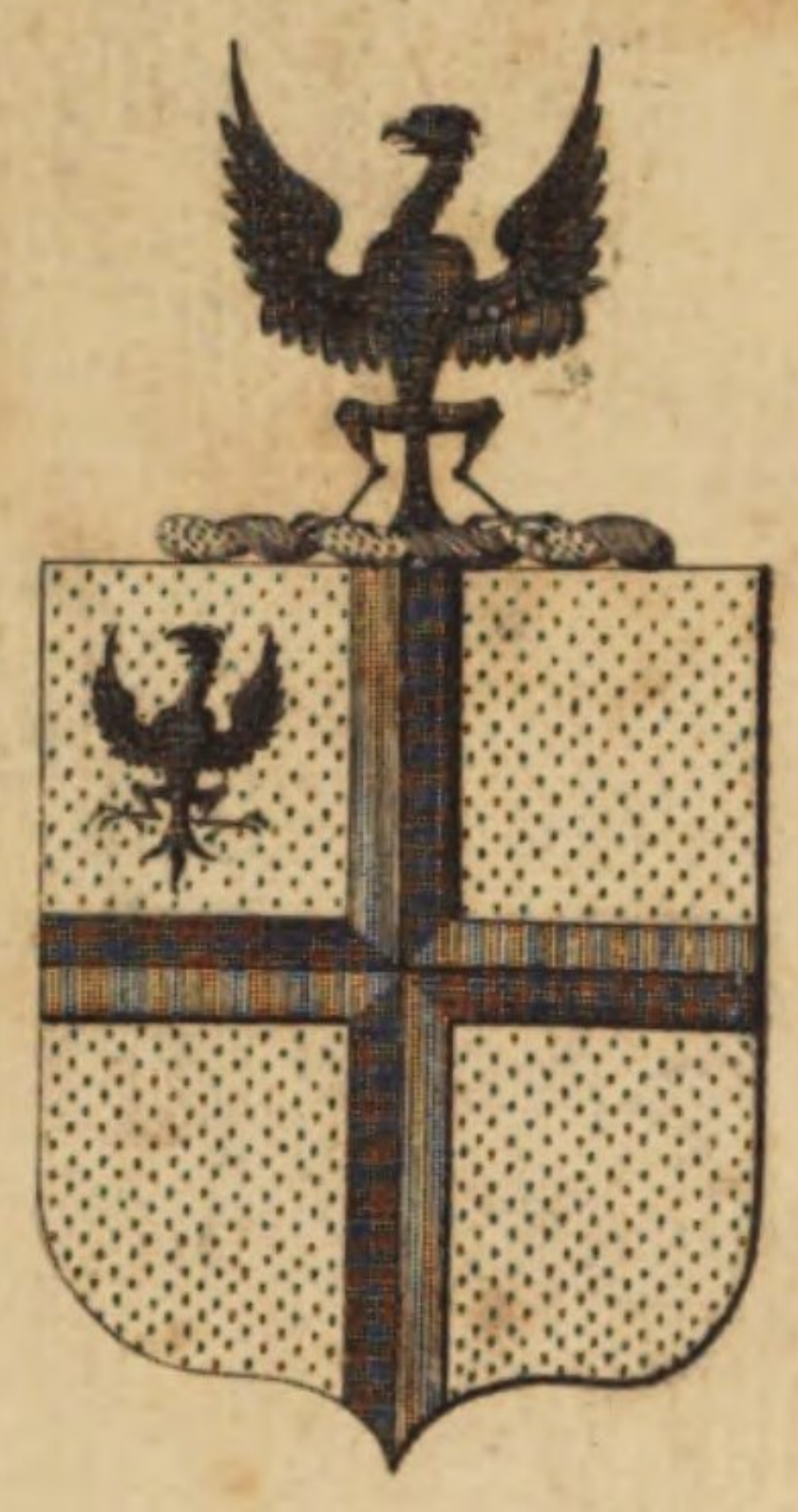

JOHN WEBB.

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A
Complete Collection
OF
STATE-TRIALS,
AND
PROCEEDINGS
FOR
HIGH-TREASON.

VOL. XI.

BAYERISCHE
STAATS-
BIBLIOTHEK
MUENCHEN

A

Complete Collection

OF

STATE-TRIALS,

AND

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FOR

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THE FOURTH EDITION;

COMMENCING WITH

The Eleventh Year of the Reign of KING RICHARD II.

AND ENDING WITH

The Sixteenth Year of the Reign of KING GEORGE III.

WITH

TWO ALPHABETICAL TABLES TO THE WHOLE.

TO WHICH IS PREFIXED,

A NEW PREFACE,

By FRANCIS HARGRAVE, ESQUIRE.

VOLUME THE ELEVENTH.

LONDON:
Printed by T. WRIGHT:
For J. F. and C. RIVINGTON, L. DAVIS, W. OWEN, T. LONGMAN, T. CADELL, B. WHITE, T. LOWNDES,
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MDCCLXXXI.

BAYERISCHE
STAATS-
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MUENCHEN

PREFACE.

My preface prefixed to the firſt volume of this edition of the STATE-TRIALS promiſed, that the preſent volume ſhould conſiſt wholly of trials not contained in any former edition; and I was underſtood to be the perſon, who would point out what were the materials proper to be adopted.

In conformity to this engagement, I uſed conſiderable diligence to diſcover what trials were omitted in the period of the former editions, and what trials of importance have occurred ſince. But the reſult of my purſuit for new matter proved very inadequate to my expectation; the induſtry of former collectors having ſcarce left any deficiencies, which I could ſupply without too far paſſing the line I had preſcribed to myſelf of merely ſelecting additional trials. Yet the few, which I have gleaned, may ſuffice to convince the reader, that I have not been ſparing of reſearch.

In the courſe of my enquiries for new trials, I reſorted to the *Britiſh Muſeum*, in hopes, that the immenſe collection of manuſcripts in that repoſitory of learning and ſcience would ſupply me with ſome new materials of importance; and I was particularly encouraged in this expectation by the promiſing titles of various articles in the catalogue of *Harleian* manuſcripts. But I was wholly diſappointed; for on examination, the few trials I met with proved, either too meagre and inſignificant to be made uſe of, or nothing more than mere tranſcripts from ſome of our old printed chronicles. And here I take great pleaſure in bearing teſtimony of the exemplary conduct of thoſe gentlemen, who by their offices have the ſuperintendance of the manuſcripts and printed books in the *Britiſh Muſeum*. Though I have had frequent occaſion to give ſeveral of thoſe gentlemen much trouble; yet I have ever found them uniformly ſtudious to render the acceſs to the valuable collections entruſted to them eaſy and agreeable. I have alſo had the full opportunity of noticing, that their deportment and attentions to others are of the ſame obliging kind. So honourable a diſcharge of their duty well entitles them to ſome rewards beyond the ſmall emoluments of their reſpective offices; and I heartily wiſh, that they may in future attract a greater ſhare of patronage from the great, than they have hitherto experienced.

There is one very ſtriking and capital defect in the former editions of this collection; I mean, in the article of parliamentary trials, under which head may be included, not only trials on impeachments, but proceedings on bills of attainder, and on bills inflicting pains and penalties. In the ten volumes, which conſtitute the work as it was before the preſent edition, there are not, as I calculate, thirty articles which fall under ſuch a deſcription. Yet from a very imperfect liſt, which I formed on a ſlight examination of the rolls of parliament, and various other books of parliamentary information, I found, that many more than a hundred ſuch trials might be extracted. It was my wiſh to have ſupplied this omiſſion; more eſpecially as by ſo doing infinite light would be thrown on a ſubject moſt intereſting to all lawyers and politicians; namely, the *criminal judicature of parliament*. But ſuch a vaſt undertaking would not only have far exceeded the limits of my engagements to the proprietors of this edition of STATE-TRIALS, but would alſo have ſwelled the preſent collection greatly beyond the terms of the propoſals to the ſubſcribers.

Before each trial in this volume, I have given notice to the reader whence it is extracted, with ſuch other explanations, as were neceſſary to enable the forming a judgment on the authority of the trial. It would have been of no ſmall advantage to the readers, if the collectors of the former volumes had been equally explanatory.

My introductory note to ſome of the trials in this volume is extended into an illuſtration of the ſubject of the trial; and occaſionally I have interſperſed ſimilar notes elſewhere. The fulleſt annotations of this kind are thoſe prefixed to the *Caſe of Impoſitions*, the *Caſe of the* POSTNATI, the *Bankers Caſe*, and the reſpective Caſes of Mr. *Whitlock* and Mr. *Oliver St. John*. Theſe and the other notes I commit to the candid conſtruction of the reader, with an aſſurance, that I have endeavoured to form and expreſs my opinions with the utmoſt impartiality and moderation; and that I ſhall even think myſelf obliged by a good-humoured correction of any errors into which I may have fallen.

In the trials and caſes in this volume, the reader will find an ample diſcuſſion of various great conſtitutional queſtions.—The *Caſe of Impoſitions* furniſhes a profuſion of learning on the point ſo long controverted, *whether the king could by prerogative impoſe duties at the ports*. In the courſe too of the arguments on that head, the learned reader will be pleaſed to ſee ſome important remarks on the *king's power of laying embargoes*. Some perſons, juſtly of high authority in the preſent times, have been inclined to reſtrict the exerciſe of this power to *time of war*. But I confeſs, that I do not ſee, why the prerogative ſhould be thus limited. The ſafety of the ſtate, which is the ground of entruſting the king with the power of laying embargoes, may require an exerciſe of it in times both of war and peace; and on the eve of a war it is obviouſly as neceſſary as in a war itſelf. Alſo from what I remember having formerly read on the ſubject, I have little doubt, but that the precedents and authorities, whenever they ſhall be well collected, will be found greatly to preponderate againſt the diſtinction I have ſtated. That profound parliamentary lawyer, Mr. *Hakewill*, when he was arguing in the houſe of commons againſt the claimed prerogative of impoſitions at the ports, candidly admitted the prerogative of embargoes to the full extent of its principle, and conſequently, as I conceive, without reſtricting its exerciſe to times of war. Yet he well knew, that the power of ſhutting up the ports was one great branch of the argument for the power of taxing at the ports; and alſo, that the power of laying embargoes had been often exerciſed under ſpecial acts of parliament. Nor did Mr. *St. John*, in his argument againſt ſhip-money, ſcruple to admit the power of laying embargoes, and that it was exerciſeable, not merely in times of war, but generally in times of *imminent danger*, whether ariſing from war, from dearth, or from any other cauſe. Perhaps ſome readers may wonder, that I ſhould be thus unreſerved in contending for the prerogative of embargoes. But I refer ſuch to my note before the *Caſe of Impoſitions*. They will there find a ſhort but connected view of the various means practiſed to eſtabliſh in the crown a power of taxing out of parliament from the acceſſion of James the firſt to the Reſtoration; and I preſume to hope, that on a conſideration of the freedom, with which I have in that note animadverted on ſuch unconſtitutional attempts, I ſhall be ſufficiently guarded againſt any ſuſpicion of the leaſt wiſh to extend the royal prerogative beyond its due limits.—The Iriſh Caſe of *Præmunire* muſt be intereſting to every perſon, who wiſhes to be informed, in a ſummary and accurate way, how the church of Rome gradually encroached on the king's eccleſiaſtical juriſdiction; and how at length the Engliſh church and kingdom were compleatly exonerated from the expence tyranny and diſgrace of foreign uſurpation. My note at the end of that caſe is intended to aſſiſt the inquiries of ſuch as may be curious to purſue the ſubject more in detail.—In the Caſe of the *Poſtnati*, the doctrine of *allegiance* to the crown is enlarged upon, with a ſurprizing variety of learning and hiſtorical information; tending to explain the relation between England and the countries which at any time before the acceſſion of the firſt James had been dependant upon England, or connected with it by being under the dominion of the ſame prince. To render this great political Caſe more intelligible, I have prefixed a fuller account of its origin, and all the proceedings in it, than is commonly to be met with; to which I have added a reference to almoſt every book of conſequence likely to ſupply the leaſt further information about the caſe. The Caſe of Mr. *Oliver St. John* for writing againſt *benevolences*, deſerves attention on account of its connection with the *Caſe of Ship Money* and the *Caſe of Impoſitions*. In my note on Mr. St. John's Caſe, I have pointed out this connection; and I have therein riſqued ſome remarks on the ſubject of *benevolences* to the Crown; with a view to ſhew, how far they have been condemned and are clearly unlawful.—In the *Caſe of the Bankers*, ſome curious ſubjects are diſcuſſed; more eſpecially the *general* power of the Crown to alienate its revenues before the reſtraining ſtatute of queen Anne; whether ſome *particular* revenues, on account of their *ſpecial* nature, were not privileged and exempt from the Crown's general power of alienating; and whether the barons of the Exchequer could compel the lord treaſurer to iſſue money for payment of the king's debts, or, in other words, whether the receipt of the Exchequer is under the controul of the barons. The moſt remarkable of the arguments in this famous caſe, or, at leaſt, of thoſe which have reached the preſent times, is lord Somers's. It not only unfolds the conſtitution of the Exchequer with great minuteneſs; but in other reſpects is moſt excellent, having a ſcope and compaſs, which will ever render it of infinite value to the profeſſion of the law. So anxious, indeed, was his lordſhip to ſuſtain his opinion by the moſt authentic materials, that the records referred to and ſtated in his argument are ſaid to have coſt him ſeveral hundred pounds. My note on this Caſe, explains how it aroſe, the progreſs of it, and how the claims of the bankers and their creditors were finally adjuſted by act of parliament, with ſome other particulars, which I thought might be conducive to a thorough underſtanding of the caſe, and of the points decided by it.—In reſpect to the remainder of the Caſes in this volume, moſt of them relate to very intereſting ſubjects; amongſt which the chief are, the *effect of matrimonial ſentences* of the eccleſiaſtical courts, the extent of the *privilege of parliament*, the queſtion of *general warrants*, the queſtion on the *ſeizure of papers*, the powers claimed by *ſecretaries of ſtate* and *privy counſellors*, the queſtion on the ſlavery of *negroes* in England, and the power of *preſſing mariners*. However, ſome of the early caſes I have introduced do, I confeſs, require an apology; being certainly too looſe and imperfect in the ſtatement to deſerve the name of trials. My inducement to inſert them was, that I wiſhed to give the reader ſome proof, how very extenſive I was in my enquiries and reſearches for new matter to ſupply the omiſſions of former collectors; and I do hope, that the notes wich precede theſe ſhort accounts of trials, will be received as a full teſtimony of my induſtry in that reſpect.—Thus much may ſuffice to appriſe the reader what he is to expect from the contents of the preſent volume.

In my preface to the firſt volume of this edition of STATE TRIALS, I thought, that I had ſufficiently explained myſelf to guard againſt any reſponſibility beyond what really belongs to me. But from the manner of placing my name in the title to the collection, which I now think might have been leſs ambiguous, a very erroneous notion has prevailed, as to the extent of my very limited ſhare in the undertaking. I therefore deem it proper to be more explicit on this head; and with that view, I here take the opportunity of declaring, that the only parts of the work for which I am in any reſpect accountable, excluſive of the preſent preface, are the preface with my name in the firſt volume; and the ſelection of the trials and caſes for this volume, with ſuch annotations as I have given in the courſe of it, particularly thoſe before the ſeveral trials. As to the trials in the ten preceding volumes, they were printed literally from the laſt of the former editions; nor did I ſee ſo much as one ſheet of thoſe volumes before it was printed and publiſhed, except only the ſheet containing my preface and the title to the firſt volume. I am equally free from reſponſibility for the *alphabetical* and *chronological tables* of all the trials in this collection, and for the *general index* of matter; all of which are placed at the end of this volume. Theſe tables and index were prepared by another gentleman. The *chronological table of the trials* is quite a new acceſſion to the work; there being no ſuch table to the former editions; though the utility of it is apparent, as it in great meaſure obviates the diſadvantage from the diſorderly arrangement of many of the trials in point of time. This diſorder was a neceſſary conſequence of continuing the firſt ſix volumes of the work by ſupplemental volumes. The merit of leſſening this inconvenience belongs wholly to the framer of the tables and Index to this edition; that is, both the propoſal of ſuch an improvement and the execution of it originated from him. All that I can pretend to ſay further concerning the tables and index is, that the latter has been executed at a much greater expence than would have been incurred, if I had not made it a particular requeſt to the proprietors of the edition to be liberal in their allowance for ſo uſeful and laborious a part of the undertaking; and further, that I have every reaſon to believe, that the gentleman who compiled the general index of matter, has been extremely diligent in endeavouring to render it acceptable.

Brompton-Row, Knightſbridge,
Aug. 30, 1781.

FRANCIS HARGRAVE.

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A COMPLETE
COLLECTION
OF
TRIALS, &c.

I. *The Trial of Sir* William Stanley, *Knight, for* High Treaſon, 10 Hen. VII. 1494-5.

[*There is not a regular account of the trial of this eminent perſon, in any book we have met with. Old* Fabian, *with his uſual dryneſs and brevity, only writes, that about* Chriſtmas 1494 *ſir* Robert Clifford *impeached ſir* William Stanley, *and that ſir* William *was beheaded the 15th of* February *following*. Fab. 530. Hall, *with his followers* Grafton *and* Hollingſhead, *explains, by whom ſir* William *was accuſed to the king, what was reported to be his offence, and how the king acted on the occaſion; adding ſome conjectures as to the cauſe of ſir* William'*s alienation from the king; but as to the trial itſelf, all they ſay is, that he was condemned and executed. Even lord* Bacon, *though he appears to have taken no ſmall pains to throw every light on the ſubject, owns, that the memory of the caſe was dark; and writes of it only from imperfect tradition, aided by the ſtrength of his own conjecture. However, our readers will ſcarce be averſe to ſeeing what a hiſtorian of ſuch a deep penetration writes on a ſubject ſo intereſting. We ſhall therefore extract the reſult of his inveſtigation, after firſt giving* Hall'*s account, which contains no mean ſpecimen of the abilities of that old chronicler, and will be found to be the groundwork of ſome part of lord* Bacon'*s more ſplendid and enlightened narrative.*]

Extract from Hall's Hen. VII. *p.* 35.

SYR *Robert Clyfford*, partely truſting on the kynges promes, and partely miſtruſtyng the thing, becauſe he knewe that diverſe that were accuſed to be partakers of that faccion and conſpiracy [in favor of *Perkyn Warbeck*] were put in execucion: and therfore perceavyng that their could not be a more pernicious nor more deſperate begonne thinge then that develiſhe enterprice, returned ſodeynly agayn into *England*. The kynge beynge certefied before of his coming, went ſtreight to the *Towre* of *London* the morow after the daye of Epiphany, and there taryed til ſuche tyme that ſyr *Robert Clyfford* was there preſented to hys perſon, which thinge he uſed under this pretence, that if ſyr *Robert Clifforde* had accuſed any of the nobilitie to be partakers of this ungracious fraternitie and diabolical conjuracion, that then every ſuch perſon might be called thether without ſuſpeccion of any evell, and there ſtreight to be attached and caſt in holde.

But before I go any farther I wil ſhew the opinion that at that tyme ranne in many mens heddes of this knyghtes goynge into *Flaunders*. Some men helde this opinion, that kyng *Henry* for a polecy dyd ſende him as a ſpye to *Flaunders*, or els he woulde not have ſo ſone receaved him into his grace and favour agayn. Neverthceleſſe this is not like to be true by diverſe reaſons and apparant argumentes, firſte, after that attempt begonne by ſyr *Robert*, he was in no ſmal dangier himſelfe, and by that was not a litle noted, and hys fame blemiſhed, but alſo hys frendes were ſuſpected and had in a gealoſy. Secondarely, he was not after that in ſo great favour, nor ſo eſtemed with the kynge as he had been in tymes paſt, becauſe he was blotted and marked with that cryme and offence. And therfore he bearing his favoure to the houſe of *Yorke*, entendynge in the beginning to adminiſter diſpleaſure to kyng *Henry*, ſayled to the lady *Margaret*, beyng ſeduced and brought in beleſe that *Perkyn* was the very ſonne of kynge *Edward*. But to my purpoſe, when ſyr *Robert* came to the preſence of the kynge, he knelyng on his knees moſt humblye, beſeched hym of grace and pardone, whiche he ſhortely obteyned. And after that beynge requyred of the maner and ordre of the conjuracion and what was done in *Flaunders*, he opened every pointe to his knowlege, and after diſcloſed the names, aſwell of the aiders and fautoures as of the inceptors and begynners. Amongeſt whome he accuſed ſyr *William Stanley*, whome the kynge made hys chieſe chamberleyn, and one of hys prevy counſayll. When he had ſo ſayde, the kyng was greatly diſmayed and greved, that he ſhoulde be partaker in that greveous offence, conſiderynge firſt that he had the governaunce of his chambre, and the charge and comptrolment of all ſuche as were next to hys bodye, and alſo callynge to remembraunce the manifolde gratuities, whiche he had receaved at hys hande, but in eſpeciall not forgettynge that benefite above all other, that onely by his aide and ſuccoure, he had vanquiſhed and overthrowen his mortall enemy kynge *Rycharde*. Wherefore at the begynnynge he coulde in no wyſe be induced nor perſuaded to beleve, that he was ſuch a prevy conſpiratoure or malicious offender; but when the cryme was openly proved and probably affirmed, then the king cauſed hym to be reſtrayned from his libertie in his awne chambre within the *Quadrate Towre*. And there appoynted hym by his prevy counſayll to be examined. In whiche examinacion he nothinge denyed, but wiſely and ſeriouſly did aſtipulate and agree to all thinges layed to hys charge, if he were in any of theim culpable or blame woorthy.

The reporte is, that this was his offence. When communicacion was had betwene hym, and this ſyr *Robert Clyfforde*, as concerning *Perkyn*, whiche falſely uſurped the name of kyng *Edwardes* ſonne, ſyr *William Stanley* ſayde and affirmed there, that he would never fight nor beare armure agaynſt the young man, if he knew of a truthe that he was the indubitate ſonne of kyng *Edward* the IV. Thys poynte argueth and proveth hym at that tyme, beynge moved with melancholy, to beare no great good will to kyng *Henry*, wherof ſuſpicion firſt grewe, and after this enſued the accuſacion of ſyr *Robert Clyfforde*.

Then the kyng doubtinge what to do with him, did conſulte and breath with hymſelfe of this ſodeyne chaunce. For he feared leaſt that his brother lorde *Thomas Stanley*, in whome he had founde great frendſhip, woulde take this mattre greveouſly. And if he ſhould remit that fault, that, abuſynge his lenyte and mercy, he would be the more bolder to offende and treaſpace more highly. Albeit at the laſt, ſeveritee tooke place, and mercy was put backe, and ſo he was arreigned at *Weſtmynſter*, and adjudged to dye, and accordinge to that judgemente was broughte to the *Towre-hill* the xvi. daye of *February*, and there had hys head ſtriken of. What was the occaſion and cauſe, why the ſyncere and faythfull mynde, that ſyr *William* allways before bare to kyng *Henry*, was turned into cancarde hatred and diſpite, and why the eſpeciall favoure that the kynge bare towarde hym was tranſmuted into diſdeyne and diſpleaſure, dyverſe men alledge dyverſe cauſes, affirmynge that when kynge *Henry* (what other mutuall benefites the one had receaved of the other, I wyll nowe pretermyt and overpaſſe) in that battaile, in the whiche he bereft kynge *Rycharde* bothe of hys life and hys kyngdom, beynge aſſociate and accompanied but with a ſmall numbre, and circumvented by kynge *Richardes* army, and in great jeopardy of his lyfe, thys ſyr *William* beynge ſent from the lord *Standley* hys brother with a good company of ſtronge and hardy men (whiche lorde *Stanley* was nere the felde with a great army) came ſodeynly and fortunately to the ſuccours of kynge *Henry*, and ſaved hym from deſtruccion, and overthrewe kynge *Rychard* as before you have heard. Surely thys was a benefite above all benefites to be remembred, by the which kyng *Henry* was not onely preſerved alyve, but alſo obteyned the croune and kingdome, which great benefite, after the kingdome once obteyned, he did neither forget nor yet left unrewarded. For the lord *Thomas Stanley* he inveſted with the ſwoorde of the countie of *Darby*, and beſide other great giftes and officies geven to *William Stanley*, he made him his chiefe chamberleyn. This ſyr *William*, although he were in great favoure with the kyng, and had in great and high eſtimacion, more remembring the benefite done to the kyng, then the rewardes and gratuitees of his liberalite receaved, thinking that the veſſel of oyle, (according to the Goſpel) would overflowe the brymmes, and as ſome ſaye, deſiryng to be erle of *Cheſtre* and therof denyed, began to grudge and diſdeyne the kyng his high frend: and one thing encoraged him much, which was the riches and treaſure of king *Richard*, which he onely poſſeſſed at the conflict of *Boſwoorth*: by reaſon of which haboundance of ryches and greate powre of people, he ſet nought by the kyng his ſovereign lord and maſtre. When the king perceaved that his ſtomack began to canker and waxe ruſty, he was with him not a litle diſpleaſed, and ſo when bothe their hartes were enflamed with melancoly, bothe loſte the fruite of their longe continued amitie and favoure. And ſo it often chaunceth, that when men do not conſider nor yet regard the great benefites to them exhibited, they rendre agayne hatred for liberalitee, and for breade geven, they yelde agayne a ſcorpion. Nowe to returne to the matter.

At thys tyme the kyng thought it beſt, ye and very neceſſary, not onely to take hede about him, but alſo to uſe ſome ſharpe punyſhment and correccion of the offences of his ſubjectes, to the intent that the late begon ſedicion might the ſoner be repreſſed, and for this cauſe ſpecially that ſome perſons voyde of all honeſt feare and reverent dread, had taken ſuch courage and audacitie to them, that they feared not to ſpeake evell of their kyng and ſovereign lord, with mooſt ſpiteful and contumelious wordes, as though thei neither feared nor woulde obey him, or his preceptes and commaundementes, expecting dayly and hourely the arryvall and landing of the feyned *Rychard* duke of *Yorke*, now lately ryſen from death to lyfe. But when knowlege of the ſlaunderous and opprobrious woordes were brought to the kynges eares, he cauſed dyverſe perſones to ſuffre condigne punyſhment for their heynous offences, whereby their complices wel perceavyng that their entreprice had no proſperous ſucceſſe nor toke any good effect, and eſpecially ſuch as temerariouſly began to make maſtries and farther ſeyng what preparacion was made and provyded agaynſt theyre tumulteous commocion and frantique entreprice, they of their awne ſwynge paceſied themſelfes, and beganne to turne to their kynge and naturall liege lorde.

Extract from Bacon's Hen. VII. *in* 1. Kenn. Compl. Hiſt. *2d. ed. p.* 610, 611.

UPON Al-hallows-day even, being now the tenth year of the king's reign, the king's ſecond ſon *Henry* was created duke of *York*; and as well the duke, as divers others, noblemen, knights batchellours, and gentlemen of quality, were made knights of the *Bath*, according to the ceremony. Upon the morrow after Twelfth-day, the king removed from *Weſtminſter* (where he had kept his *Chriſtmas*) to the *Tower* of *London*. This he did as ſoon as he had advertiſement, that ſir *Robert Clifford* (in whoſe boſom or budget moſt of *Perkin*'s ſecrets were layed up) was come into *England*. And the place of the *Tower* was choſen to that end, that if *Clifford* ſhould accuſe any of the great ones, they might without ſuſpicion, or noiſe, or ſending abroad of warrants, be preſently attached; the court and priſon being within the cincture of one wall. After a day or two, the king drew unto him a ſelected council, and admitted *Clifford* to his preſence; who firſt fell down at his feet, and in all humble manner craved the king's pardon, which the king then granted, though he were indeed ſecretly aſſured of his life before. Then commanded to tell his knowledge, he did amongſt many others (of himſelf, not interrogated) appeach ſir *William Stanley*, the lord chamberlain of the king's houſhold.

The king ſeemed to be much amazed at the naming of this lord, as if he had heard the news of ſome ſtrange and fearful prodigy. To hear a man, that had done him ſervice of ſo high a nature, as to ſave his life, and ſet the crown upon his head; a man, that enjoyed by his favour and advancement ſo great a fortune, both in honour and riches; a man, that was tied unto him in ſo near a band of alliance, his brother having married the king's mother; and laſtly, a man, to whom he had committed the truſt of his perſon, in making him his chamberlain; that this man, no ways diſgraced, no ways diſcontent, no ways put in fear, ſhould be falſe unto him. *Clifford* was required to ſay over again, and again, the particulars of his accuſation, being warned, that in a matter ſo unlikely, and that concerned ſo great a ſervant of the king's, he ſhould not in any wiſe go too far. But the king finding that he did ſadly and conſtantly (without heſitation or varying, and with thoſe civil proteſtations that were fit) ſtand to that that he had ſaid, offering to juſtifie it upon his ſoul and life; he cauſed him to be removed. And after he had not a little bemoaned himſelf unto his council there preſent, gave order that ſir *William Stanley* ſhould be reſtrained in his own chamber, where he lay before, in the *Square Tower*. And the next day he was examined by the lords. Upon his examination he denied little of that wherewith he was charged, nor endeavoured much to excuſe or extenuate his fault. So that (not very wiſely) thinking to make his offence leſs by confeſſion, he made it enough for condemnation. It was conceived, that he truſted much to his former merits, and the intereſt that his brother had in the king. But thoſe helps were over-weighed by divers things that made againſt him, and were predominant in the king's nature and mind. Firſt, an over-merit; for convenient merit, unto which reward may eaſily reach, doth beſt with kings. Next the ſenſe of his power; for the king thought, that he that could ſet him up, was the more dangerous to pull him down. Thirdly, the glimmering of a confiſcation; for he was the richeſt ſubject for value in the kingdom; there being found in his caſtle of *Holt* forty thouſand marks in ready money, and plate, beſides jewels, houſhold-ſtuff, ſtocks upon his grounds, and other perſonal eſtate, exceeding great. And for his revenue in land and fee, it was three thouſand pounds a year of old rent, a great matter in thoſe times. Laſtly, the nature of the time; for if the king had been out of fear of his own eſtate, it was not unlike he would have ſpared his life. But the cloud of ſo great a rebellion, hanging over his head, made him work ſure. Wherefore after ſome ſix weeks diſtance of time, which the king did honourably interpoſe, both to give ſpace to his brother's interceſſion, and to ſhew to the world, that he had a conflict with himſelf what he ſhould do; he was arraigned of high-treaſon, and condemned, and preſently after beheaded.

Yet is it to this day but in dark memory, both what the caſe of this noble perſon was, for which he ſuffered, and what likewiſe was the ground and cauſe of his defection, and the alienation of his heart from the king. His caſe was ſaid to be this: that in diſcourſe between ſir *Robert Clifford* and him, he had ſaid; *that if he were ſure, that that young man were king* Edward'*s ſon, he would never bear arms againſt him.* This caſe ſeems ſomewhat an hard caſe, both in reſpect of the conditional, and in reſpect of the other words. But for the conditional, it ſeems the judges of that time (who were learned men, and the three chief of them of the privy council) thought it was a dangerous thing to admit *ifs* and *ands*, to qualifie words of treaſon; whereby every man might expreſs his malice, and blanch his danger. And it was like to the caſe (in the following times) of *Elizabeth Barton*, the holy maid of *Kent*; who had ſaid, *that if king* Henry *the eighth did not take* Katherine *his wife again, he ſhould be deprived of his crown, and die the death of a dog.* And infinite caſes may be put of like nature. Which (it ſeemeth) the grave judges taking into conſideration, would not admit of treaſons upon condition. And as for the poſitive words, *that he would not bear arms againſt king* Edward'*s ſon*; though the words ſeem calm, yet it was a plain and direct over-ruling of the king's title, either by the line of *Lancaſter*, or by act of parliament. Which (no doubt) pierced the king more, than if *Stanley* had charged his launce upon him in the field. For if *Stanley* would hold that opinion, that a ſon of king *Edward* had ſtill the better right, he being ſo principal a perſon of authority, and favour about the king; it was to teach all *England* to ſay as much. And therefore (as thoſe times were) that ſpeech touched the quick. But ſome writers do put this out of doubt; for they ſay, that *Stanley* did expreſly promiſe to aid *Perkin*, and ſent him ſome help of treaſure.

Now for the motive of his falling off from the King; it is true, that at *Boſworth Field* the king was beſet, and in a manner incloſed round about by the troops of king *Richard*, and in manifeſt danger of his life; when this *Stanley* was ſent by his brother with three thouſand men to his reſcue, which he performed ſo, that king *Richard* was ſlain upon the place. So as the condition of mortal men is not capable of a greater benefit, than the king received by the hands of *Stanley*; being like the benefit of *Chriſt*, at once to ſave and crown. For which ſervice the king gave him great gifts, made him his councellour and chamberlain; and, ſomewhat contrary to his nature, had winked at the great ſpoils of *Boſworth Field*, which came almoſt wholly to this man's hands, to his infinite enriching. Yet nevertheleſs blown up with the conceit of his merit, he did not think he had received good meaſure from the king, at leaſt not preſt down and running over, as he expected. And his ambition was ſo exorbitant, and unbounded, as he became ſuitor to the king for the earldom of *Cheſter*. Which ever being a kind of appendage to the principality of *Wales*, and uſing to go to the king's ſon; his ſuit did not only end in a denial, but in a diſtaſte; the king perceiving thereby, that his deſires were intemperate, and his cogitations vaſt, and irregular, and that his former benefits were but cheap, and lightly regarded by him. Wherefore the king began not to brook him well. And as a little leaven of new diſtaſte doth commonly ſour the whole lump of former merit, the king's wit began to ſuggeſt unto his paſſion that *Stanley*, at *Boſworth Field*, though he came time enough to ſave his life, yet he ſtayed long enough to endanger it. But yet having no matter againſt him, he continued him in his places until this his fall.

After him was made lord chamberlain, *Giles* lord *Dawbeny*, a man of great ſufficiency and valour; the more, becauſe he was gentle and moderate.

There was a common opinion, that ſir *Robert Clifford* (who now was become the ſtate informer) was from the beginning an emiſſary, and ſpie of the king's; and that he fled over into *Flanders* with his conſent and privity. But this is not probable; both becauſe he never recovered that degree of grace, which he had with the king before his going over; and chiefly, for that the diſcovery which he had made touching the lord chamberlain (which was his great ſervice) grew not from any thing he learned abroad, for that he knew it well before he went.

II. *The Trial of Sir* THOMAS EMPSON, *Knight, and* EDMUND DUDLEY, *Eſq. for* High Treaſon, *at* Guildhall, London, 1 Hen. VIII. 1509.

[*The moſt exact account of the proceedings againſt theſe two remarkable perſons being to be found in lord* Herbert, *we ſhall lay it before the reader; who, if he chooſes to purſue the ſubject further, may conſult* Polydore Virgil, Hall, *and* Hollingſhead.—*But it is proper to premiſe, what we conceive to be a great error, which is current in reſpect to* Empſon *and* Dudley. *Our hiſtorians in general, not excepting lord* Herbert *and Mr.* Hume, *repreſent* Empſon *and* Dudley *to have been* doubly *attainted, firſt by judgment on trial before a jury, and ſecondly by an act of parliament. But the ſtatute, thus treated as an act of attainder, was in truth only an act to relieve certain perſons, in truſt for whom* Empſon *and* Dudley *were ſeiſed of various eſtates; and to prevent their attainders from hurting innocent perſons. Nor is there a word in the act, either to confirm the attainder or to attaint; as will appear by conſulting the act itſelf, which is extant in* Raſtall'*s edition of the* Statutes. *Yet even the elaborate writers of the* Parliamentary Hiſtory, *to whom both lawyers and politicians are ſo much indebted for their uſeful and important labours, have adopted the error; though throughout that work, recourſe is apparently had to the journals and records of parliament, which ſtamps it with great authority. How this happened, we cannot otherwiſe account for, than by conjecturing, that they were confirmed in the error of their predeceſſors, by the particular manner in which the* Journals of the Lords *take notice of the act, whilſt it was in its progreſs through that houſe as a bill. On the firſt and ſecond reading, which was the ſame day, it is ſtiled a bill concerning* Dudley *and* Empſon, *and their* attaint and conviction in parliament. *Theſe words certainly import a parliamentary attainder, and might well lead any perſon to give credit to the prior repreſentation of its being ſo, without taking the trouble to examine the act, which is not in the later edition of the* Statutes. *But whether their thus deſcribing the bill was an inaccuracy in the penner of the journal, or the bill was at firſt to attaint, it certainly did not paſs in that form. Indeed the* ſubſequent *part of the journal takes notice, that the bill was* newly formed, *before it was ſent to the Commons.*]

Extract from Lord Herbert's Hen. VIII. *in* 2. Kenn. Compl. Hiſt. *2d ed. p.* 2, 4, 6.

WHILE the obſequies and rites [of *H.* VII.] were preparing *(a)* (the particulars whereof *Hall* after his manner relates) king *Henry* retired privately from *Richmond* (where his father died) to the *Tower* of *London*, both that he might with more leiſure adviſe with his council concerning the preſent affairs of his kingdom, as alſo the better to avoid thoſe ſalutes and acclamations of the people, which could not but be unſeaſonable, till the lamentations and ſolemnity of his father's funeral were paſt. He thought not fit to mingle the noiſes. Here then it was in the firſt place reſolved to make good his authority, as having more undoubted right to the crown by the *Union of the White-Roſe* and the *Red* in his perſon, than any king ever delivered to us by warrantable hiſtory. For this end he found or took occaſions. In one kind *Henry Stafford*, brother to the duke of *Buckingham*, ſerved for example, who (upon I know not what ſuſpicion) was apprehended preſently, and committed to the *Tower*; which yet ſeemed afterwards ſo frivolous, that, to repair this diſgrace, he was the ſame year made earl of *Wiltſhire*. In the other kind, doctor *Ruthall* became the object, being (together with one of his council) made the ſame day biſhop of *Dureſme*. Thus, though it ſeems he haſted to take upon him the real marks of ſoveraignty, yet he ſo tempered them, as to leave his ſubjects in hope of an even hand. Beſides, that he might ſhew himſelf gracious to his ſubjects, he not only confirmed the pardon his father gave a little before his death for all offences, except murder, felony, and treaſon, (to which general abolitions do not properly reach) but for farther performance of his father's laſt will cauſed a proclamation to be made; that if any man could prove himſelf to be then wrongfully deprived of his goods, by occaſion of a certain commiſſion for forfeitures, he ſhould (upon due complaint) have ſatisfaction; whereupon ſo many petitions were preſently exhibited againſt ſir *Richard Empſon* and *Edmund Dudley*, eſq. (employed lately for taking the benefit of penal ſtatutes) that it was thought fit to call them before the council, where *Empſon* ſpake to this effect: *(b)*

“ *Right Honourable and others here preſent:*

“ I HAVE remarked two cauſes in general, that move attention. One is the greatneſs, the other is the ſtrangeneſs and novelty of argument. Both theſe concur ſo manifeſtly in the affairs now queſtioned, that I will not much implore your patience. Though on the other ſide, conſidering my violent perſecution, I cannot but think it a favour, that I may ſpeak for myſelf; but (alas) to whom? The king my maſter, to whom I ſhould appeal, as to my ſupreme judge and protector, abandons me to my enemies, without other cauſe, than that I obeyed his father's commands, and upheld the regal authority. The people, on whoſe equal tryal I ſhould put my life, ſeek my deſtruction, only becauſe I endeavour to execute thoſe laws whereof themſelves were authors. What would have happened to me, if I had diſobeyed my king, or broke my country's laws? Surely, if I have any ways tranſgreſſed, it is in procuring, that theſe penal ſtatutes might be obſerved, which your ſelves in open parliament decreed, and to which you then ſubmitted, both your perſons, eſtates, and poſterity; and if this be a crime, why do you not firſt repeal your proper acts? Or if (which is truth) they ſtand ſtill in full force and vertue, why do you not vindicate from all imputation both your ſelves and me? For who ever yet ſaw any man condemn'd for doing juſtice? Eſpecially when by the chief diſpencer thereof (which is the king) the whole frame of the proceeding hath been confirmed and warranted? Nay, whoever ſaw man on theſe terms not rewarded? And muſt that, which is the life and ſtrength of all other actions, be the ſubverſion and overthrow of mine? Have you read or heard in any well-governed country, that the infractors of laws made by publick vote, and conſent, eſcaped without puniſhment, and they only puniſhed who laboured to ſuſtain them? Or when you had not read or heard any ſuch thing, could you imagine a more certain ſign of ruine in that common-wealth. And will you alone hope to decline this heavy judgment? When, contrary to all equity and example, you not only make precedents for injuſtice and impunity, but together with defaming would inflict a cruel death on thoſe who would maintain them; as if this might be a fit guerdon for thoſe who (I muſt tell you) every where elſe would have been thought the beſt patriots; what can we expect then, but a fatal period to us all? But let God turn this away, though I be the ſacrifice. Only, if I muſt die, let me deſire that my enditement may be entered on no record, nor divulged to foreign nations, leſt, if they hear, in my condemnation, all that may argue a final diſſolution in government, they invade and overcome you.”

To this was anſwered briefly, “ That he received a great deal of liberty to ſpeak ill, as well as to do: that he ſhould find at laſt, he was puniſhed for paſſing the bounds of his commiſſion from the late King, and for ſtretching a law which in it's ſelf was ſevere enough to the common and poorer ſort of people, from whom he exacted moſt unjuſtly.” The chief parts of his accuſation (that I can find) were, *(c)*

“ 1. That he had committed divers perſons to priſon, without ſuffering them to anſwer till they had compounded for their fines.

“ 2. For ſearching unduly mens eſtates, and bringing them wrongfully to hold under that tenure they call *in capite*; without that the parties could be permitted to a traverſe, till they had payed great fines and ranſoms.

“ 3. That wards, being come to full years, were not allowed to ſue out their livery, till they had paid an exceſſive compoſition.

“ 4. That out lawed perſons could not be allowed to ſue out their charter of pardon, till they had paid half the profit of their lands for two years, upon pretence that it was according to law.

“ 5. That he uſurped upon the juriſdiction of other courts, in hearing and determining divers matters properly belonging to them.

“ 6. *Laſtly*, That whereas a priſoner being indicted for theft, in the city of *Coventry*, to the value of one pound, was by the jury acquitted; the ſaid *Empſon* conceiving the evidence to be ſufficient, committed the jury to priſon, till they entered into bond to appear before the king's council, where the matter being again conſidered, it was ordered, they ſhould pay eight pounds for a fine (which was thought ſo heinous, as, at a ſeſſions being held afterwards at *Coventry*, a particular indictment was framed againſt him, and he was found guilty).” How many of theſe allegations were verified, or how far they might be warranted by the laſt king's commiſſion, appears not to me. Howſoever, for the preſent, they were *(d)* committed to the *Tower*.

This *Empſon*, reported to be a ſieve-maker's ſon in *Torceſter*, from this mean beginning, by his wit and induſtry, came to be of council to king *Henry* VII. and maſter or ſurveyor of his forfeits in divers kinds, in which place he ſerved as an inſtrument for raiſing great ſums to the king; *Dudley* (a gentleman of birth, and ſuch parts as he was choſen ſpeaker of the parliament-houſe *(e)* 19 *Henry* VII.) aſſiſting him. Theſe men (called by *Polydore Virgil*, *Judices Fiſcales*) having it ſeems exceeded their bounds, were deteſted of all, but eſpecially the poorer ſort, who found it eaſier to hate than to pay. To ſatisfy their complaints therefore, it was thought fit to permit them to the ordinary ways of juſtice: the *promoters* they uſed being ſo ſeverely puniſhed in the mean time, betwixt the pillory and ſhame, that they dy'd all (a few days after) in priſon, ſave one *Giovanni Baptiſta Grimaldi*, who, foreſeeing the ſtorm, took ſanctuary in *Weſtminſter*.

Empſon and *Dudley* being (as is aboveſaid) committed to the *Tower*, new and ſtrange crimes were found and objected againſt them, as appears in their indictments upon record, wherein, they are accuſed of conſpiracy againſt the king and ſtate; and firſt, that during the ſickneſs of the late king in *March* laſt, they ſummoned certain of their friends to be in arms at an hour's warning; and upon the death of the ſaid king, to haſten to *London*. Out of which, and other circumſtances, it was collected by the jury, that their intent was to ſeize on the perſon of the new king, and ſo to aſſume the ſole government; or when they could not attain this, to deſtroy him.

Of which crimes, how improbable ſoever, *Dudley* in his tryal at *Guildhall* in *London*, *July* 16, 1509, and *Empſon* at *Northampton*, *October* 1,

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(a) April 23.

(b) April 25.

(c) Hollingſhead.

(d) April 23.

(e) 1503.

were found guilty by their juries, and both condemned of treaſon, and ſo remanded to the *Tower*.

Empſon and *Dudley* lying now in priſon, condemned and attainted by parliament, the importunate clamours of the people prevailing with the king in this year's progreſs, he not only reſtored divers mulcts, but for further ſatisfaction to the commonalty (by a ſpecial writ) commanded to have their heads ſtruck off, *Auguſt* 18, doing therein (as thought by many) more like a good King, than a good Maſter.

III. *The Trial of* EDWARD *Duke of* Buckingham, *for* High Treaſon, *in the Court of the Lord High Steward of* England, 13*th May*, 13 H. VIII. 1522.

[*Some account of this trial is to be met with in various writers, excluſive of the notice taken of it by our more modern hiſtorians. It is ſlightly mentioned by* Polydore Virgil, *whoſe hiſtory firſt came out within eleven or twelve years after the event; and from him it appears, that the proſecution originated from the malice of one* Charles Knevet, *who, having been removed from the ſtewardſhip of ſome of the duke's eſtates for oppreſſing the tenants, in revenge turned informer againſt his former maſter, and betrayed him to his great and powerful enemy cardinal* Wolſey. Polyd. Virg. *ed.* Baſil. 660, 665. Hall, *who was alſo a cotemporary hiſtorian, gives many particulars, relative as well to the manner of arreſting the duke and his execution, as to the trial itſelf.* Hall's Hen. VIII. *fol.* 85. Grafton *merely copies from* Hall: *but* Hollingſhead *and* Stow *ſtate in addition the ſeveral facts charged as treaſon in the indictment of the duke from the record of it.* Grafton, 1044. 3. Hollingſh. 2*d. edit.* 863. Stow's Chron. Howes's *edit.* 512. *Lord* Herbert, *in his hiſtory of* Henry *the eighth, aſſiſted by materials from the preceding authors, writes the narration of the duke's trial, which we now offer to the reader.* Herb. Hen. VIII. *in vol.* 2. Kenn. Compl. Hiſtory, 2*d. edit. p.* 41.---*There is an account of this trial amongſt the* Harleian Manuſcripts; *but it is merely compilement from* Hall *and* Stow.]

Extract from Lord Herbert's Hen. VIII. *in* 2. Kenn. Compl. Hiſt. 2*d edit. p.* 40.

ABOUT this time *Edward Stafford* duke of *Buckingham*, eminent for his high blood, and large revenue, drew on himſelf a dangerous ſuſpicion; which though it was again fomented by the cardinal, who diſaffected him for ſome ſpeeches he had caſt forth, yet, could not have overthrown him, but that ſome indiſcretion of his own concurred. Beſides, he ſuffered much through the ill offices of *Charles Knevet*, formerly mentioned; who yet durſt not appear, till he ſaw the duke not only diſcountenanced, but weakened in his friends and allies. And of theſe I find two principally; one, *Henry Percy* earl of *Northumberland*, whoſe daughter the duke had married; the other, *Thomas* earl of *Surrey*, who had married the duke's daughter. Againſt *Northumberland*, cauſe was taken for claiming certain wards; which, after cloſe commitment, yet, he was forced to relinquiſh. Againſt *Surrey* the cardinal proceeded otherwiſe: for, though he hated him for drawing his dagger at him on ſome occaſion; yet as the earl was more wary than to give new offence, he thought fit to ſend him away upon ſome honourable employment for which he found this overture.

Gerald Fitz-Gerald, earl of *Kildare*, made deputy in *Ireland* to *Henry* duke of *York*, (now king, who at (*a*) four years old was by his father made lieutenant of that country) having done divers good ſervices againſt the rebels, was made (*b*) knight of the garter, and enjoyed that place till his death (*c*); when his ſon *Gerald* being ſubſtitute therein, ſo behaved himſelf, as he likewiſe got much credit: though, as he had the houſe of *Ormond* his enemy, and particularly ſir *Pierce Butler* earl of *Oſſory*, (*d*) ſecret ill offices were done him. Nor did it avail, that he had given his ſiſter in marriage to the ſaid *Butler*, and helped him to recover the earldom of *Ormond*, detained wrongfully, ſince the death of *James*, by a baſtard of that family: for it was impoſſible to oblige him; eſpecially, where he found ſo advantageous an occaſion to diſſent. For as he watched over the earl of *Deſmond*, his perpetual adverſary, ſince the diviſion of *Lancaſter* and *York*, (in which his anceſtors were on the ſide of *Lancaſter*, and the *Kildares* and *Deſmonds* on that of *York*), he diſcovered more favours done the preſent earl of *Deſmond*, (whom he called a traytor) than he thought due to him; inſomuch that he complained to the cardinal, who thereupon ſent for *Kildare*. Though *Polydore* ſaith, he came voluntarily into *England* to match with ſome *Engliſh* lady, and there behaved himſelf ſo unreſpectfully to the cardinal, that he was caſt into priſon. But whatſoever the cauſe was, his charge was beſtowed on the earl of *Surrey*, who going to *Ireland* in *April* 1520, reduced the earl of *Deſmond* and others to obedience.

The duke of *Buckingham* being thus expoſed and unfriended, the cardinal treats ſecretly with *Knevet*, concerning him; who thereupon diſcovers his late maſter's life; confeſſing, that the duke, by way of diſcourſe, was accuſtomed to ſay, how he meant ſo to uſe the matter, that, if king *Henry* died without iſſue, he would attain the crown, and that he would puniſh the cardinal. Beſides, that he had ſpoken hereof unto *George Nevill* lord *Abergavenny*, who married the ſaid duke's daughter. By what means yet the duke intended particularly to effect theſe deſigns, I do not find exactly ſet down by *Charles Knevet*. Neither do the authors, who write hereof, relate his pedigree; only our Heralds ſay, he was deſcended from *Anne Plantagenet*, daughter of *Thomas* of *Woodſtock*, ſon to king *Edward* the third. How far this yet might entitle him to the crown, in caſe king *Henry* ſhould have no iſſue, I have neither leiſure nor diſpoſition to examine. I ſhall only therefore, for ſatisfaction of the reader, ſelect ſome principal points out of his indictment; leaving the reader, for the reſt, unto the ſearch of the record: In which, the points that in my opinion made moſt againſt the duke, were; 1. *That at* (*e*) *ſeveral times he had ſent to one* Hopkins, *a monk in the priory of* Henton, *to be informed by him, concerning the matters he imagined; and that the monk ſhould return anſwer, the duke ſhould have all; and therefore ſhould labour to procure the love of the people.* 2. *That the duke* (*f*) *afterwards ſhould go in perſon to the ſaid* Hopkins, *who confirmed the ſaid prediction, adding, that he knew it by revelation. Whereupon the ſaid duke ſhould give him ſeveral rewards.* 3. *That he ſhould* (*g*) *ſpeak to* Ralph Nevill *earl of* Weſtmorland (*his ſon-in-law*), *that, if aught but good come to the king, the duke of* Buckingham *ſhould be next in blood to the crown, the king having as yet no iſſue. That, to comply herewith, he did many things which argued ambition, and deſire to make himſelf popular. That he* (*h*) *ſaid to one* Gilbert, *his chancellor, that whatſoever was done by the king's father, was done by wrong; murmuring withal againſt the preſent government.* 4. *And to the ſaid* Charles Knevet, *that if he had been committed to the* Tower, (*whereof he was in danger, upon occaſion of one ſir* William Bulmer) *he would have ſo wrought, that the principal doers thereof ſhould not have cauſe of great rejoycing; for he would have plaid the part which his father intended to have put in practice againſt king* Richard *the third at* Saliſbury, *who made earneſt ſuit to come into the preſence of the ſaid king, which ſuit, if he might have obtained, he having a knife ſecretly about him, would have thruſt it into the body of king* Richard, *as he had made ſemblance to kneel down before him. And that, in ſpeaking theſe words, he maliciouſly laid hands on his dagger, ſwearing, that, if he were ſo evil uſed, he would do his beſt to accompliſh his intended purpoſe.* 5. *That* (*i*) *being in ſpeech with ſir* George Nevill, *knight, lord* Abergavenny, *he ſaid, that if the king died, he would have the rule of the realm, in ſpight of whoſoever ſaid the contrary; ſwearing, that if the lord* Abergavenny *revealed this, he would fight with him.* This I conceive to be the ſubſtance of the moſt ſpecial articles in the evidence; which the courteous reader yet may do well to conſider more at large, as they are extant on record. How far yet theſe particulars were proved, and in what ſort, my authors deliver not. Only I find (out of our records) that the duke of *Buckingham* being committed to the *Tower*, *April* 16th, did, under his own hand, declare to ſir *Thomas Lovell*, conſtable of the *Tower*, the paſſages betwixt him and *Hopkins*, in this manner; that is to ſay, *That the ſummer before our King made war in* France (*k*), Hopkins *ſent for him; but, not being able to go, he commanded one* Delacour, *his chaplain, to repair thither; howbeit, that* Hopkins *ſaid nought to him; yet that himſelf came the next* Lent; *where, in ſhrift, the ſaid monk told him, that our king ſhould win great honour in his journey to* France; *and that if the king of* Scots *came to* England *then, he ſhould never go home again. And that, when he aſked* Hopkins *how he knew this* (*l*), *he ſaid,* ex Deo habeo; *It is revealed to me of God. And that* Hopkins *demanding afterward what children the king had had, he told the number; and that* Hopkins *ſhould ſay thereupon, I pray God his iſſue continue; for that he feared God was not contented, becauſe he made no reſtitution according to his father's will, charging the duke further to adviſe the king's council to make reſtitution. Further, That he told his chancellor thoſe words, and at his return out of* France, *came to* Hopkins *again, and ſaid, he had told him true: Alſo, that (another time) he came to* Hopkins, *together with his ſon* Stafford, *and the earl of* Weſtmorland; *and that* Hopkins *aſked who he was? and thereupon ſhould ſay, that ſome of his blood or name ſhould prove* great men. *And that, after this,* Hopkins *ſhould ſend to the duke, to pray him, according to his promiſe, to help their houſe (being at* Henton *in* Somerſetſhire) *to make their conduit; the ten pounds, formerly given by him, being ſpent.* And more than this he confeſſed not. Notwithſtanding which, when the indictment was openly read, the duke ſaid, it was *falſe, untrue, conſpired, and forged* (*m*), to bring him to his death; alledging (as he was an eloquent perſon) many reaſons to falſify the indictment. The king's attorney, on the other ſide, producing the examinations, confeſſions, and proofs of witneſſes; the duke hereupon deſired the witneſſes (*n*), which were *Knevet*, *Gilbert*, *Delacour*, and *Hopkins*, to be brought forth. Theſe confirming their depoſitions, the duke was

(*a*) *Campion*'s Hiſtory of *Ireland*. 1495. (*b*) 1504. (*c*) 1513. (*d*) *Campion*'s Hiſtory of *Ireland*. (*e*) 1512. *April* 24. and *July* 22. and 1513. *April* 26. and 1517. *July* 20. (*f*) 1515. *April* 16. (*g*) 15$\frac{18}{19}$. *March* 20. and *Feb.* 20. 15$\frac{12}{13}$. (*h*) *Feb.* 20. 15$\frac{19}{20}$. (*i*) 1519. *Sept.* 10th. (*k*) 1512. (*l*) 1513. (*m*) *Hall. Hollingſhead.* (*n*) *E. Hall.*

tried by his peers, (being a duke, a marquis, ſeven earls, and twelve barons) before the duke of *Norfolk*, who was for the time made lord high ſteward of *England (a)*. They condemning him, the duke of *Norfolk* delivered his ſentence, not without tears. To which he replyed; *My lord of* Norfolk, *you have ſaid as a traytor ſhould be ſaid unto, but I was never one. But, my lords, I nothing malign for what you have done to me; but the eternal God forgive you my death, and I do. I ſhall never ſue to the king for life: howbeit, he is a gracious prince, and more grace may come from him, than I deſire. And ſo I deſire you, my lords, and all my fellows, to pray for me.* Whereupon he was brought back to the *Tower*; where all the favour he received was a meſſage from the king, declaring his ſentence was mitigated ſo far, that, inſtead of receiving the death of a traytor, he ſhould have only his head cut off. Thus ended the duke of *Buckingham (b)*, much lamented by the people, (who libelled the cardinal for it, calling him *Carnificis filium, Son of a Butcher*,) as being thought rather *criminal* through folly and raſh words, than any intention declared by overt-act againſt the king's perſon; and therefore not uncapable of his mercy; which alſo it was thought would not have been denyed, had he ſued for it in fitting terms. But ſince at his arraignment, he did, as it were, diſclaim his life, he would not obtrude it; and therefore only cauſed a letter of comfort to be written to the dutcheſs, and lord *Stafford*. Yet the tragedy ended not ſo; for though *George* lord *Abergavenny*, after a few months impriſonment, was, through the king's favour, delivered; yet *Hopkins*, after a ſerious repentance that he had been an author of ſo much miſchief, dyed of grief. And here I muſt obſerve, that together with this duke, that great place of high-conſtable of *England* remains extinguiſhed, unleſs ſome extraordinary occaſion revive it.

[*Lord* Herbert'*s ſtate of the effect of the indictment, not being nearly ſo full as* Stowe'*s, and there being alſo ſome further particulars in the latter, perhaps his account of the trial may be acceptable to ſome readers. The following extract from* Stowe's Chronicle *is therefore added.*]

Extract from Stowe's Chronicle, Howes's *ed. p.* 510, *to* 513.

IN this meane time *Edward* duke of *Buckingham* was accuſed of high treaſon, wherefore the king directed his letters to the ſaid duke, being at his mannor of *Thornebury* in *Gloceſterſhire*, that incontinently he ſhould come to his preſence, which commandement the duke obeyed, and came to *London*, where hee was ſtraight wayes arreſted by ſir *Henry Marney* captaine of the gard, and conveyed to the *Tower* of *London* on the 16. of *Aprill:* before which time ſir *Gilbert Parke* the dukes chancellor was taken, which had confeſſed matter of high treaſon, concerning the kings perſon. There was alſo attached one *Nicholas Hopkins* a monk of the order of *Carthuſians*, being of *Henton* priory in *Somerſetſhire*, and *John de la Court* the dukes confeſſor, and others. Theſe were priſoners in the *Tower*.

(c) After the apprehenſion of the duke, inquiſitions were taken in divers ſhires of him, ſo that by the knights and gentlemen he was indicted of high treaſon for certaine words ſpoken by the ſaid duke at *Blechingly* in *Surrey*, to *George Nevill* lord *Burgaveny*, and therewith was the ſame lord attached for concealement, and ſo likewiſe was the lord *Montague*, and both conveied to the *Tower:* and ſir *Edward Nevill* brother to the ſaid lord of *Burgaveny* was forbidden the kings preſence.

Moreover, in the *Guildhall* of *London*, before ſir *John Bruge* knight, then maior of the ſame city, by an inqueſt, the ſaid duke was indicted of divers points of high treaſon, as by the ſame inditement (which I have ſeene and read) it appeareth, inferring, that the ſaid duke intending to exalt himſelfe, and to uſurpe the crowne, the royall power, and dignity of the realme of *England*, and to deprive the king thereof, that hee the ſayde duke might take upon him the ſame againſt his allegeance, had the tenth day of *March*, in the ſecond yeere of the kings raigne and at divers times before, and after, imagined and compaſſed the kings death and deſtruction at *London*, and at *Thornebury* in the county of *Gloceſter:* and for the accompliſhment of the wicked intent and purpoſe, the 24. of *Aprill*, in the fourth yeere of the kings raygne, he ſent one of his chaplaines called *John de la Court*, unto the priory of *Henton* in *Somerſetſhire*, which was an houſe of *Carthuſian* monkes, there to underſtand of one *Nicholas Hopkins*, a monke of the ſame houſe (who was vainely reputed by way of revelation to have foreknowledge of things to come) what ſhould happen concerning this matter, which he had imagined: which monke, cauſing the ſaid *de la Court* firſt to ſweare unto him, not to diſcloſe his words to any manner of perſon, but onely to the duke his maſter, therewith declared that his maſter the ſaid duke ſhould have all, willing him for the accompliſhment of his purpoſe to ſeeke to winne the favour of the people. *De la Court* came backe with this anſwere, and told it to the duke at *Thornebury* the morrow after, being the 25. of *Aprill*. And on the 22. of *July* the ſame fourth yeere, the duke ſent the ſame *de la Court* with letters unto the ſaide monke, to underſtand of him further of ſuch matters, and the monke told to him againe for anſwere, that the duke ſhould have all: and beeing aſked as well now as before at the firſt time, how he knew this to bee true, he ſaide by the grace of God, and with this anſwere, *de la Court* now alſo returning, declared the ſame unto the duke, on the 24. of *July* at *Thornebury* aforeſaid. Moreover, the ſaide duke ſent the ſame *de la Court* againe unto the ſaid monke with his letters the 26. of *Aprill*, in the 5. yeere of the kings raigne, when the king was to take his journey into *France*, requiring to underſtand what ſhould become of theſe warres, and whether the *Scottiſh* king ſhould in the kings abſence invade this realme or not. The monke among other things, for anſwere of theſe letters, ſent the duke word that the king ſhould have no iſſue male. Againe, the ſaid duke the 20 day of *Feb.* in the 6. yeere of the kings raigne, being at *Thorneb*ury, ſpake theſe words unto *Ralph* earle of *Weſtmerland:* Well, there are two dukes created in *England*, but if ought but good come to the king, the duke of *Buckingham* ſhould be next in blood to ſucceede to the crowne. After this the ſaid duke on the 16. day of *Aprill*, in the ſaid ſixt yeere of the kings raigne, went in perſon unto the priory of *Henton*, and there had conference with the foreſaid monke *Nicholas Hopkins*, who told him, that hee ſhould bee king: whereunto the duke ſaid, that if it chanced, hee would ſhew himſelfe a juſt and right wiſe prince. The monke alſo told the duke that he knew this by revelation, and willed him in any wiſe to procure the love of the commons, the better to attayne his purpoſed intention. The duke the ſame time gave, and promiſed to give yeerely unto the ſaide priory 6. pound, therewith to buy a tunne of wine; and further promiſed to give unto the ſaid priory in ready money twenty pounds, whereof ten pounds he gave in hand, towards the conveying the water unto the houſe by conduit. And to the ſaide monke *Nicholas Hopkins*, he gave at that preſent in reward three pound, and at one other time forty ſhillings, and at another time a marke, and at another time ſixe ſhillings and eight-pence. After this, on the twentieth day of *March*, in the tenth yeere of the kings raigne, he came to the ſame priory, and eftſoones had conference with the ſaide monke, to bee more fully informed by him in the matters above ſpecified, at what time the monke alſo told him that he ſhould be king, and the duke in talke tolde the monke, that he had done very well to binde his chaplaine *John de la Court*, under the ſeale of confeſſion, to keepe ſecret ſuch matters, for if the king ſhould come to knowledge thereof, it would be his deſtruction. Likewiſe, the twentieth day of *October*, in the ſeventh yeere of the kings raigne, and at divers other times, as well before as after, the ſaide duke had ſent his chancellor *Robert Gilbert*, chaplaine, unto *London*, there to buy certaine clothes of golde, ſilver, and velvets, every time ſo much as amounted to the value of three hundred pound, to the intent, that the ſaide duke might beſtow the ſame, as well upon knights, eſquires, and gentlemen of the kings houſe, and yeomen of his gard, as upon other the kings ſubjects, to winne their favours and friendſhips to aſſiſt him in his evill purpoſe: which clothes the ſaide *Gilbert* did buy, and brought the ſame to the ſaid duke, who on the 20. day of *January* in the ſaide ſeventh yeere, and divers other dayes and yeeres before and after, did diſtribute, and give the ſame to certaine of the kings ſubjects, for the purpoſe before recited. Furthermore, the ſaide duke the tenth of *July*, in the tenth yeere of the kings raigne, and divers other dayes and times, as well before as after, did conſtitute more ſeverall and particular offices in his caſtles, honors, lordſhips, and lands, than hee was accuſtomed to have, to the end they might bee aſſiſtant to him under colour of offices, to bring his evill purpoſe to paſſe. Moreover, the ſame duke ſent to the king the tenth day of *May*, in the ninth yeere of his raigne, for licence to retaine any of the kings ſubjects, whom it ſhould pleaſe him, dwelling within the ſhires of *Hereford*, *Glouceſter*, and *Somerſetſhire:* and alſo, that he might at his pleaſure convey divers armours, and habilements for warre into *Wales*, to the intent to uſe the ſame againſt the king, for the accompliſhment of his naughty purpoſe, which was to deſtroy the king, and to uſurpe the roial government and power to himſelfe: which ſuite for licence to have retayners, and to convey ſuch armours and habilements of war, the ſaid *Gilbert* the twentieth day of *May*, in the ſayde ninth yeere, and divers other dayes before and after at *London*, and *Eaſt Greenewich* did follow, labouring earneſtly, both to the king and counſell, for obtaining of the ſame. And the twentieth day of *July*, in the ſaid ninth yeere, the ſaid duke ſent the ſaid *Gilbert* unto *Henton* aforeſaide, to underſtand of the aforeſaid monke *Nicholas Hopkins* what hee heard of him; and the monke ſent him word, that before *Chriſtmas* next there ſhould be a change, and that the duke ſhould have the rule and government of all *England*. And moreover, the twentieth day of *February*, in the eleventh yeere of the kings raigne, at *Blechingly* in *Surrey*, the ſayde duke ſayde unto the ſaide *Robert Gilbert* his chancellor, that he did expect and tarry for a time more convenient to atchieve his purpoſe, and that it might eaſily bee done, if the nobles of the realme would declare their mindes together: but ſome of them miſtruſted and feared to ſhew their mindes. Hee ſayde further the ſame time unto the ſaide *Robert Gilbert*, that whatſoever was done by the kings father, was done by wrong: and ſtill the duke murmured againſt all that the king then preſently raigning did. And further he ſaid, that he knew himſelfe to be ſo wicked a ſinner, that hee wanted Gods favour, and therefore he knew, that whatſoever he tooke in hand againſt the king had the worſe ſucceſſe. And furthermore, the ſaide duke (to alienate the kings ſubjects mindes from dutifull obedience, towards him and his heires, the twentieth of *September*, in the firſt yeere of his raigne) beeing then at *London*, reported to *Robert Gilbert*, that he had a certaine writing, ſealed with the kings great ſeale, comprehending a certaine act of parliament, in the which it was enacted, that the duke of *Somerſet*, one of the kings progenitors, was made legitimate. And further, that the ſaid duke meant to have delivered the ſame writing unto king *Henry* the ſeventh, But (ſaid he) I would not that I had ſo done for ten thouſand pounds. And furthermore, the ſame duke the fourth day of *November*, in the eleventh yeere of the kings raygne, at *Eaſt Greenewich* in the county of *Kent*, ſaid unto one *Charles Knevet* eſquire, after the king had reprooved the duke for retayning *William Bulmer* knight unto his ſervice, that if he had perceived that he ſhould have bin committed to the *Tower*, as he doubted he ſhould have beene, he would have ſo wrought, that the principall doers therein ſhould not have had cauſe of great rejoycing, for he would have played the part, which his father intended to have put in practiſe againſt king *Richard* the 3. at *Saliſbury*, who made earneſt ſuit to have come to the preſence of the ſame king *Richard*, which ſuite if hee might have obtained, he having a knife ſecretly about him, would have thruſt it into the body of king *Richard*, as he had made ſemblance to kneele downe before him:

(a) May 13.

(b) May 17.

(c) Anno regni 13.

and in ſpeaking theſe words, he maliciouſly laid his hand upon his dagger, and ſaid, that if he were ſo evill uſed, he would doe his beſt to accompliſh his pretended purpoſe, ſwearing to confirme his word, by the blood of our Lord. And beſide all this, the ſame duke the 10. of *May*, in the 12. yeere of the kings raigne at *London*, in a place called the *Roſe*, within the pariſh of S. *Laurence Poultney* in *Canwike-ſtreet* ward, demanded of the ſaid *Charles Knevet* eſquire what was the talke amongſt the *Londoners*, concerning the kings journey beyond the ſeas: and the ſaid *Charles* told him, that many ſtoode in doubt of the journey, leſt the *Frenchmen* meant ſome deceit towards the king: whereunto the duke anſwered, it was to be feared leſt it would come to paſſe, according to the words of an holy monke: For there is (ſaith he) a certaine Charter-houſe monke, that divers times hath ſent to mee, willing mee to ſend unto him my chancellor, and I did ſend unto him *J. de la Court* my chaplain, unto whom hee would not declare any thing, till *de la Court* had ſworne unto him to keepe all things ſecret, and to tel to no creature living what he ſhould heare of him, except it were to me; and the ſaid monke told *de la Court*, that neither the king nor his heires ſhould proſper, and that I ſhould endeavour myſelfe to purchaſe the good wils of the communality of *England*, for I (the ſame duke) and my blood ſhould proſper and have the rule of the realme of *England*. Then ſaid *Charles Knevet*, The monke may be deceived through illuſion of the devil, and that it was evill to meddle with ſuch matters. Well, ſaid the duke, it cannot hurt me, and ſo the duke ſeemed to rejoyce in the monkes words. And further, the ſame time the duke told the ſaid *Charles*, that if the king had miſcarryed now in his laſt ſicknes, hee would have chopped off the heads of the cardinall, of ſir *Thomas Lovell* knight, and of others: and alſo ſaid, that he had rather die for it, than to bee ſo uſed as he had beene. Moreover, the 10. day of *September* in the ſaid 11. yeere of this kings raigne, at *Blechingly* in the county of *Surrey*, walking in the gallery there with *George Nevill* knight, l. of *Burgaveny*, the duke murmuring againſt the kings counſellors, and their government, ſaid unto the ſaid *George*, that if the king died, he would have the rule of the realme in ſpite of whoſoever ſaid the contrary, and withall ſaid, that if the ſaid l. of *Burgaveny* would ſay, that the duke had ſpoken ſuch words, hee would fight with him, and lay his ſword upon his pate, and this he bound with many great oaths.---Theſe were the points and articles compriſed in the indictment, and laid to his charge, whereof he was by the inqueſt found guilty.

On the 13. of *May*, the ſaid duke was brought from the *Tower* by water unto *Weſtminſter-hall*, before the duke of *Norffolke* high ſteward of *England*, to accompliſh the high appeale of the peere or peeres of the realme, and to diſcerne and judge the cauſe of the peeres. There were alſo appointed to ſit as peeres and judges upon the duke of *Buckingham*, the duke of *Suffolke*, the marques *Dorſet*, the earles of *Worceſter*, *Devonſhire*, *Eſſex*, *Shrewſbury*, *Kent*, *Oxford*, and *Darby*, the lords of *S. Johns*, *de la Ware*, *Fitz Waren*, *Willoughby*, *Brooke*, *Cobham*, *Herbert*, and *Morley*. There was made within the hall at *Weſtminſter* a ſcaffold for theſe lords, and a preſence for the judge railed, and counter-railed about, and barred with degrees. When the lords had taken their place, the duke was brought to the barre, and upon his arraignement pleaded *not guilty*, and put himſelfe upon his peeres. Then was the indictement read, which the duke denyed to bee true, and (as he was an eloquent man) alleaged reaſons to falſifie the indictement, very pithily. The kings attorney againſt the dukes reaſons, alleaged the examinations, confeſſions and proofes of witneſſes. The duke deſired the witneſſes might bee brought forth: and then came before him *Charles Knevet*, ſir *Gilbert Perke* his chancellor, *John de la Court* his confeſſor, and *Nicholas Hopkins* the monke of *Henton*, that had fed his humour with vaine ſpeeches: divers preſumptions and accuſations were laid to him by *Charles Knevet*, which hee would have covered. But the depoſitions being read, and the deponents delivered priſoners to the officers of the *Tower*, finally, he was found guilty by his peeres, and having judgement to ſuffer as in caſe of treaſon is uſed, was led againe to his barge, and ſo conveyed, by water, to the *Temple* ſtaires, where he was ſet a land, and from thence by land through *London* to the *Tower* with the axe afore him, ſir *William Sands* having him by the right arme, and ſir *Nicholas Vaux* by the left arme. And on the 17. of *May*, being the *Fryday* before *Whitſunday*, he was delivered to the ſheriffes of *London*, who led him to the ſcaffold on the *Tower-hill*, about 11. of the clocke, and there he was beheaded, in the preſence of ſir *Thomas Lovel* and all the people; his body with the head was borne by the fryers *Auguſtines* to their church, and there buried in the chappell church for the cloſe. And now followeth the publication at the diſgrading of the ſaide *Edward* late duke of *Buckingham*, knight and companion of the moſt noble order of S. *George*, named the *Gartar*, which was read and publiſhed by *Gartar* King at Armes, at the feaſt of Saint *George*, in the quire of *Windſore-Colledge*, ſtanding on the high paſe at the dexe, all the other officers of armes about him, there being alſo preſent the lord marques *Dorſet* knight of the ſame order, then being the kings deputy for the feaſt, the earle of *Eſſex*, the earle of *Wilſhire*, the earle of *Kent*, ſir *Thomas Lovel*, and the lord *la Ware*, knights of the ſaid order, with other great audience aſſembled there on the eight of *June*, the thirteene yeere of *Henry* the eight, the yeere of Chriſt, 1521.

Bee it knowne unto all men, that whereas *Edward* late duke of *Buckingham*, knight and companion of the noble order of Saint *George*, named the *Gartar*, hath lately done and committed high treaſon againſt the king our ſoveraigne lord, and ſoveraigne of the ſaide order of the *Gartar*, in compaſſing and imagining the deſtruction of the moſt noble perſon of our ſaid ſoveraigne lord the king, contrary to his oath and due allegeance, and for the which high treaſon the ſaid *Edward* hath bin indicted, arraigned, convicted, and attainted, for the which deteſtable offence and high treaſon, the ſaide *Edward* hath deſerved to bee diſgraded of the ſaid noble order, and expelled out of the ſaide company, and not worthy that his armes, enſignes, and hachments ſhould remaine among other noble enſignes of the other noble, vertuous, and approoved knights of the ſaid noble order, nor have the benefit of the ſaid noble order: wherefore our ſaid ſoveraigne lord the king, ſoveraigne of the ſaid noble order of Saint *George*, named the *Gartar*, by the advice of the other knights of the ſaid noble order, for his ſaide offences, and committing of the ſaid high treaſon, willeth and commandeth that the ſaid *Edward* duke of *Buckingham* be diſgraded of the ſaid noble order, and his armes, enſignes, and hachments cleerely expelled, and put from among the armes, enſignes, and hachments of the other noble knights of the ſaide order, to the intent, that all other noble men thereby may take enſample hereafter, not to committe any ſuch haynous and deteſtable treaſon and offences, as God forbid they ſhould.

God ſave the King.

It is to be remembred, that *Somerſet Herault* was in the roode loft behind the hachments of the ſaide duke *Edward*: and when *Gartar* ſpake theſe words, *expelled and put from the armes*, then the ſaide *Somerſet* violently caſt downe into the quire, his creaſt, his banner, and ſword. And when the publication was all done, the officers of armes ſpurned the ſaide hachment with their feete out of the quire into the body of the church, firſt the ſword, and then the banner, and then was the creaſt ſpurned out of the ſaid quire through the church out at the weſt doore, and ſo to the bridge, where it was ſpurned over into the ditch. And thus was the ſaid *Edward* late duke of *Buckingham* fully diſgraded of the order of Saint *George*, named the *Gartar*.

[*It is well known, that, by the attainder of the duke of* Buckingham, *the ſubject of the preceding trial, the great office of high conſtable, which was hereditary in his family, reverted to the crown, and has ever ſince reſted dormant, except when granted for particular occaſions, ſuch as a coronation, and the holding of a court of the high conſtable. See* 3. Hollingſh. 365. Co. Lit. 165, *a.* Keilw. 170. *b.* Dy. 285. 6. *b. and the* 2d. *volume of* Hearne's *Antiquarian Diſcourſes.*

The execution of the duke of Buckingham *was ſoon after followed with a parliamentary attainder of him; the reaſon of which is not very obvious; unleſs indeed this ſanction was added, that the two houſes might have their ſhare of the odium of his death with the king, his then miniſter cardinal* Wolſey, *and the particular peers by whom the duke was condemned.* Ro. Parl. *in* 1. Journ. Dom. Proc. cv. *and the private acts of* 14. H. VIII. 3. Parl. Hiſt. 37. 1. Dugdale's Baron. 170. *However, ſome mercy was ſhewn to the duke's family. The ſame parliament made a proviſion for his ducheſs for her life; and alſo confirmed a grant from the king to* Henry, *the duke's eldeſt ſon, and his iſſue by his wife* Urſula, *of ſome of the forfeited eſtates.* Ro. Parl. 1. Journ. Dom. Proc. cxxxii, cxxxiv. *Sir* William Dugdale *calls the laſt act a* reſtitution of blood, *except to honours and lands; but improperly, the record ſhewing, that it was ſimply an act to confirm a grant from the crown, of part of the duke's real property.* 1. Dugd. Baron. 171. *The king alſo a few years afterwards extended his bounty to the ſame* Henry, *granting to him ſome more of the late duke's poſſeſſions, particularly the caſtle and manor of* Stafford. Ibid. *Further, in the firſt parliament of* Edward VI. *the ſame* Henry Stafford *was reſtored in blood, ſo far as to take the barony of* Stafford, *one of the family honours.* 1. Journ. Dom. Proc. 305, 522. *A female deſcendant from this* Henry, *and her huſband, one of the* Howard *family, obtained the title of viſcount from* Charles I. *By his attainder for treaſon in the next reign both titles were forfeited. But the attainder was ſoon afterwards reverſed by act of parliament, and ſo the titles revived in his eldeſt ſon, who in* 1688 *was created earl of* Stafford. *But after three deſcents the earldom, for want of heirs male, became extinct in* 1762. *Whether the titles of viſcount and baron are alſo extinct for the like reaſon, we cannot inform the reader. See* Dugd. Baron. ubi ſupra, *and* Collins's Peer. *tit. duke of* Norfolk. *In the lateſt book of extinct peerage, the titles baron and viſcount are included with the earldom. But unleſs they were confined to heirs male in the ſame manner, which is not very probable as to the barony, it being of great antiquity, it is poſſible, that the right to them, or at leaſt the barony, may ſtill be ſubſiſting in ſome perſon who is ignorant of it. To ſuch as are allied to either of the noble families of* Stafford, *and* Stafford Howard, *this notice cannot prove unacceptable; unleſs they are ſo blameably deficient in ſenſibility, as to be indifferent about the remnant of the ſplendid titles, offices, and honours, which rendered the laſt* Stafford, *who poſſeſſed the dukedom,*

dukedom, an object of jealouſy even to his ſovereign. Of other readers we beg pardon for rather exceeding what, in ſtrictneſs, is the proper purpoſe of our annotations.

Since the foregoing note was written, we have been honoured with ſome information, which confirms our conjecture, that the barony of Stafford *is not extinct. It ſeems, that the heirs of the laſt earl of* Stafford *but one, at his death, were three ſiſters, in conſequence of which the barony became in abeyance.* Mary, *one of them, married count* Rohan Chabot *in* France, *but is now dead without iſſue. Her two ſiſters are both nuns in* France. *But on their deaths, which, as they are profeſſed perſons, is moſt likely to be without iſſue, the abeyance will probably ceaſe; the preſent lady* Jerningham, *who is niece of the laſt earl of* Stafford, *being ſingly, as we are told, the next in the ſucceſſion to the barony, and having ſeveral ſons. We alſo underſtand, that part of the family eſtates is now in the poſſeſſion of this latter lady, under the will of her couſin the counteſs of* Rohan Chabot.]

IV. *The Trial of* John Fisher, *Biſhop of* Rocheſter, *before Commiſſioners of* Oyer *and* Terminer, *at* Weſtminſter, *for* High Treaſon, 17*th* June, 27 Hen. VIII. 1535.

[*The reverend prelate, whoſe trial we now offer to the reader, was one of the moſt eminent ſufferers in the reign of* Henry *the eighth, for oppoſing the king's divorce from his firſt queen, and his claim to the ſupremacy over the church of* England. *Opinions ſo averſe to that prince's views and paſſions, involved the biſhop in three different proſecutions. The firſt was on a charge of miſpriſion of treaſon, in concealing the predictions againſt the king, made by the famous viſionary* Elizabeth Barton, *known by the name of the* Holy Maid of Kent; *one of whoſe prophecies denounced, that, if the king did not deſiſt from the divorce, but married again, he ſhould not continue king more than a month after. For this offence the biſhop was included in the act for puniſhing* Elizabeth Barton *and her accomplices; but was one of thoſe, whom the act attainted of miſpriſion of treaſon only. This act was paſſed in* January 1533-4. *See* 25 Hen. VIII. *c.* 12. Raſtall's *edit. of* Stat. *The ſame parliament paſſed a law, which declared* Henry's *firſt marriage void, confirmed his marriage with* Anna Bolloigne, *made it treaſon to do or ſay any thing in derogation from the latter marriage, and required every perſon to take an oath to adhere to the contents of the ſtatute, making it miſpriſion of treaſon to refuſe the oath.* 25 Hen. VIII. *c.* 22. *and* 26 Hen. VIII. *c.* 2. *It was for refuſing the oath formed on the* 25 Hen. VIII. *that the biſhop endured a ſecond proſecution; for on that account the next parliament attainted him of miſpriſion of treaſon, and deprived him of his biſhoprick. See* 26 Hen. VIII. *c.* 3. *of private acts. The third proſecution, which terminated with the biſhop's life, ſoon followed. The ſtatute of the* 26 Hen. VIII. *annexed the title of ſupreme head of the church to the crown; and by another ſtatute of the ſame parliament, it was made high treaſon by words or writing to attempt depriving the king of any of his titles.* 26 Hen. VIII. *c.* 1, *and* 13. *The operation of theſe two laſt ſtatutes gave the opportunity of reaching the life of the biſhop, who, as will appear from the following trial, having been enſnared into a denial of the king's being ſupreme head of the church, after the acceſſion of that title, was therefore deemed to come within the ſucceeding ſtatute, which made it treaſon to deny the king any of his titles.*

The following trial is extracted from a very ſcarce book, which was printed in 1655, *with a title deſcribing it as the life of biſhop* Fiſher, *by Dr.* Thomas Bailey. *But the real author, according to Biſhop* Tanner *and others, was Dr.* Richard Hall, *who wrote ſeveral pieces in the reign of* Elizabeth. Tann. Bibliothec. Britannic. Hibern. voce Hall Edwardus. *In number* 7049 *of the* Harleian MSS. *at the* Britiſh Muſeum, *there is a life of biſhop* Fiſher, *which contains an account of his trial in the ſame words as the printed life.*

It is proper to apprize the reader, that the book, whence we borrow the trial, was certainly written by a very zealous Roman Catholic, *and that on other accounts he ſhould be believed with caution. The writer throughout ſtrenuouſly ſupports the Pope's claim of the ſupremacy. He relates a very improbable ſtory of queen* Anna Bolleyne, *accuſing her of great indignity to the head of biſhop* Fiſher *after his execution, and of even ſtriking it. His book is alſo full of miracles; one of which is, that, though the biſhop's head was parboiled, and the weather was very warm, when exhibited on* London-Bridge, *it not only continued fourteen days without waſting, but in that time daily grew ſo much freſher, that the biſhop was never ſeen to look ſo well. However, ſo far as regards the relation of the trial, it muſt be confeſſed, that it carries with it great appearance of truth; and more eſpecially ſeems to deſerve credit, becauſe the hard meaſure it repreſents the biſhop to have experienced at his trial, ſo much reſembles what we read in the trial of his eminent fellow-ſufferer Sir* Thomas More. *Nor in theſe liberal and humane times can we imagine, that many will be found, however averſe to bigotry and ſuperſtition, who will not concur in the ſentiment, that the proceedings againſt both ſir* Thomas *and the biſhop, were attended with extreme cruelty and injuſtice. This cenſure more particularly belongs to the biſhop's caſe. His crime was ſimply an opinion againſt the king's ſupremacy, which he was urged to give by a meſſage from his ſovereign, who at the ſame time ſent a promiſe of indemnity. If this was really ſo, which there ſeems too much reaſon to believe, the biſhop's death was one of the worſt paſſages which polluted the reign of* Henry; *becauſe the injuſtice of the caſe was highly aggravated by ſuperadding inſidiouſneſs and breach of faith. What an idea muſt we form of a* prince, *who could ſtoop to deviſe ſuch unworthy means to accompliſh his cruel purpoſe? What muſt we think of the* ſubject, *who could be ſo void of feeling, as to become the inſtrument of ſuch perfidy? What muſt we conceive of the* times, *in which judges and juries could be found to give the form and colour of juſtice on ſuch bad proceedings?*]

Extract from the Life of Biſhop Fiſher, *by Dr.* Bailey, *page* 188, *& ſeq.*

AFTER this good biſhop was recovered to ſome better ſtrength, by the help of his phyſitians, and that he was more able to be carried abroad, he was on *Thurſday* the 17. of *June*, brought to the *King's Bench* at *Weſtminſter*, from the *Tower*, with a huge number of holberts, bills, and other weapons about him, and the ax of the *Tower* born before him with the edge from him, as the manner is; and becauſe he was not yet ſo well recovered, that he was able to walk by land all the way on foot, he rode part of the way on horſeback in a black cloth gown, and the reſt he was carried by water, for that he was not well able to ride through for weakneſſe. As ſoon as he was come to *Weſtminſter*, he was there preſented at the barre before the commiſſioners, being all ſet ready in their places againſt his coming, whoſe names were theſe: Sir *Thomas Audely*, knight, lord chancellor of *England*; *Charles* duke of *Suffolk*; *Henry* earle of *Cumberlande*; *Thomas* earle of *Wiltſhire*; *Thomas Cromwell* ſecretary; ſir *John Fitz-James* chief juſtice of *England*; ſir *John Baldwin* chief juſtice of the *Common Pleas*; Sir *William Pawlet*; ſir *Richard Lyſter* chief baron of the *Exchequer*; ſir *John Port*, ſir *John Spilman*, and ſir *Walter Luke*, late juſtices of the *King's Bench*; and ſir *Anthony Fitzherbert* one of the juſtices of the *Common Pleas*. Being thus preſented before theſe commiſſioners, he was commanded, by the name of *John Fiſher* late of *Rocheſter*, clerk, otherwiſe called *John Fiſher* biſhop of *Rocheſter*, to hold up his hand, which he did, with a moſt cheerful countenance and rare conſtancy. Then was his indictment read, which was very long and full of words; but the effect of it was thus, That he maliciouſly, treacherouſly, and falſely, had ſaid theſe words, *The King, our ſoveraigne lord, is not ſupreme head in the earth of the church of England:* and being read to the end, it was aſked him, whether he was guilty of this treaſon, or no? Whereunto he pleaded, *not guilty*. Then was a jury of twelve men (being free-holders of *Middleſex*) called to try this iſſue, whoſe names were theſe: Sir *Hugh Vaughan* knight, Sir *Walter Langford* knight, *Thomas Burbage*, *John Nudygate*, *William Browne*, *John Hewes*, *Joſper Leak*, *John Palmer*, *Richard Henry Young*, *Henry Lodiſman*, *John Elrington*, and *George Heveningham*, eſquires. Theſe twelve men being ſworne to trie whether the priſoner were guilty of this treaſon or no, at laſt came forth to give evidence againſt him Mr. *Rich*, the ſecret and cloſe meſſenger that paſſed between the king and him, as ye have read before, who openly, in the preſence of the judges, and all the people there aſſembled, depoſed and ſwore, that he heard the priſoner ſay in plaine words, within the *Tower* of *London*, that he believed in his conſcience, and by his learning he aſſuredly knew, that the king neither was, nor by right, could be ſupreme head in earth of the church of *England*. When this bleſſed father heard the accuſations of this moſt wretched and falſe perſon, contrary to his former oath and promiſe, he was not a little aſtoniſhed thereat; wherefore he ſaid to him in this manner: Mr. *Rich*, I cannot but mervaile to hear you come in, and beare witneſs againſt me of theſe words, knowing in what ſecret manner you came to me: but ſuppoſe I ſo ſaid unto you, yet in that ſaying I committed no treaſon; for upon what occaſion, and for what cauſe it might be ſaid, your ſelf doth know right well; and therefore being now urged (ſaid he) by this occaſion, to open ſomewhat of this matter, I ſhall deſire my lords, and others here, to take a little patience in hearing what I ſhall ſay for myſelf.

This man (meaning Mr. *Rich*) *came to me from the king, as he ſaid on a ſecret meſſage with commendations from his grace, declaring at large, what a good opinion his majeſty had of me, and how ſorry he was of my trouble, with many more words than are here needfull to be recited, becauſe they tended ſo much to my praiſe, as I was not onely aſhamed to hear them, but alſo knew right well that I could no way deſerve them. At laſt he broke with me of the matter of the king's ſupremacy, lately granted unto him by act of parliament, to the which he ſaid, Although all the biſhops in the realme have conſented, except your ſelfe alone, and alſo the whole court of parliament, both ſpirituall and temporall, except a very few; yet he told me, that the king, for better ſatisfaction of his owne conſcience, had ſent him unto me in this ſecret manner, to know my full opinion in the matter, for the great affiance he had in me more than any other. He added further, that if I would herein frankly and freely advertiſe his majeſty my knowledge, that upon certificate of my miſliking, he was very like to retract much of his former doings, and make ſatisfaction for the ſame, in caſe I ſhould ſo advertiſe him. When I had heard all this meſſage, and conſidered a little upon his words, I put him in minde of the new act of parliament, which ſtanding in force as it doth againſt all them that ſhall directly ſay, or do any thing that is againſt it, might thereby endanger me very much, in caſe I ſhould utter unto him any thing that were offenſive againſt the law. To that he told me, that the king willed him to aſſure me on his honour, and in the word of a king, that whatever I ſhould ſay unto him by this his ſecret meſſenger, I ſhould abide no danger, no perill for it, neither that any advantage ſhould be taken againſt me for the ſame, no, although my words were never ſo directly againſt the ſtatute, ſeeing it was but a declaration of my minde ſecretly to him, as to his owne perſon: and for the meſſenger himſelfe, he gave me his faithfull promiſe that he would never utter my words in this matter to any man living, but to the king alone. Now therefore, my lords,* quoth he, *ſeeing it pleaſed the king's majeſty to ſend to me thus ſecretly under the pretence of plaine and true meaning, to know my poore advice and opinion in theſe his weighty and great affaires, which I moſt gladly was and ever will be willing to ſend him in; methinks it is very hard in juſtice to heare the meſſenger's accuſation, and to allow the ſame as a ſufficient teſtimony againſt me in caſe of treaſon.* To this the meſſenger made no direct anſwer, but (neither denying his words as falſe, nor confeſſing them as true) ſaid, that whatever he had ſaid unto him on the king's behalf, he ſaid no more than his majeſty commanded; And, ſaid he, if I had ſaid to you in ſuch ſort as you have declared, I would gladly know what diſcharge this is to you in law againſt his majeſty, for ſo directly ſpeaking againſt the ſtatute; whereat ſome of the judges taking quick hold one after another, ſaid, that this meſſage, or promiſe from the king to him, neither could, nor did by rigour of the law, diſcharge him; but in ſo declaring of his minde and conſcience againſt the ſupremacy, yea though it were at the king's own commandment or requeſt, he committed treaſon by the ſtatute, and nothing can diſcharge him from death but the king's pardon.

This good father perceiving the ſmall account made of his words, and the favourable credit given to his accuſer, might then eaſily finde in which doore the wind blew. Wherefore directing his ſpeeches to the lords his judges, he ſaid, Yet I pray you, my lords, conſider, that by all equity, juſtice, worldly honeſty, and courteous dealing, I cannot (as the caſe ſtandeth) be directly charged therewith as with treaſon, though I had ſpoken the words indeed, the ſame being not ſpoken maliciouſly, but in the way of advice and counſell, when it was requeſted of me by the king himſelf; and that favour the very words of the ſtatute do give me, being made onely againſt ſuch as ſhall maliciouſly gainſay the king's ſupremacy, and none other: wherefore, although by rigour of law, you may take occaſion thus to condemn me, yet I hope you cannot finde law, except you adde rigour to that law, to caſt me downe, which herein I hope I have not deſerved. To which it was anſwered by ſome of the judges, that the word *maliciouſly* is but a ſuperfluous and void word; for if a man ſpeak againſt the king's ſupremacy by any manner of meanes, that ſpeaking is to be underſtood, and taken in law as maliciouſly.

My lords, ſaid he, if the law be ſo underſtood, then it is a hard expoſition, and (as I take it) contrary to the meaning of them that made the law. But then let me demand this queſtion, whether a ſingle teſtimony of one man may be admitted as ſufficient to prove me guilty of treaſon for ſpeaking theſe words, or no? and whether my anſwer, negatively, may not be accepted againſt his affirmative, to my availe and benefit, or no? To that the judges and lawyers anſwered (that being the king's caſe) it reſted much in the conſcience and diſcretion of the jury; and as they upon the evidence given before them ſhall finde it, you are either to be acquitted, or elſe by judgement to be condemned. The jury having heard all this ſimple evidence, departed (according to the order) into a ſecret place, there to agree upon the verdict; but before they went from the place, the caſe was ſo aggravated to them by my lord chancellour, making it ſo hainous and dangerous a treaſon, that they eaſily perceived what verdict they muſt returne; otherways heap ſuch danger upon their owne heads, as none of them were willing to undergo. Some other of the commiſſioners charged this moſt reverend man with obſtinacy and ſingularity, alledging, that he being but one man, did preſumptuouſly ſtand againſt that, which was in the great councell of parliament agreed upon, and finally was conſented unto by all the biſhops of this realme, ſaving himſelfe alone. But to that he anſwered, that indeed he might well be accounted ſingular, if he alone ſhould ſtand in this matter (as they ſaid); but having on his part the reſt of the biſhops in *Chriſtendome*, far ſurmounting the number of the biſhops of *England*, he ſaid they could not juſtly account him ſingular. And having on his part all the *Catholicks* and biſhops of the world from *Chriſt*'s aſcention, till now, joyned with the whole conſent of *Chriſt*'s univerſall church, I muſt needs, ſaid he, account mine own part farre the ſurer: and as for obſtinacy, which is likewiſe objected againſt me, I have no way to cleare my ſelf thereof, but my owne ſolemne word and promiſe to the contrary, if you pleaſe to believe it, or elſe, if that will not ſerve, I am here ready to confirme the ſame by my oath. Thus in effect he anſwered their objections, though with many more words, both wiſely and profoundly uttered, and that with a mervailous, couragious, and rare conſtancy, inſomuch as many of his hearers, yea ſome of his judges, lamented ſo grievouſly, that their inward ſorrow in all ſides, was expreſſed by the outward teares in their eyes, to perceive ſuch a famous and reverend man in danger to be condemned to a cruell death, upon ſo weak evidence given by ſuch an accuſer, contrary to all faith and promiſe of the king himſelf. But all pity, mercy, and right, being ſet aſide, rigour, cruelty, and malice, took place; for the twelve men being ſhortly returned from their conſultation, verdict was given that he was guilty of the treaſon, which although they thus did, upon the menacing and threatning words of the commiſſioners, the king's learned councell, yet was it (no doubt) full ſore againſt their conſcience, as ſome of them would after report, to their dying daies, onely for ſafety of their goods and lives, which they were well aſſured to loſe, in caſe they had acquitted him. After the verdict thus given by the twelve men, the lord chancellour commanding ſilence to be kept, ſaid unto the priſoner in this ſort, *My lord of* Rocheſter, *you have been here arraigned of high treaſon, and putting your ſelfe to the triall of twelve men, you have pleaded not guilty, and they notwithſtanding have found you guilty in their conſcience; wherefore, if you have any more to ſay for your ſelfe, you are now to be heard, or elſe to receive judgement according to the order and courſe of law.* Then ſaid this bleſſed father againe, *Truly, my lord, if that which I have before ſpoken be not ſufficient, I have no more to ſay, but onely to deſire Almighty God to forgive them that have thus condemned me, for I think they know not what they have done.* Then my lord chancellour, framing himſelfe to a ſolemnity in countenance, proclaimed ſentence of death upon him, in manner and forme following: *You ſhall be led to the place from whence you came, and from thence ſhall be drawn through the city to the place of execution at* Tyborne, *where your body ſhall be hanged by the neck, half alive you ſhall be cut down and throwne to the ground, your bowels to be taken out of your body before you, being alive, your head to be ſmitten off, and your body to be divided into four quarters, and after your head and quarters to be ſet up, where the king ſhall appoint; and God have mercy upon your ſoule.*

After the pronouncing of this cruell ſentence, the lieutenant of the *Tower*, with his band of men, ſtood ready to receive and carry him back again to his priſon. Before his departure he deſired audience of the commiſſioners for a few words, which being granted, he ſaid thus in effect: *My lords, I am here condemned before you of high treaſon, for deniall of the king's ſupremacy over the church of* England, *but by what order of juſtice I leave to God, who is the ſearcher both of the king's majeſty's conſcience and yours. Nevertheleſs, being found guilty (as it is termed) I am, and muſt be, contented with all that God ſhall ſend, to whoſe will I wholly referre and ſubmit myſelfe. And now to tell you more plainly my minde, touching this matter of the king's ſupremacy, I think indeed, and alwaies have thought, and do now laſtly affirm, that his grace cannot juſtly claime any ſuch ſupremacy over the church of God, as he now taketh upon him, neither hath it ever been ſeen or heard of, that any temporall prince, before his daies, hath preſumed to that dignity. Wherefore if the king will now adventure himſelfe in proceeding in this ſtrange and unwonted caſe, no doubt but he ſhall deeply incurre the grievous diſpleaſure of Almighty God, to the great dammage of his owne ſoule, and of many others, and to the utter ruine of this realme, committed to his charge, whereof will enſue ſome ſharp puniſhment at his hand: wherefore I pray God his grace may remember himſelfe in time, and hearken to good counſell, for the preſervation of himſelfe and his realme, and the quietneſſe of all Chriſtendome.* Which words being ended, he was conveyed back againe to the *Tower* of *London*, part on foot, and part on horſeback, with a number of men, bearing holberts and other weapons about him, as was before at his coming to arraignment: and when he was come to the *Tower-gate*, he turned him back to all his traine that had thus conducted him forward and backward, and ſaid unto them, *My maſters, I thank you all for the great labour and paines you have taken with me this day: I am not able to give you any thing in recompence, for I have nothing left; and therefore I pray you accept in good part my hearty thanks.* And this he ſpake with ſo luſty a courage, ſo amiable a countenance, and with ſo freſh and lively a colour, as he ſeemed rather to have come from ſome great feaſt, or banquet, than from his arraignment, ſhewing by all his geſture, and outward countenance, nothing elſe but joy and gladneſſe.

Thus being after his condemnation, the ſpace of three or four daies, in his priſon, he occupied himſelfe in continuall prayer moſt fervently; and although he looked daily for death, yet could ye not have perceived him one whit diſmayed thereat, neither in word nor countenance, but ſtill continued his former trade of conſtancy and patience, and that rather with a more joyfull cheere and free minde than ever he had done before, which appeared well by this chance that I will tell you: There hapned a falſe rumour to riſe ſodainely among the people, that he ſhould be brought to his execution by a certain day; whereupon his cook, that was wont to dreſs his dinner, and carry it daily unto him, hearing, among others, of his execution, dreſſed him no dinner at all that day; wherefore at the cook's next repaire unto him, he demanded the cauſe why he brought him not his dinner as he was wont to doe: Sir, ſaid the cook, it was commonly talked all the towne over, that you ſhould have died that day, and therefore I thought it but vaine to dreſſe any thing for you. Well, ſaid he merrily unto him againe, for all that report thou ſeeſt me yet alive, and therefore whatſoever newes thou ſhalt heare of me hereafter, let me no more lack my dinner, but make it ready as thou art wont to do; and if thou ſee me dead when thou comeſt, then eat it thy ſelfe: but I promiſe thee, if I be alive, I minde, by God's grace, to eat never a bit the leſſe.

Thus while this bleſſed biſhop lay daily expecting the houre of his death, the king (who no leſſe deſired his death than himſelfe looked for it) cauſed at laſt a writ of execution to be made, and brought to ſir *Edmond Walſingham* lieutenant of the *Tower*. But where by his judgement at *Weſtminſter*, he was condemned (as ye have read before) to drawing, hanging, and quartering, as traitors alwaies uſe to be, yet was he ſpared from that cruell execution. Wherefore order was taken that he ſhould be led no further than *Tower-hill*, and there to have his head ſtruck off.

After the lieutenant had received this bloody writ, he called unto him certaine perſons, whoſe ſervice and preſence were to be uſed in that buſineſſe, commanding them to be ready againſt the next day in the morning: and becauſe that was very late in the night, and the priſoner aſleep, he was loath to diſeaſe him of his reſt for that time; and ſo in the morning before five of the clock, he came to him in his chamber in the *Bell-tower*, finding him yet aſleep in his bed, and waked him, ſhewing him that he was come to him on a meſſage from the king; and after ſome circumſtance uſed, with perſwaſion that he ſhould remember himſelf to be an old man, and that for age he could not, by courſe of nature, live long; he told him at laſt, that he was come to ſignifie unto him, that the king's pleaſure was he ſhould ſuffer death that forenoone. Well (quoth this bleſſed father) if this be your errand, you bring me no great newes, for I have long time looked for this meſſage: I moſt humbly thank his majeſty, that it pleaſeth him to rid me from all this worldly buſineſſe; and I thank you alſo for your tidings. But I pray you, Mr. Lieutenant (ſaid he) when is mine houre that I muſt go hence? Your houre (ſaid the lieutenant) muſt be nine of the clock. And what houre is it now (ſaid he)? It is now about five (ſaid the lieutenant). Well then (ſaid he) let me by your patience, ſleep an houre or two, for I have ſlept very little this night: And yet to tell you the truth, not for any feare of death (I thank God) but by reaſon of my great infirmity and weakneſſe. The king's further pleaſure is (ſaid the lieutenant), that you ſhould uſe as little ſpeech as may be, eſpecially any thing touching his majeſty, whereby the people ſhould have any cauſe to think of him or his proceedings otherwiſe than well. For that (ſaid he) you ſhall ſee me order myſelf, as, by God's grace, neither the king, nor any man elſe, ſhall have occaſion to miſlike my words. With which anſwer the lieutenant departed from him; and ſo the priſoner falling againe to reſt, ſlept ſoundly two houres and more. And after he was waked, he called to his man to help him up: but firſt of all he commanded him to take away the ſhirt of haire (which accuſtomably he wore on his back) and to convey it privily out of the houſe, and inſtead thereof to lay him forth a clean white ſhirt, and all the beſt aparrell he had, as cleanly bruſhed as may be: and as he was arraying himſelfe, his man perceiving in him more curioſity and care for the fine and cleanly wearing of his aparrell that day, than ever was wont to be before, demanded of him what this ſodain change meant, ſaying that his lordſhip knew well enough he muſt put off all againe within two houres, and loſe it. What of that (ſaid he)? Doeſt thou not mark, that this is our marriage-day, and that it behoveth us therefore to uſe more cleanlineſſe for ſolemnity of the marriage-ſake?

About nine of the clock the lieutenant came againe to his priſoner, and finding him almoſt ready, ſaid that he was come now for him. I will wait upon you ſtraight (ſaid he) as faſt as this thin body of mine will give me leave. Then ſaid he to his man, Reach me my furred tippet to put about my neck. O my Lord, ſaid the lieutenant, what need you be ſo carefull for your health for this little time, being (as your ſelf knoweth) not much above an houre? I think no otherwiſe (ſaid this bleſſed father), but yet in the mean time I will keep myſelfe as well as I can, till the very time of my execution: for I tell you truth, though I have (I thank our Lord) a very good deſire, and a willing minde, to die at this preſent, and ſo truſt of his infinite mercy and goodneſſe he will continue it, yet will I not willingly hinder my health, in the mean time, one minute of an houre, but ſtill prolong the ſame as long as I can, by ſuch reaſonable waies and meanes as Almighty God hath provided for me. With that taking a little book in his hand, which was a N. Teſt. lying by him, he made a croſſe on his forehead, and went out of his priſon-doore with the lieutenant, being ſo weak that he was ſcarce able to go downe ſtaires: wherefore at the ſtaires foot he was taken up in a chaire between two of the lieutenants men, and carried to the *Tower-gate*, with a great number of weapons about him, to be delivered to the ſheriffs of *London* for execution. And as they were come to the uttermoſt precinct of the liberty of the *Tower*, they reſted there with him a ſpace, till ſuch time as one was ſent before to know in what readineſſe the ſheriffs were to receive him: during which ſpace he roſe out of his chaire, and ſtanding on his feet leaned his ſhoulders to the wall, and lifting his eyes towards heaven, opened his little book in his hand, and ſaid, *O Lord, this is the laſt time that ever I ſhall open this book; let ſome comfortable place now chance unto me, whereby I thy poore ſervant may glorifie thee in this my laſt houre*; and with that, looking into the book, the firſt thing that came to his ſight were theſe words, *Hæc eſt autem vita æterna, ut cognoſcant te, ſolum verum Deum, & quem miſiſti Jeſum Chriſtum. Ego te glorificavi ſuper terram, opus conſummavi quod dediſti mihi ut faciam: Et nunc clarifica tu me, Pater, apud temet ipſum claritate quam habui priuſquam, &c.* and with that he ſhut the book together, and ſaid, *Here is even learning enough for me to my live's end.* And ſo the ſheriffs being ready for him, he was taken up again among certain of the ſheriffs men, with a new and much greater company of weapons than was before, and carried to the ſcaffold on the *Tower-hill*, otherwiſe called *Eaſt-Smithfield*, himſelfe praying all the way, and recording upon the words which he before had read; and when he was come to the foot of the ſcaffold, they that carried him offered to help him up the ſtaires. But then ſaid he, Nay, maſters, ſeeing I am come ſo farre, let me alone, and ye ſhall ſee me ſhift for my ſelf well enough; and ſo went up the ſtaires without any helpe, ſo lively, that it was mervaile to them that knew before of his debility and weakneſſe; but as he was mounting up the ſtaires, the ſouth-eaſt ſun ſhined very bright in his face, whereupon he ſaid to himſelfe theſe words, lifting up his hands, *Accedite ad eum, & illuminamini, & facies veſtra non confundetur.* By that time he was upon the ſcaffold it was about ten of the clock; where the executioner being ready to do his office, kneeled downe to him (as the faſhion is) and aſked him forgiveneſſe: I forgive thee (ſaid he) with all my heart, and I truſt thou ſhalt ſee me overcome this ſtorme luſtily. Then was his gown and tippet taken from him, and he ſtood in his doublet and hoſe, in ſight of all the people, whereof was no ſmall number aſſembled to ſee this execution. There was to be ſeen a long, lean, and ſlender body, having on it little other ſubſtance beſides ſkin and bones, inſomuch as moſt of the beholders mervailed to ſee a living man ſo farre conſumed, for he ſeemed a very image of death, and as it were death in a man's ſhape, uſing a man's voice; and therefore it was thought the king was ſomething cruell to put ſuch a man to death, being ſo neere his end, and to kill that which was dying already, except it were for pity ſake to rid him of his pain.

When the innocent and holy man was come upon the ſcaffold, he ſpake to the people in effect as followeth:

Chriſtian people, I am come hither to die for the faith of Chriſt's holy Catholique church; and I thank God hitherto my ſtomack hath ſerved me very well thereunto, ſo that yet I have not feared death; wherefore I deſire you all to help and aſſiſt with your prayers, that at the very point and inſtant of death's ſtroke, I may in that very moment ſtand ſtedfaſt, without fainting in any one point of the Catholique faith, free from any fear. And I beſeech Almighty God of his infinite goodneſſe, to ſave the king and this realme, and that it may pleaſe him to hold his hand over it, and ſend the king good councel.

Theſe or the like words he ſpake, with ſuch a cheerefull countenance, ſuch a ſtout and conſtant courage, and ſuch a reverend gravity, that he appeared to all men not only void of feare, but alſo glad of death. Beſides this, he uttered his words ſo diſtinctly, and with ſo loud and cleare a voice, that the people were aſtoniſhed thereat, and noted it for a miraculous thing, to heare ſo plain and audible a voice come from ſo weak and ſickly an old body; for the youngeſt man in that preſence, being in good and perfect health, could not have ſpoken to be better heard and perceived, than he was. Then after theſe few words by him uttered, he kneeled down on both his knees, and ſaid certain prayers, among which one was the hymn of *Te Deum Laudamus*, to the end, and the pſalm of *In te Domine Speravi.* Then came the executioner, and bound a handkerchief about his eyes; and ſo this holy father lifting up his hands and heart towards heaven, ſaid a few prayers, which were not long, but fervent, and devout: which being ended, he laid his head down on the middle of a little block, where the executioner being ready with a ſharp and heavy ax cut aſunder his ſlender neck at one blow, which bled ſo abundantly, that many wondered to ſee ſo much blood iſſue out of ſo ſlender and leane a body.

V. *The Trial of* WILLIAM *Lord* DACRES *of the North, for* High Treaſon, *in the Court of the Lord High Steward*, 9*th* July, 26 Hen. VIII. 1535.

[*This trial is taken notice of in moſt of the old chronicles, and alſo in one of the* Harleian *manuſcripts; but* Hall's *is the book, from which the others tranſcribe. We therefore preſent our readers with an extract from him, to which we add one from lord* Herbert's Henry *the eighth, as the latter is more explanatory. But both accounts are ſo ſhort, that we fear they will be deemed too trivial for inſertion. Againſt ſuch a cenſure, we have only to ſay, that it is* the fact of lord *Dacres*'s acquittal, *which was our chief inducement for admitting the mention of this trial into the collection. In antient times, more eſpecially in the reign of* Henry *the eighth, when, from the devaſtation made by the civil wars amongſt the ancient nobility, and other cauſes diſturbing the ballance of the conſtitution, the influence of the crown was become exorbitant, and ſeems to have been in its zenith, to be accuſed of a crime againſt the ſtate and to be convicted were almoſt the ſame thing. The one was uſually ſo certain a conſequence of the other, that, excluſively of lord* Dacres'*s caſe in the reign of* Henry *the eighth, and that of ſir* Nicholas Throckmorton *in his daughter* Mary'*s, the examples to the contrary are very rare. But thoſe which do occur ought to be remembered in juſtice to the times they belong to, as a ſort of ballance for the reproach deſervedly caſt upon them, for the culpable facility of condemnation ſo conſpicuous in moſt other inſtances.*]

Extract from Hall's Hen. VIII. *p.* 225.

THE nynth day of *July* was the lorde *Dacres* of the north arreigned at *Weſtminſter* of high treaſon, where the duke of *Norffolke* ſate as judge and high ſteward of *England.* The ſayd lorde *Dacres* beyng brought to the barre with the axe of the *Tower* before him, after his inditement red, not only improved the ſayd inditement as falſe and maliciouſly deviſed againſt him, and anſwered every part and matter herin contained, but alſo ſo manly, wittily, and directly confuted his accuſors, whiche there were ready to avouche their accuſacions, that to their great ſhames, and to his great honor, he was found that day by his peres not giltie, whiche undoubtedly the commons excedyngly joyed and rejoyſed of, inſomuche as there was in the hall at thoſe woordes, *not giltie*, the greateſt ſhoute and crye of joy that the like no man livyng may remembre that ever he heard.

Extract from Lord Herbert's Hen. VIII. *in* 2 Kenn. Compl. Hiſt. 2*d. edit. p.* 177.

THE lord *Dacres* of the north (*July* 9, as our hiſtorians have it) was arraigned at *Weſtminſter* of high treaſon, but as the principal witneſſes produced againſt him by his accuſers (ſir *Ralph Fenwick* and one *Muſgrave*) were ſome mean and provoked *Scottiſh* men, ſo his peers acquitted him, as believing they not only ſpoke maliciouſly, but might be eaſily ſuborned againſt him, as one who (having been warden of the Marches) by frequent inroads had done much harm in that country. And thus eſcaped that lord to his no little honour, and his judges, as giving example thereby how perſons of great quality, brought to their tryal, are not ſo neceſſarily condemned, but that they ſometimes may eſcape, when they obtain an equal hearing.

VI. *The Trials of Queen* Anna Boleyn *and her Brother Lord Viſcount* Rochforde, *for* High Treaſon, *in the Court of the Lord High Steward; and alſo of* Henry Norrys, Marke Smeton, William Brereton, *and Sir* Francis Weſton, *before Commiſſioners of Oyer and Terminer for the ſame Offence, in* May, 28 Hen. VIII. 1536.

[*The earlieſt account we have of theſe proceedings is in* Hall's Chronicle; *but, except the queen's ſpeech at her death, it ſcarce mentions more, than that ſhe and the reſt were arreſted, accuſed, tried, and executed.* Hall's Hen. VIII. *fo.* 227, *b.* Grafton *copies verbatim from* Hall, *except omitting this circumſtance, that the king the day after her death wore white for mourning.* Graft. 1228. Fox, *in his* Martyrology, *is chiefly occupied in vindicating the queen's virtue, and defending the ſucceſſion to the crown through her.* 2 Fox Martyr. *ed.* 1610, *p.* 987. *In* Hollingſhead, *the account is more full than* Hall. 3 Hollingſh. 940. Stow, *who follows next, chiefly borrows from* Hollingſhead. Stow Chron. Howe'*s ed.* 572. *Some additional circumſtances are noticed by* Speed. Speed's Chron. 1014. *Lord* Herbert *is ſtill more particular in his narrative.* Herbert's Hen. VIII. *in* Kenn. Compl. Hiſt. 2*d. ed. vol.* 2. *p.* 193. *There is alſo a ſhort account of this trial amongſt the* Harleian *manuſcripts at the* Britiſh Muſeum, *which ſeems to have been compiled out of the printed chronicles. But the moſt copious relations of this ſingular tranſaction, are in* Heylin *and* Burnet; *more eſpecially the latter, who was aided not only by ſome original letters, but by two other cotemporary manuſcripts of great authority, one being a common-place-book of judge* Spelman, *the other an account by* Anthony Anthony, *a ſurveyor of the ordnance of the* Tower. Heyl. Reformat. 263. 1 Burn. Reform. *After* Burnet'*s book, our learned annaliſt* Strype *favoured the world with ſome additional matter.* 1 Strype's Memor. 279.—*What we ſhall lay before the reader, will conſiſt, firſt of the* Harleian *manuſcript, ſecondly of extracts from* Burnet, *and thirdly of an extract from* Strype; *which together will, as we apprehend, nearly comprize every circumſtance deſerving of notice throughout the whole affair.*]

Extract from Harleian *manuſcript.*

THOMAS duke of *Norfolke*, lord high ſteward of *England*, att the tryall of queene *Anne Boleyn*, who on the 15th day of *May*, in the 28th yeare of the raigne of kinge *Henry* the eight, was arraigned in the *Tower* of *London*, on a ſcaffold for that purpoſe made in the kings hall, the duke of *Norfolke* ſittinge under the cloath of ſtate, the lord chauncellor on his right hand, and the duke of *Suffolke* on his lefte, the earle of *Surrey*, ſonne of the duke of *Norfolke*, ſittinge directly before his father, a degree lower, as earle marſhall of *England*, to whome were adjoyned 26 other peeres, and among them the queenes father (*a*), by whome ſhee was to be tryed. The kings commiſſion beinge read, the accuſers gave in theire evidence, and the wittneſſes were produced; the queene ſittinge in her chaire made for her, (whether in regard of any infirmity, or out of honor permitted to the wife of the ſoveraigne) haveinge an excellent quick witt, and being a ready ſpeaker, did ſo anſweare to all obiections, that had the peeres given in theire verdict accordinge to the expectacion of the aſſembly, ſhee had beene acquitted: but they (among whome the duke of *Suffolke* the kings brother-in-law was cheife, and wholy applyinge himſelfe to the kings humor) pronounced her guilty; wherevpon the duke of *Norfolke*, bound to proceed accordinge to the verdict of the peeres, condemned her to death, either by beinge burned in the *Tower-Greene*, or beheaded, as his majeſtie in his pleaſure ſhould thinke fitt.

The ſentence beinge denounced the court aroſe, and ſhe was conveyed back againe to her chamber, the lady *Boleyn* her aunt, and the lady *Kingſton*, wife to the conſtable of the *Tower*, only attendinge her.

And on the 19th of *May*, the queene was brought to the place of execucion in the *Greene* within the *Tower*, ſome of the nobility and company of the cittie beinge admitted rather to bee wittneſſes then ſpectators of her death, to whome the queene (haveinge aſcended the ſcaffold) ſpake on this manner.

Freinds and good Chriſtian people, I am here in your preſence to ſuffer death, whereto I acknowledge my ſelfe adjudged by the lawe, how iuſtly I will not ſay; I intend not an accuſacion of any one. I beſeech the Almighty to preſerve his majeſtie longe to raigne over you, a more gentle or mild prince never ſwayed ſepter; his bounty and clemency towards mee I am ſure hath beene ſpeciall; if any one intend an inquiſitive ſurvey of my actions, I intreate him to judge favourably of mee, and not raſhly to admitt any cenſorious conceit. And ſoe I bid the world farewell, beſeeching you to commend mee in your prayers to God.

(*a*) [*The queen's father was not one of her judges. See page* 12, *and the note there.*]

This ſpeech ſhee vttered with a ſmylinge countenaunce; then kneelinge downe, with a fervent ſpirit ſaid: To *Jeſus Chriſt* I commend my ſoule, Lord *Jeſu* receaue my ſoule; and repeatinge theſe words very often, ſuddenly the ſtroake of the ſword ſealed the debt that ſhee owed vnto death.

Nowe the court of *England* was like a ſtage, whereon are repreſented the viciſſitudes of ever various fortunes; for within one and the ſame moneth, that ſaw queene *Anne* floriſhinge, accuſed, condemned, executed, and another aſſumed into her place both of bedd and honour. The firſt of *May* (yt ſeemeth) ſhee was informed againſt, the ſecond impriſoned, the fifteenth condemned, the ſeaventeenth deprived of her brother and friends, who ſuffered in her cauſe, and the nyneteenth executed. On the twentyeth the kinge married *Jane Seimour,* who on the nyne and twentieth was publiquely ſhewed queene.

Extract from Burnet's Reformation, *vol.* 1. *p.* 196.

IN *January,* 1536, the queen brought forth a dead ſon. This was thought to have made ill impreſſions on the king: and that, as he concluded from the death of his ſons by the former queen, that the marriage was diſpleaſing to God; ſo he might upon this misfortune, begin to make the like judgment of this marriage. Sure enough the Popiſh party were earneſtly ſet againſt the queen, looking on her as the great ſupporter of hereſie. And at that time, *Fox* then biſhop of *Hereford* was in *Germany* at *Smalcald,* treating a league with the Proteſtant princes, who inſiſted much on the *Augſburg* confeſſion. There were many conferences between *Fox* and doctor *Barnes,* and ſome others, with the *Lutheran* divines, for accommodating the differences between them, and the thing was in a good forwardneſs. All which was imputed to the queen. *Gardiner* was then ambaſſador in *France,* and wrote earneſtly to the king, to diſſuade him from entering into any religious league with theſe princes: for that would alienate all the world from him, and diſpoſe his own ſubjects to rebel. The king thought the *German* princes and divines ſhould have ſubmitted all things to his judgment, and had ſuch an opinion of his own learning, and was ſo puft up with the flattering praiſes that he daily heard, that he grew impatient of any oppoſition, and thought that his dictates ſhould paſs for oracles. And becauſe the *Germans* would not receive them ſo, his mind was alienated from them.

But the duke of *Norfolk* at court, and *Gardiner* beyond ſea, thought there might eaſily be found a mean to accommodate the king, both with the emperor and the pope, if the queen were once out of the way; for then he might freely marry any one whom he pleaſed, and that marriage, with the male iſſue of it, could not be diſputed: whereas, as long as the queen lived, her marriage, as being judged null from the beginning, could never be allowed by the court of *Rome,* or any of that party. With theſe reaſons of ſtate, others of affection concurred. The queen had been his wife three years; but at this time he entertained a ſecret love for *Jane Seimour,* who had all the charms both of beauty and youth in her perſon; and her humor was tempered, between the ſevere gravity of queen *Katharine,* and the gay pleaſantneſs of queen *Ann.* The queen, perceiving this alienation of the kings heart, uſed all poſſible arts to recover that affection, of whoſe decay ſhe was ſadly ſenſible. But the ſucceſs was quite contrary to what ſhe deſigned. For the king ſaw her no more with thoſe eyes, which ſhe had formerly captivated; but grew jealous, and aſcribed theſe careſſes to ſome other criminal affections, of which he began to ſuſpect her. This being one of the moſt memorable paſſages of this reign, I was at more than ordinary pains to learn all I could concerning it, and have not only ſeen a great many letters that were writ by thoſe that were ſet about the queen, and catcht every thing that fell from her, and ſent it to court, but have alſo ſeen an account of it, which the learned *Spelman,* who was a judge at that time, writ with his own hand in his common-place book, and another account of it writ by one *Anthony Anthony* a ſurveyour of the ordnance of the *Tower.* From all which I ſhall give a juſt and faithful relation of it, without concealing the leaſt circumſtance, that may either ſeem favourable or unfavourable to her.

She was of a very cheerful temper, which was not always limited within the bounds of exact decency and diſcretion. She had rallied ſome of the kings ſervants more than became her. Her brother, the lord *Rochford,* was her friend as well as brother; but his ſpiteful wife was jealous of him: and being a woman of no ſort of vertue, (as will appear afterwards by her ſerving queen *Katherine Howard* in her beaſtly practices, for which ſhe was attainted and executed,) ſhe carryed many ſtories to the king, or ſome about him, to perſuade, that there was a familiarity between the queen and her brother, beyond what ſo near a relation could juſtifie. All that could be ſaid for it, was only this: that he was once ſeen leaning upon her bed, which bred great ſuſpition. *Henry Norris,* that was groom of the ſtole, *Weſton,* and *Brereton,* that were of the kings privy-chamber, and one *Mark Smeton,* a muſician, were all obſerved to have much of her favour; and their zeal in ſerving her was thought too warm and diligent to flow from a leſs active principle than love. Many circumſtances were brought to the king, which working upon his averſion to the queen, together with his affection to miſtreſs *Seimour,* made him conclude her guilty. Yet ſomewhat which himſelf obſerved, or fancied, at a tilting at *Greenwich,* is believed to have given the criſis to her ruin. It is ſaid, that he ſpied her let her handkerchief fall to one of her gallants to wipe his face, being hot after a courſe. Whether ſhe dropt it careleſly, or of deſign; or whether there be any truth in that ſtory, the letters concerning her fall, making no mention of it, I cannot determine; for *Spelman* makes no mention of it, and gives a very different account of the diſcovery in theſe words. *As for the evidence of this matter, it was diſcovered by the lady* Wingfield, *who had been a ſervant to the queen, and becoming on a ſudden infirm ſome time before her death, did ſwear this matter to one of her* ····· and here unluckily the reſt of the page is torn off. By this it ſeems, there was no legal evidence againſt the queen, and that it was but a witneſs at ſecond hand, who depoſed what they heard the lady *Wingfield* ſwear. Who this perſon was we know not, nor in what temper of mind the lady *Wingfield* might be, when ſhe ſwore it. The ſafeſt ſort of forgery, to one whoſe conſcience can ſwallow it, is to lay a thing on a dead perſons name, where there is no fear of diſcovery before the great day: and when it was underſtood that the queen had loſt the kings heart, many, either out of their zeal to popery, or deſign to make their fortune, might be eaſily induced to carry a ſtory of this nature. And this it ſeems was that which was brought to the king at *Greenwich,* who did thereupon immediately return to *Whitehall,* it being the 1ſt of *May.* The queen was immediately reſtrained to her chamber, the other five were alſo ſeized on: but none of them would confeſs any thing, but *Mark Smeton, as to any actual thing,* ſo *Cromwell* writ. Upon this they were carried to the *Tower.* The poor queen was in a ſad condition; ſhe muſt not only fall under the kings diſpleaſure, but be both defam'd and deſtroyed at once. At firſt ſhe ſmiled and carryed it cheerfully; and ſaid, ſhe believed the king did this only to prove her. But when ſhe ſaw it was in earneſt; ſhe deſired to have the ſacrament in her cloſet, and expreſſed great devotion, and ſeemed to be prepared for death.

The ſurprize and confuſion ſhe was in, raiſed fits of the mother, which thoſe about her did not ſeem to underſtand: but three or four letters, which were writ concerning her to court, ſay, that ſhe was at ſome times very devout, and cryed much; and of a ſudden would burſt out in laughter, which are evident ſigns of vapours. When ſhe heard that thoſe who were accuſed with her, were ſent to the *Tower,* ſhe then concluded her ſelf loſt; and ſaid, ſhe ſhould be ſent thither next; and talked idlely, ſaying, “ That if her biſhops were about the king, they would all “ ſpeak for her. She alſo ſaid, that ſhe would be a ſaint in heaven, “ for ſhe had done many good deeds; and that there ſhould be no rain, “ but heavy judgments on the land, for what they were now doing to “ her.” Her enemies had now gone too far, not to deſtroy her. Next day ſhe was carryed to the *Tower,* and ſome lords, that met her on the river, declared to her what her offences were. Upon which, ſhe made deep proteſtations of her innocence, and begged leave to ſee the king; but that was not to be expected. When ſhe was carried into the *Tower,* “ She fell down on her knees, and prayed God to help her, as ſhe was “ not guilty of the thing for which ſhe was accuſed.” That ſame day the king wrote to *Cranmer,* to come to *Lambeth;* but ordered him not to come into his preſence. Which was procured by the queens enemies, who took care, that one who had ſuch credit with the king, ſhould not come at him, till they had fully perſuaded him that ſhe was guilty. Her uncles lady, the lady *Boleyn,* was appointed to lye in the chamber with her. Which ſhe took very ill; for, upon what reaſon I know not, ſhe had been in very ill terms with her. She engaged her into much diſcourſe, and ſtudied to draw confeſſions from her. Whatſoever ſhe ſaid, was preſently ſent to the court. And a woman full of vapours, was like enough to tell every thing that was true, with a great deal more; for perſons in that condition, not only have no command of themſelves, but are apt to ſay any thing that comes in their fancy.

The duke of *Norfolk,* and ſome of the kings council, were with her; but could draw nothing from her, though they made her believe, that *Norris* and *Mark* had accuſed her. But when they were gone, ſhe fell down on her knees and wept, and prayed often, *Jeſu have mercy on me;* and then fell a-laughing: when that fit was over, ſhe deſired to have the ſacrament ſtill by her, that ſhe might cry for mercy. And ſhe ſaid to the lieutenant of the *Tower,* ſhe was as clear of the company of all men, as to ſin, as ſhe was clear from him; and that ſhe was the kings true wedded wife. And ſhe cryed out, “ O *Norris,* haſt thou accuſed me? “ Thou art in the *Tower* with me, and thou and I ſhall dye together; “ and *Mark,* ſo ſhall thou too.” She apprehended they were to put her in a dungeon; and ſadly bemoaned her own, and her mothers miſery; and aſked them, whether ſhe muſt dye without juſtice. But they told her, the pooreſt ſubjects had juſtice, much more would ſhe have it. The ſame letter ſays, that *Norris* had not accuſed her; and that he ſaid to her almoner, that he could ſwear for her, *ſhe was a good woman.* But ſhe being made believe that he had accuſed her, and not being then ſo free in her thoughts, as to conſider that ordinary artifice for drawing out confeſſions, told all ſhe knew, both of him and *Mark.* Which though it was not enough to deſtroy her, yet certainly wrought much on the jealous and alienated king. She told them, “ That ſhe once aſked “ *Norris,* why he did not go on with his marriage? who anſwered her, “ that he would yet tarry ſome time. To which ſhe replyed, You “ look for dead mens ſhoes; for if ought come to the King but good, “ you would look to have me. He anſwered, if he had any ſuch thought, “ he would his head were cut off. Upon which, ſhe ſaid, ſhe could “ undoe him if ſhe pleaſed, and thereupon ſhe fell out with him.” As for *Mark,* who was then laid in irons, ſhe ſaid, he was never in her chamber, but when the king was laſt at *Wincheſter;* and then he came in to play on the virginals: ſhe ſaid, that “ ſhe never ſpoke to him “ after that, but on *Saturday* before *May-day,* when ſhe ſaw him ſtanding in the window, and then ſhe aſked him, why he was ſo ſad; he “ ſaid, it was no matter: ſhe anſwered, You may not look to have me “ ſpeak to you, as if you were a nobleman, ſince you are an inferior “ perſon. No, no, madam, ſaid he, a look ſufficeth me.” She ſeemed more apprehenſive of *Weſton,* than of any body. For on *Whitſun-Munday* laſt he ſaid to her, “ That *Norris* came more to her chamber upon “ her account, than for any body elſe that was there. She had obſerved, “ that he loved a kinſwoman of hers, and challenged him for it, and “ for not loving his wife. But he anſwered her, that there were women “ in the houſe, whom he loved better than them both; ſhe aſked who “ is that; yourſelf, ſaid he; upon which, ſhe ſaid, ſhe defied him.”

This miſery of the queens drew after it the common effects that follow perſons under ſuch a diſgrace; for now all the court was againſt her, and every one was courting the riſing queen. But *Cranmer* had not learned theſe arts, and had a better ſoul in him, than to be capable of ſuch baſeneſs and ingratitude. He had been much obliged by her, and had conceived an high opinion of her, and ſo could not eaſily receive ill impreſſions of her; yet he knew the kings temper, and that a down-right juſtification of her would provoke him: therefore he wrote the following letter, on the 3d of *May*, with all the ſoftneſs that ſo tender a point required; in which he juſtified her as far as was conſiſtent with prudence and charity. The letter ſhows of what a conſtitution he was that wrote it; and contains ſo many things that tend highly to her honour, that I ſhall inſert it here, as I copied it from the original.

“ *Pleaſeth it your moſt noble grace*, to be advertiſed, that at your graces commandment by Mr. Secretary his letters, written in your graces name, I came to *Lambeth* yeſterday, and do there remain to know your graces further pleaſure. And forſomuch as without your graces commandment, I dare not, contrary to the contents of the ſaid letters, preſume to come unto your graces preſence; nevertheleſs of my moſt bounden duty, I can do no leſs than moſt humbly to deſire your grace, by your great wiſdom, and by the aſſiſtance of Gods help, ſomewhat to ſuppreſs the deep ſorrows of your graces heart, and to take all adverſities of Gods hands both patiently and thankfully. I cannot deny, but your grace hath great cauſes many ways of lamentable heavineſs: and alſo that in the wrongful eſtimation of the world, your graces honour of every part is ſo highly touched (whether the things that commonly be ſpoken of, be true or not,) that I remember not that ever Almighty God ſent unto your grace, any like occaſion to try your graces conſtancy throughout, whether your highneſs can be content to take off Gods hand, as well things diſpleaſant, as pleaſant. And if he find in your moſt noble heart ſuch an obedience unto his will, that your grace, without murmuration and overmuch heavineſs, do accept all adverſities, not leſs thanking him, than when all things ſucceed after your graces will and pleaſure, nor leſs procuring his glory and honour; then I ſuppoſe your grace did never thing more acceptable unto him, ſince your firſt governance of this your realm. And moreover, your grace ſhall give unto him occaſion to multiply and encreaſe his graces and benefits unto your highneſs, as he did unto his moſt faithful ſervant *Job*; unto whom, after his great calamities and heavineſs, for his obedient heart, and willing acceptation of Gods ſcourge and rod, *Addidit ei Dominus cuncta duplicia.* And if it be true, that is openly reported of the queens grace, if men had a right eſtimation of things, they ſhould not eſteem any part of your graces honour to be touched thereby, but her honour only to be clearly diſparaged. And I am in ſuch a perplexity, that my mind is clean amazed. For I never had better opinion in woman, than I had in her; which maketh me to think, that ſhe ſhould not be culpable. And again, I think your highneſs would not have gon ſo far, except ſhe had ſurely been culpable. Now I think that your grace beſt knoweth, that next unto your grace, I was moſt bound unto her of all creatures living. Wherefore I moſt humbly beſeech your grace, to ſuffer me in that, which both Gods law, nature, and alſo her kindneſs, bindeth me unto; that is, that I may with your graces favour wiſh and pray for her, that ſhe may declare her ſelf inculpable and innocent. And if ſhe be found culpable, conſidering your graces goodneſs towards her, and from what condition your grace of your only meer goodneſs took her, and ſet the crown upon her head; I repute him not your graces faithful ſervant and ſubject, nor true unto the realm, that would not deſire the offence without mercy to be puniſhed, to the example of all other. And as I loved her not a little, for the love which I judged her to bear towards God and his goſpel; ſo if ſhe be proved culpable, there is not one that loveth God and his goſpel, that ever will favour her, but muſt hate her above all other; and the more they favour the goſpel, the more they will hate her: for then there was never creature in our time that ſo much ſlandered the goſpel. And God hath ſent her this puniſhment, for that ſhe feignedly hath profeſſed his goſpel in her mouth, and not in heart and deed. And though ſhe have offended ſo, that ſhe hath deſerved never to be reconciled unto your graces favour; yet Almighty God hath manifoldly declared his goodneſs towards your grace, and never offended you. But your grace, I am ſure, knowledgeth that you have offended him. Wherefore I truſt that your grace will bear no leſs entire favour unto the truth of the goſpel, than you did before: forſomuch as your graces favour to the goſpel, was not led by affection unto her, but by zeal unto the truth. And thus I beſeech Almighty God, whoſe goſpel he hath ordained your grace to be defender of, ever to preſerve your grace from all evil, and give you at the end the promiſe of his goſpel. From *Lambeth*, the 3d day of *May*.

“ After I had written this letter unto your grace, my lord chancellor, my lord of *Oxford*, my lord of *Suſſex*, and my lord chamberlain of your graces houſe, ſent for me to come unto the *Star-Chamber*; and there declared unto me ſuch things as your graces pleaſure was they ſhould make me privy unto. For the which I am moſt bounden unto your grace. And what communication we had together, I doubt not but they will make the true report thereof unto your grace. I am exceedingly ſorry, that ſuch faults can be proved by the queen, as I heard of their relation. But I am, and ever ſhall be, your faithful ſubject,

Your graces moſt
humble ſubject,
and chaplain.
T. Cantuarienſis.

But jealouſy, and the kings new affection, had quite defaced all the remainders of eſteem for his late beloved queen. Yet the miniſters continued practiſing, to get further evidence for the tryal; which was not brought on, till the 12th of *May*; and then *Norris*, *Weſton*, *Brereton*, and *Smeton*, were tryed by a commiſſion of *oyer* and *terminer* in *Weſtminſter-hall.* They were twice indicted, and the indictments were found by two grand juries, in the counties of *Kent* and *Middleſex*; the crimes with which they were charged, being ſaid to be done in both theſe counties. *Mark Smeton* confeſſed, he had known the queen carnally three times. The other three pleaded *not guilty*; but the jury, upon the evidence formerly mentioned, found them all *guilty*; and judgment was given, that they ſhould be drawn to the place of execution, and ſome of them to be hanged, others to be beheaded, and all to be quartered, as guilty of high treaſon. On the 15th of *May*, the queen and her brother the lord *Rochford* (who was a peer, having been made a viſcount when his father was created earl of *Wiltſhire*) were brought to be tryed by their peers; the duke of *Norfolk* being lord high ſteward for that occaſion. With him ſate the duke of *Suffolk*, the marqueſs of *Exeter*, the earl of *Arundel*, and twenty-ſeven more peers, of whom their father the earl of *Wiltſhire* was one *(a)*. Whether this unnatural complyance was impoſed on him by the imperious king, or officiouſly ſubmitted to by himſelf, that he might thereby be preſerved from the ruin that fell on his family, is not known. Here the queen of *England* by an unheard-of precedent was brought to the bar, and indicted of high treaſon. The crimes charged on her were, *that ſhe had procured her brother and the other four to lye with her, which they had done often*; *that ſhe had ſaid to them, that the king never had her heart, and had ſaid to every one of them by themſelves, that ſhe loved them better than any perſon whatſoever. Which was to the ſlander of the iſſue that was begotten between the king and her.* And this was treaſon, according to the ſtatute made in the 26th year of this reign (ſo that the law, that was made for her and the iſſue of her marriage, is now made uſe of to deſtroy her). It was alſo added in the indictment, that ſhe, and her complices, *had conſpired the kings death*; but this it ſeems was only put in to ſwell the charge, for if there had been any evidence for it, there was no need of ſtretching the other ſtatute, or if they could have proved the violating of the queen, the known ſtatute of the twenty-fifth year of the reign of *Edward* the third had been ſufficient. When the indictment was read, ſhe held up her hand, and pleaded *not guilty*, and ſo did her brother, and did anſwer the evidence was brought againſt her diſcreetly. One thing is remarkable, that *Mark Smeton*, who was the only perſon that confeſſed any thing, was never confronted with the queen, nor was kept to be an evidence againſt her; for he had received his ſentence three days before, and ſo could be no witneſs in law. But perhaps, though he was wrought on to confeſs, yet they did not think he had confidence enough to aver it to the queens face. Therefore the evidence they brought, as *Spelman* ſays, was the oath of a woman that was dead, yet this, or rather the terror of offending the king, ſo wrought on the lords, that they found her and her brother *guilty*; and judgment was given, that ſhe ſhould be *burnt*, or *beheaded at the kings pleaſure*. Upon which *Spelman* obſerves, that whereas burning is the death which the law appoints for a woman that is attainted of treaſon, yet ſince ſhe had been queen of *England*, they left it to the king to determine, whether ſhe ſhould dye ſo infamous a death, or be beheaded. But the judges complained of this way of proceeding, and ſaid, ſuch a disjunctive in a judgment of treaſon, had never been ſeen. The lord *Rochford* was alſo condemned to be beheaded and quartered. Yet all this did not ſatisfie the enraged king, but the marriage between him and her muſt be annulled, and the iſſue illegitimated. The king remembred an intrigue that had been between her and the earl of *Northumberland*, which was mentioned in the former book; and that he then lord *Piercy* ſaid to the cardinal, “ That he had gone ſo far before witneſſes, that it lay upon his conſcience, ſo that he could not go back.” This it's like might be ſome promiſe he made to marry her, *per verba de futuro*, which though it was no precontract in itſelf, yet it ſeems the poor queen was either ſo ignorant or ſo ill-adviſed, as to be perſwaded afterwards it was one; though it's certain that nothing, but a contract *per verba de præſenti*, could be of any force to annul the ſubſequent marriage. The king and his council, reflecting upon what it ſeems the cardinal had told him, reſolved to try what could be made of it, and preſſed the earl of *Northumberland* to confeſs a contract between him and her. But he took his oath before the two arch-biſhops, that there was no contract, nor promiſe of marriage ever between them, and received the ſacrament upon it, before the duke of *Norfolk*, and others of the kings privy council; wiſhing it might be to his damnation, if there was any ſuch thing (concerning which I have ſeen the original declaration under his own hand). Nor could they draw any confeſſion from the queen, before the ſentence; for certainly if they could have done that, the divorce had gone before the tryal; and then ſhe muſt have been tryed only as marchioneſs of *Pembroke*. But now ſhe lying under ſo terrible a ſentence, it is moſt probable, that either ſome hopes of life were given her; or at leaſt, ſhe was wrought on by the aſſurances of mitigating that cruel part of her judgement, of being *burnt*, into the milder part of the ſentence, of *having her head cut off*; ſo that ſhe confeſſed a pre-contract, and on the 17th of *May* was brought to *Lambeth*; and in court, the afflicted arch-biſhop ſitting judge, ſome perſons of quality being preſent, ſhe confeſſed ſome juſt and lawful impediments; by which it was evident, that her marriage with the king was not valid. Upon which confeſſion, her marriage between the king and her was judged to have been null and void. The record of the ſentence is burnt; but theſe particulars are repeated in the act that paſſed in the next parliament, touching the ſucceſſion to the crown. It ſeems this was ſecretly done, for *Spelman* writes of it thus; It was ſaid, there was a divorce made between the king and her, upon her confeſſing a precontract with another before her marriage with the king: ſo that it was then only talkt of, but not generally known.

The two ſentences that were paſt upon the queen, the one of attainder for adultery, the other of divorce becauſe of a precontract, did ſo contradict one another, that it was apparent, one, if not both of them muſt be unjuſt; for if the marriage between the king and her was null from the beginning, then ſince ſhe was not the kings wedded wife, there could be no adultery: and her marriage to the king was either a true marriage, or not; if it was true, then the annulling of it was unjuſt, and if it was no true marriage, then the attainder was unjuſt; for there could be no breach of that faith which was never given: So that it is plain, the king was reſolved to be rid of her, and to illegitimate her daughter, and in that tranſport of his fury, did not conſider that the very method he took, diſcovered the unjuſtice of his proceedings againſt her. Two days after this, ſhe was ordered to be executed in the Green on *Tower-Hill.* How ſhe received theſe tidings, and how ſtedfaſt ſhe continued in the proteſtations of her innocence, will beſt appear by the following circumſtances. The day before ſhe ſuffered, upon a ſtrict ſearch of her paſt life, ſhe called to mind, that ſhe had played the ſtep-mother too ſeverely to lady *Mary*, and had done her many injuries. Upon which, ſhe made the lieutenant of the *Tower*'s lady ſit down in the chair of ſtate; which the other, after ſome ceremony, doing, ſhe fell down on her knees, and with many tears charged the lady, as ſhe would anſwer it to God, to go in her name, and do as ſhe had done, to the lady *Mary*, and aſk her forgiveneſs for the wrongs ſhe had done her. And ſhe ſaid, ſhe had no quiet in her conſcience, till ſhe had done that. But though ſhe did in this what became a Chriſtian, the lady *Mary* could not ſo eaſily pardon theſe injuries; but retained the reſentments of them her whole life.

(a) [*This is a miſtake. The queen's father was not one of her judges, as biſhop Burnet acknowledges in another part of his work. See* Addend. *to* 1. Burn. Reformat. *p.* 363.]

This ingenuity and tenderneſs of conſcience about leſſer matters, is a great preſumption, that if ſhe had been guilty of more eminent faults, ſhe had not continued to the laſt denying them, and making proteſtations of her innocency. For that ſame night ſhe ſent her laſt meſſage to the king, and acknowledged her ſelf much obliged to him, that had continued ſtill to advance her. She ſaid, he had, from a private gentlewoman, firſt made her a marchioneſs, and then a queen; and now, ſince he could raiſe her no higher, was ſending her to be a ſaint in Heaven: She proteſted her innocence, and recommended her daughter to his care. And her carriage that day ſhe died, will appear from the following letter writ by the lieutenant of the *Tower*, copied from the original, which I inſert, becauſe the copier imployed by the lord *Herbert* has not writ it out faithfully; for I cannot think that any part of it was left out on deſign.

“ Sir, Theſe ſhould be to advertiſe you, I have received your letter,
“ wherein you would have ſtrangers conveyed out of the *Tower*, and ſo
“ they be by the means of *Richard Greſſum*, and *William Cooke*, and *Wytſpoll.*
“ But the number of ſtrangers paſt not thirty, and not many of thoſe
“ armed; and the ambaſſador of the emperor had a ſervant there, and
“ honeſtly put out: Sir, if we have not an hour certain, as it may be
“ known in *London*, I think here will be but few, and I think a reaſonable
“ number were beſt, for I ſuppoſe ſhe will declare her ſelf to be a
“ good woman, for all men but for the king, at the hour of her death.
“ For this morning ſhe ſent for me, that I might be with her at ſuch
“ time as ſhe received the Good Lord, to the intent I ſhould hear her ſpeak
“ as touching her innocency alway to be clear. And in the writing of
“ this, ſhe ſent for me, and at my coming ſhe ſaid: Mr. *Kingſton*, I hear
“ ſay I ſhall not die aforenoon, and I am very ſorry therefore, for I
“ thought to be dead by this time, and paſt my pain. I told her, it
“ ſhould be no pain, it was ſo ſottle. And then ſhe ſaid, I heard ſay
“ the executioner was very good, and I have a little neck, and put her
“ hands about it, laughing heartily. I have ſeen many men, and alſo
“ women, executed; and that they have been in great ſorrow, and to
“ my knowledge this lady has much joy and pleaſure in death. Sir, her
“ almoner is continually with her, and had been ſince two a clock after
“ midnight. This is the effect of any thing that is here at this time,
“ and thus fare you well,

Yours,
William Kingſton.”

A little before noon, being the 19th of *May*, ſhe was brought to the ſcaffold, where ſhe made a ſhort ſpeech to a great company that came to look on the laſt ſcene of this fatal tragedy: the chief of whom were the dukes of *Suffolk* and *Richmond*, the lord chancellor, and ſecretary *Cromwell*, with the lord mayor, the ſheriffs and aldermen of *London.* “ She “ ſaid, ſhe was come to die, as ſhe was judged by the law; ſhe would “ accuſe none, nor ſay any thing of the ground upon which ſhe was “ judged. She prayed heartily for the king; and called him a moſt merciful and gentle prince, and that he had been always to her, a good, “ gentle, ſoveraign lord: and if any would meddle with her cauſe, ſhe “ required them to judge the beſt. And ſo ſhe took her leave of them, “ and of the world; and heartily deſired they would pray for her.” After ſhe had been ſome time in her devotions, her laſt words being, *To Chriſt I commend my ſoul*; her head was cut off by the hangman of *Calais*, who was brought over as more expert at beheading than any in *England*: her eyes and lips were obſerved to move after her head was cut off, as *Spelman* writes; but her body was thrown into a common cheſt of elm-tree that was made to put arrows in, and was buried in the chappel within the *Tower* before twelve a clock.

Her brother with the other four did alſo ſuffer; none of them were quartered, but they were all beheaded, except *Smeton*, who was hanged. It was generally ſaid, that he was corrupted into that confeſſion, and had his life promiſed him; but it was not fit to let him live to tell tales. *Norris* had been much in the kings favour, and an offer was made him of his life, if he would confeſs his guilt, and accuſe the queen. But he generouſly rejected that un-handſom propoſition, and ſaid, “ That in “ his conſcience he thought her innocent of theſe things laid to her “ charge; but whether ſhe was or not, he would not accuſe her of any “ thing, and he would die a thouſand times, rather than ruin an innocent perſon.”

Theſe proceedings occaſioned as great variety of cenſures, as there were diverſity of intereſts. The Popiſh party ſaid, the juſtice of God was viſible, that ſhe who had ſupplanted queen *Katherine*, met with the like, and harder meaſure, by the ſame means. Some took notice of her faint juſtifying her ſelf on the ſcaffold, as if her conſcience had then prevailed ſo far, that ſhe could no longer deny a thing, for which ſhe was ſo ſoon to anſwer at another tribunal. But others thought her care of her daughter made her ſpeak ſo tenderly; for ſhe had obſerved, that queen *Katherines* obſtinacy had drawn the kings indignation on her daughter; and therefore that ſhe alone might bear her misfortunes, and derive no ſhare of them on her daughter, ſhe ſpake in a ſtile, that could give the king no juſt offence: and as ſhe ſaid enough to juſtifie her ſelf, ſo ſhe ſaid as much for the kings honour, as could be expected. Yet in a letter that ſhe wrote to the king from the *Tower*, (which will be found in the Collection,) ſhe pleaded her innocence, in a ſtrain of ſo much wit, and moving paſſionate eloquence, as perhaps can ſcarce be parallel'd: certainly her ſpirits were much exalted when ſhe wrote it, for it is a pitch above her ordinary ſtile. Yet the copy I take it from, lying among *Cromwells* other papers, makes me believe it was truly written by her.

Her carriage ſeemed too free, and all people thought that ſome freedoms and levities in her had encouraged thoſe unfortunate perſons to ſpeak ſuch bold things to her, ſince few attempt upon the chaſtity, or make declarations of love, to perſons of ſo exalted a quality, except they ſee ſome invitations, at leaſt in their carriage. Others thought that a free and jovial temper might, with great innocence, though with no diſcretion, lead one to all thoſe things that were proved againſt her; and therefore they concluded her chaſte, though indiſcreet. Others blamed the king, and taxed his cruelty in proceeding ſo ſeverely againſt a perſon whoſe chaſtity he had reaſon to be aſſured of, ſince ſhe had reſiſted his addreſſes near five years, till he legitimated them by marriage. But others accuſed him. It is certain her carriage had given juſt cauſe of ſome jealouſie, and that being the rage of a man, it was no wonder if a king of his temper, conceiving it againſt one whom he had ſo ſignally obliged, was tranſported into unjuſtifiable exceſſes.

Others condemned *Cranmer*, as a man that obſequiouſly followed all the kings appetites; and that he had now divorced the king a ſecond time, which ſhewed that his conſcience was governed by the kings pleaſure as his ſupreme law. But what he did was unavoidable. For whatever motives drew from her the confeſſion of that precontract, he was obliged to give ſentence upon it: and that which ſhe confeſſed, being ſuch as made her incapable to contract marriage with the king, he could not decline the giving of ſentence upon ſo formal a confeſſion. Some loaded all that favoured the Reformation: and ſaid, It now appeared what a woman their great patroneſs and ſupporter had been. But to thoſe it was anſwered, That her faults, if true, being ſecret, could caſt no reflection on thoſe, who being ignorant of them, made uſe of her protection. And the church of *Rome* thought not their cauſe ſuffered by the enraged cruelty and ambition of the curſed *Irene*, who had convened the ſecond council of *Nice*, and ſet up the worſhip of images again in the eaſt; whom the popes continued to court and magnifie, after her barbarous murder of her ſon, with other acts of unſatiated ſpite and ambition. Therefore they had no reaſon to think the worſe of perſons for claiming the protection of a queen, whoſe faults (if ſhe was at all criminal,) were unknown to them when they made uſe of her.

Some have ſince that time concluded it a great evidence of her guilt, that during her daughters long and glorious reign, there was no full nor compleat vindication of her publiſhed. For the writers of that time thought it enough to ſpeak honourably of her; and in general, to call her *innocent*, but none of them ever attempted a clear diſcuſſion of the particulars laid to her charge. This had been much to her daughters honour, and therefore, ſince it was not done, others concluded it could not be done; and that their knowledge of her guilt reſtrained their pens. But others do not at all allow of that inference, and think rather, that it was the great wiſdom of that time not to ſuffer ſuch things to be called in queſtion; ſince no wiſe government will admit of a debate about the clearneſs of the princes title. For the very attempting to prove it weakens it more, than any of the proofs that are brought can confirm it; therefore it was prudently done of that queen and her great miniſters, never to ſuffer any vindication or apology to be written. Some indiſcretions could not be denied, and theſe would all have been catched hold of, and improved by the buſie emiſſaries of *Rome* and *Spain.*

Extract from 3 Burn. Reformat. *p.* 118, *to* 121.

THE tragedy of queen *Anne* followed ſoon after this: it broke out on the firſt of *May* 1536, but it ſeems it was concerted before; for a parliament was ſummoned, at leaſt the writs were teſted the 27th of *April* before.

There is a long account of her ſufferings given by *Meteren*, in that excellent hiſtory that he wrote of the wars in the *Netherlands*, which he took from a full relation of it, given by a *French* gentleman, *Criſpin*, who was then in *London*, and as *Meteren* relates the matter, wrote without partiality. He begins it thus. “ There was a gentleman who blamed “ his ſiſter for ſome lightneſs that appeared in her behaviour: ſhe ſaid “ the queen did more than ſhe did; for ſhe admitted ſome of her court “ to come into her chamber at undue hours: and named the lord *Rochford, Norris, Weſton, Brereton*, and *Smeton* the muſician: and ſhe ſaid “ to her brother, that *Smeton* could tell much more: all this was carried “ to the king.”

When the matter broke out on the firſt of *May*, the king who loved *Norris*, ſent for him, and ſaid, if he would confeſs thoſe things with which the queen was charged, he ſhould neither ſuffer in his perſon, nor his eſtate; nor ſo much as be put in priſon: but if he did not confeſs, and were found guilty, he ſhould ſuffer the extremity of the law. *Norris* anſwered, he would much rather die than be guilty of ſuch falſhood: that it was all falſe, which he was ready to juſtify in a combat againſt any perſon whatſoever: ſo he was ſent with the reſt to the *Tower*: the confeſſion of *Smeton* was all that was brought againſt the queen: he, as was believ'd, was prevailed on to accuſe her: yet he was condemned contrary to the promiſe that had been made him: but it was pretended that his crime was, that he had told his ſuſpicions to others, and not to the king: and when it was alledg'd that one witneſs was not ſufficient, it was anſwered that it was ſufficient. He adds, that the queen was try'd in the *Tower*; and that ſhe defended her honour, and modeſty, in ſuch a way, as to ſoften the king (for ſhe knew his temper) by ſuch humble deportment, to favour her daughter. She was brought to her trial without having any advocate allow'd her; having none but her maids about her. A chair was ſet for her, and ſhe looked to all her judges with a chearful countenance, as ſhe made her curtſies to them, without any fear: ſhe behaved her ſelf as if ſhe had been ſtill queen: ſhe ſpoke not much in her own defence; but the modeſty of her countenance pleaded her innocence, much more than the defence that ſhe made; ſo that all who ſaw or heard her, believed her innocent. Both the magiſtrates of *London*, and ſeveral others who were there, ſaid, they ſaw no evidence againſt her; only it appear'd, that they were reſolv'd to be rid of her.

She was made to lay aſide all the characters of her dignity: which ſhe did willingly; but ſtill proteſted her innocence. When ſhe heard the ſentence, that ſhe was to be beheaded, or burnt, ſhe was not terrified; but lifted up her hands to God, and ſaid, " O Father! O Creator! Thou, " who art the way, the truth, and the life; thou knoweſt that I have " not deſerved this death." And turning herſelf to her judges, (her uncle, the duke of *Norfolk*, being the lord high ſteward) ſhe ſaid, " My lords, " I will not ſay that your ſentence is unjuſt; nor preſume, that my " opinion ought to be preferred to the judgment of you all. I believe " you have reaſons, and occaſions of ſuſpicion and jealouſy, upon which " you have condemned me: but they muſt be other, than thoſe that have " been produced here in court; for I am entirely innocent of all theſe " accuſations; ſo that I cannot aſk pardon of God for them. I have " been always a faithful and loyal wife to the king. I have not, perhaps, " at all times ſhewed him that humility and reverence, that his goodneſs " to me, and the honour to which he raiſed me, did deſerve. I confeſs, " I have had fancies and ſuſpicions of him, which I had not ſtrength nor " diſcretion enough to manage: but God knows, and is my witneſs, " that I never failed otherwiſe towards him: and I ſhall never confeſs " any other, at the hour of my death. Do not think that I ſay this, on " deſign to prolong my life: God has taught me to know how to die; " and he will fortify my faith. Do not think that I am ſo carried in my " mind, as not to lay the honour of my chaſtity to heart; of which I " ſhould make ſmall account now in my extremity, if I had not maintained it my whole life long, as much as ever queen did. I know, " theſe my laſt words will ſignify nothing, but to juſtifie my honour and " my chaſtity. As for my brother, and thoſe others, who are unjuſtly " condemned, I would willingly ſuffer many deaths, to deliver them: " but ſince I ſee it ſo pleaſes the king, I muſt willingly bear with their " death, and ſhall accompany them in death, with this aſſurance, that " I ſhall lead an endleſs life with them in peace." She ſaid all this, and a great deal more: and then, with a modeſt air, ſhe roſe up, and took leave of them all. Her brother, and the other gentlemen, were executed firſt. " He exhorted thoſe who ſuffered with him, to die without fear; " and ſaid to thoſe that were about him, that he came to die, ſince it " was the king's pleaſure that it ſhould be ſo. He exhorted all perſons, " not to truſt to courts, ſtates, and kings, but in God only. He had " deſerved a heavier puniſhment for his other ſins; but not from the " king, whom he had never offended. Yet he prayed God to give " him a long, and a good life. With him, all the reſt ſuffer'd a death, " which they had no way deſerved. *Mark Smeton* only confeſſed, he " had deſerved well to die: which gave occaſion to many reflections.

" When the queen heard how her brother and the other gentlemen " had ſuffered, and had ſealed her innocence with their own blood; but " that *Mark* had confeſs'd, he deſerved to die; ſhe broke out into ſome " paſſion, and ſaid; Has he not then clear'd me of that publick ſhame he " has brought me to? Alas! I fear his ſoul ſuffers for it, and that he is " now puniſhed for his falſe accuſation. But for my brother, and thoſe " others, I doubt not, but they are now in the preſence of that Great " King, before whom I am to be to-morrow."

It ſeems, that gentleman knew nothing of the judgment that paſſed at *Lambeth*, annulling the marriage: for it was tranſacted ſecretly. It could have no foundation or colour, but from that ſtory mention'd in *Cavendiſh*'s life of *Wolſey*, of the lord *Percy*'s addreſſes to her. He was now examined upon that: but it will appear from his letter to *Cromwell*, that he ſolemnly purged both himſelf and her, from any precontract; being examined upon oath by the two archbiſhops: and that he received the ſacrament upon it, before the duke of *Norfolk*, and ſome of the king's council that were learned in the ſpiritual law; aſſuring them by his oath, and by the ſacrament that he had received, and intended to receive, that there was never any contract, or promiſe of marriage, between her and him. This he wrote on the 13th of *May*, four days before the queen's execution; which will be found in the Collection.

This ſhews plainly, that ſhe was prevailed on, between fear and hope, to confeſs a precontract, the perſon not being named.

The *French* gentleman gives the ſame account of the manner of her death, and of her ſpeech, that all the other writers of that time do. " When ſhe was brought to the place of execution, within the *Tower*, " he ſays, her looks were chearful; and ſhe never appeared more beautiful, than at that time. She ſaid to thoſe about her, Be not ſorry to " ſee me die thus; but pardon me from your hearts, that I have not expreſſed to all about me, that mildneſs that became me; and that I " have not done that good, that was in my power to do. She prayed for " thoſe who were the procurers of her death. Then, with the aid of " her maids, ſhe undreſſed her neck with great courage, and ſo ended her " days."

This long recital I have tranſlated out of *Meteren*; for I do not find it taken notice of by any of our writers. I leave it thus, without any other reflections upon it, but that it ſeems all over credible.

Thevet, a *Franciſcan* fryar, who for 17 or 18 years, had wandred up and down *Europe*, to prepare materials for his *Coſmography*, (which he publiſhed in the year 1563,) ſays, that many *Engliſh* gentlemen aſſured him, that king *Henry* expreſſed great repentance of his ſins, being at the point of death; and among other things, of the injury and the crime committed againſt queen *Anne Boleyn*, who was falſly accuſed, and convicted of that which was laid to her charge. It is true, *Thuanus* has very much diſgraced that writer, as a vain and ignorant plagiary: but he having been of the order that ſuffered ſo much for their adhering to queen *Katherine*, is not to be ſuſpected of partiality for queen *Anne*. We muſt leave thoſe ſecrets to the great day.

The earl of Northumberland's *letter to* Cromwell, *denying any contract, or promiſe of marriage, between queen* Anne *and himſelf.*

MR. Secretary, this ſhall be to ſignifie unto you, that I perceyve by ſir *Raynold Carnaby*, that there is ſuppoſed a precontract between the queen and me; whereupon I was not only heretofore examined upon my oath before the archbiſhopps of *Canterbury* and *York*, but alſo received the bleſſed ſacrament upon the ſame before the duke of *Norfolk*, and other the king's highnes council learned in the ſpirituall law; aſſuring you, Mr. Secretary, by the ſaid oath, and bleſſed body which affore I received, and hereafter intend to receive, that the ſame may be to my damnation, if ever there were any contracte, or promiſe of marriage between her and me. At *Newyngton-Green*, the xiijth day of *Maye*, in the 28th. year of the reigne of our ſoveraigne lord king *Henry* the VIIIth.

Your aſſured,

Northumberland.

Extract from Appen. *to* 1 Burn. Reformat. *p.* 154.

Queen Ann Boleyn's *laſt letter to king* Henry.

SIR,

YOUR grace's diſpleaſure, and my impriſonment, are things ſo ſtrange unto me, as what to write, or what to excuſe, I am altogether ignorant. Whereas you ſend unto me (willing me to confeſs a truth, and ſo obtain your favour) by ſuch an one whom you know to be mine antient profeſſed enemy; I no ſooner received this meſſage by him, than I rightly conceived your meaning; and if, as you ſay, confeſſing a truth indeed may procure my ſafety, I ſhall with all willingneſs and duty perform your command.

But let not your grace ever imagine that your poor wife will ever be brought to acknowledge a fault, where not ſo much as a thought thereof preceded. And to ſpeak a truth, never prince had wife more loyal in all duty, and in all true affection, than you have ever found in *Ann Boleyn*, with which name and place I could willingly have contented my ſelf, if God and your grace's pleaſure had been ſo pleaſed. Neither did I at any time ſo far forget my ſelf in my exaltation, or received queenſhip, but that I alwayes looked for ſuch an alteration as now I find; for the ground of my preferment being on no ſurer foundation than your grace's fancy, the leaſt alteration, I knew, was fit and ſufficient to draw that fancy to ſome other ſubject. You have choſen me, from a low eſtate, to be your queen and companion, far beyond my deſert or deſire. If then you found me worthy of ſuch honour, good your grace let not any light fancy, or bad counſel of mine enemies, withdraw your princely favour from me; neither let that ſtain, that unworthy ſtain of a diſloyal heart towards your good grace, ever caſt ſo foul a blot on your moſt dutiful wife, and the infant princeſs your daughter: try me, good king, but let me have a lawful trial, and let not my ſworn enemies ſit as my accuſers and judges; yea, let me receive an open trial, for my truth ſhall fear no open ſhame; then ſhall you ſee, either mine innocency cleared, your ſuſpicion and conſcience ſatisfied, the ignominy and ſlander of the world ſtopped, or my guilt openly declared. So that whatſoever God or you may determine of me, your grace may be freed from an open cenſure; and mine offence being ſo lawfully proved, your grace is at liberty, both before God and man, not only to execute worthy puniſhment on me as an unlawful wife, but to follow your affection, already ſettled on that party, for whoſe ſake I am now as I am, whoſe name I could ſome good while ſince have pointed unto; your grace being not ignorant of my ſuſpicion therein.

But if you have already determined of me, and that not only my death, but an infamous ſlander muſt bring you the enjoying of your deſired happineſs; then I deſire of God, that he will pardon your great ſin therein, and likewiſe mine enemies, the inſtruments thereof; and that he will not call you to a ſtrict account for your unprincely and cruel uſage of me, at his general judgment-ſeat, where both you and my ſelf muſt ſhortly appear, and in whoſe judgment I doubt not (whatſoever the world may think of me) mine innocence ſhall be openly known, and ſufficiently cleared.

My laſt and only requeſt ſhall be, that my ſelf may only bear the burthen of your grace's diſpleaſure, and that it may not touch the innocent ſouls of thoſe poor gentlemen, who (as I underſtand) are likewiſe in ſtrait impriſonment for my ſake. If ever I have found favour in your ſight, if ever the name of *Ann Boleyn* hath been pleaſing in your ears, then let me obtain this requeſt; and I will ſo leave to trouble your grace any further, with mine earneſt prayers to the Trinity to have your grace in his good keeping, and to direct you in all your actions. From my doleful priſon in the *Tower*, this 6th of *May*.

Your moſt loyal and ever

faithful wife,

Ann Boleyn.

Extract from Strype's Memorials, *vol.* 1, *p.* 279.

THIS year, [1536] in the month of *May*, queen *Anne Boleyn* was beheaded: a great friend and patroneſs of the reformed religion.

She was very nobly charitable, and expended largely in all manner of acts of liberality, according to her high quality. And among the reſt of her ways of ſhewing this Chriſtian virtue, ſhe being a favourer of learning, together with her father, the lord *Wiltſhire*, and the lord *Rochford* her brother, maintained divers ingenious men at the univerſities. Among the reſt, were theſe men of note, Dr. *Hethe*, afterward archbiſhop of *York*, and lord chancellor; Dr. *Thirlby*, afterward biſhop of *Ely*; and Mr. *Paget*, afterward lord *Paget*, and ſecretary of ſtate: all which in her time were favourers of the Goſpel, though afterwards they relapſed. Of *Paget* one hath obſerved, that he was a moſt earneſt Proteſtant, and being in *Cambridge*, gave unto one *Raynold Weſt*, *Luther*'s book, and other books of the *Germans*, as *Franciſcus Lambertus de Sectis:* and that, at that time he read *Melancthon*'s rhetorick openly in *Trinity*-hall; and was a maintainer of Dr. *Barnes*, and all the Proteſtants then in *Cambridge*, and helped many religious perſons out of their cowles.

This queen was alſo a great favourer of thoſe that ſuffered for religion. Let this letter enſuing, writ by her to *Crumwel*, ſtand upon record here, ſhewing both her love to ſuch ſufferers, and her high eſteem of the word of God.

By the Queen.

“ *Anne the Queen.* Truſty and right well beloved, wee greet you well.
“ And whereas, we be credibly enformed, that the bearer hereof, *Rychard*
“ *Herman*, merchant, and citizen of *Antwerp* in *Brabant*, was, in the
“ time of the late lord cardinal, put and expelled from his freedom and
“ fellowſhip of and in the *Engliſh Houſe* there, for nothing elſe, as he af-
“ firmeth, but only for that, that he did, both with his goods and policy,
“ to his great hurt and hindrance in this world, help to the ſetting forth
“ of the New Teſtament in *Engliſh*. Wee therefore deſire and inſtantly
“ pray you, that with all ſpeed and favour convenient, ye woll cauſe this
“ good and honeſt merchant, being my lords true, faithful and loving
“ ſubject, to be reſtored to his priſtin freedom, liberty and fellowſhip
“ aforeſaid. And the ſooner at this our requeſt: and at your good ple-
“ ſure to hear him in ſuch things as he hath to make further relation
“ unto you in this behalf. Yeven under our ſignet, at my lord's mannor
“ of *Grenewich*, the xiv. day of *May*.”

Such a material piece of hiſtory in the king's reign, beſides what is written by our hiſtorians, may deſerve divers particular remarks to be ſhewn, concerning this queen's behaviour and her ſpeeches, from the time of her commitment to the *Tower*, to her execution. Which I am enabled to give from five or ſix letters of ſir *William Kyngſton*, conſtable, or (as others) lieutenant, of the *Tower*, to ſecretary *Crumwel*. And I do it the rather, to repreſent matters concerning this queen in her afflictions the more largely, exactly and diſtinctly; which biſhop *Burnet* hath ſet down from the ſame papers, more briefly and imperfectly. And perhaps upon the reading of what follows, ſome things which that reverend author attributes to fits and vapours in the queen, may find a better and truer interpretation The lord *Herbert* alſo has given us only ſome ſhort hints of theſe things.

After the duke of *Norfolk*, and ſome other of the kings council who had conducted queen *Anne* to the *Tower*, (which was on the 2d of *May*) were departed, the ſaid conſtable of the *Tower* went before her into her lodging. And then ſhe ſaid to him, Mr. *Kyngſton*, ſhall I go into a dungeon? he anſwered her, No, madam; you ſhall go into your lodging, that you lay in at your coronation. Upon which ſhe ſaid, It is too good for me. And further ſaid, *Jeſu! have mercy on me.* And then kneeled down, weeping a great pace. And in the ſame ſorrow, fell into a great laughing. And ſo ſhe did ſeveral times afterwards. Then ſhe deſired Mr. *Kyngſton*, to move the king's highneſs, that ſhe might have the ſacrament in the cloſet by her chamber, that ſhe might pray for mercy. *For I am as clear*, ſaid ſhe, *from the company of man*, *as for ſin*, *as I am clear from you:* and again, *the king's true wedded wife*. And then ſhe ſaid, Mr. *Kyngſton*, do you know wherefore I am here? and he ſaid, Nay. And then ſhe aſked him, when he ſaw the king? he ſaid, not ſince he ſaw him in the *Tilt Yard*, [which was but the day before at *Greenwich*, when he ſeemed firſt to take a diſpleaſure againſt her.] And then ſhe aſked him, I pray you tell me, where my lord my father is. He told her, he ſaw him afore dinner in the court. O! where is my ſweet brother? [for ſhe feared the king's diſpleaſure againſt her, would reach unto all her relations.] *Kingſton* replyed, I left him at *York-Place:* thinking it convenient to conceal it from her, though he was committed the ſame day. I hear ſay, ſaid ſhe, that I ſhall be accuſed by three men. And I can ſay no more, but, Nay: though you ſhould open my body; and therewith ſhe opened her gown. Adding, O! *Norris*, haſt thou accuſed me? thou art in the *Tower* with me. And thou and I ſhall die together. And *Mark*, [another that accuſed her] thou art here too. And then with much compaſſion ſhe ſaid, O! my mother, thou wilt die with ſorrow. And then ſhe much lamented my lady *Worceſter*, (being with child) becauſe her child did not ſtir in her body. And wnen the conſtable's wife, being preſent, aſked, what might be the cauſe, ſhe ſaid, It was for the ſorrow ſhe took for me.

Then ſhe ſaid, Mr. *Kyngſton*, ſhall I die without juſtice? to which he replyed, The pooreſt ſubject the king had, had juſtice. And therewith ſhe laughed. All theſe ſayings happened that night. The next morning in converſation with her, theſe ſpeeches happened; related by ſir *William Kyngſton* in his foreſaid letter. Mrs. *Coſins*, a gentlewoman appointed to wait upon the queen here, and that lay on her palate bed, ſaid, that *Norris* (one of thoſe that were accuſed about her) did ſay on *Saturday* laſt unto the queen's amner, that he would ſwear for the queen, that ſhe was a good woman. And then the ſaid gentlewoman added, ſpeaking to the queen, [as minding to enquire of her concerning the occaſion of her preſent trouble] Madam, why ſhould there be any ſuch matters ſpoken of? Marry, ſaid the queen, I bade him do ſo. For I aſked him, why he did not go through with his marriage [with ſome lady, it ſeems, *Norris* courted]. And he made anſwer, he would tarry a time. Then ſaid ſhe, You look for dead men's ſhoes. For if ought ſhould come to the king, but good, you would look to have me. Then he ſaid, If he ſhould have any ſuch thought, he would his head were off. And then ſhe ſaid, ſhe could undo him, if ſhe would. And therewith they fell out.

And then ſhe ſaid, I more fear *Weſton* [another that was caſt into the *Tower* about her buſineſs]. For *Weſton* had ſaid unto her, that *Norris* came more unto her chamber for her, than he did for *Mage* [the name, I ſuppoſe, of one of the queen's maids, that he courted]. And further, *Kyngſton* related another ſaying, which the queen ſpake to him concerning *Weſton*, [whom alſo ſhe had ſometimes talk with, coming often in her way; which might create a jealouſy concerning him] That ſhe had ſpoke with him, becauſe he did love her kinſwoman, Mrs. *Skelton*. And ſaid to him, that he loved not his wife [ſpoken by way of reproof]. And he made anſwer to her again, that he loved one in her houſe better than them both. And the queen ſaid, Who is that? he gave this anſwer, It is yourſelf. And then ſhe defied him, as ſhe ſaid to *Kyngſton* [in ſcorne and diſpleaſure, as reflecting upon her honour, undoubtedly]. Theſe paſſages between the queen and them, was the cauſe of all their deaths; coming ſome way or other to the jealous king's ears. For ſhe, being of a free and courteous nature, would exchange words ſometimes, and enter into ſome talk with ſuch as ſhe met in the court; and with theſe gentlemen, who were of the privy chamber: and ſo happened often to come where ſhe was. And ſome of their diſcourſe happened to be brought to the king by ſome officious perſon, that owed her no good will.

In another letter to ſecretary *Crumwel*, he wrote theſe paſſages concerning the ſaid queen: That ſhe much deſired to have there in her cloſet the ſacrament; and alſo her amner for one hour, when ſhe was determined to die [that is, to ſuffer death]. After an examination of her at *Greenwich*, before ſome of the council, the ſaid *Kyngſton* ſent for his wife and Mrs. *Coſins* (who both were appointed to be always with her) to know of them, how ſhe had done that day. They ſaid, ſhe had been very merry, and made a good dinner: and after, called for a ſupper. And then called for him, and aſked him, where he had been all day. And after ſome words, ſhe began talk, and ſaid, ſhe was cruelly handled at *Greenwich* with the king's council: namely, with my lord of *Norfolk* [who was indeed her enemy]. And that he ſaid, [to what ſhe had ſpoken, as it ſeems in her own defence[*Tut*, *tut*, *tut*; and ſhaking his head three or four times. And as for Mr. Treaſurer, he was, ſaid ſhe, in the foreſt of *Windſor*. You know, added the writer of the letter, what ſhe meant by that. And then named Mr. Comptroler (another of the council) to be a very gentleman. But ſhe to be a queen, and ſo cruelly handled, it was never ſeen. *But I think the king doth it to prove me.* And then laughed withal: and was very merry. And then ſhe ſaid, I ſhall have juſtice. Then ſaid the conſtable, Have no doubt therein. Then ſhe ſaid, If any man accuſe me, I can ſay but *nay*. And they can bring no witneſs.

And in ſome communication with the lady *Kyngſton* and Mrs. *Coſins*, I would to God, ſaid ſhe, I had my biſhops. For they would all go to the king for me. For I think the moſt part of *England* prayeth for me. And if I die, you ſhall ſee the greateſt puniſhment for me within this ſeven years, that ever came to *England*. [This ſhe ſpake no doubt in the confidence of her innocency; and God's righteous and viſible judgments for the moſt part, for ſhedding innocent blood. And indeed within the ſeventh year following, happened a dreadful peſtilence in *London*, and many commotions and inſurrections to the end of this reign.] *And then*, ſaid ſhe, *ſhall I be in Heaven. For I have done many good deeds in my days.* Then ſhe took notice of divers women ſet about her, that ſhe liked not; ſaying, I think much unkindneſs in the king to put ſuch about me, as I never loved. Then *Kyngſton* ſhewed her, that the king took them to be honeſt and good women. But I would have had of my own privy chamber, replyed ſhe, which I favour moſt, *&c.*

In another letter of *Kyngſton* to *Crumwel*, he relates, how ſhe deſired of him to carry a letter to the ſaid *Crumwel* [of whoſe friendſhip ſhe had a belief]. But he (it ſeems not thinking it ſafe for him to carry letters from her) ſaid to her, that if ſhe would tell it him by mouth, he would do it. For which ſhe gave him thanks: and added, that ſhe much marvelled, that the king's council came not to her, as ſeeming to be ready to juſtify her ſelf. The ſame day ſhe ſaid, we ſhould have no rain, till ſhe was delivered out of the *Tower:* it being a ſeaſon that wanted rain: [thinking probably that God (who takes care of innocency) would vindicate her, by giving, or withholding the clouds of Heaven.] To which *Kyngſton* replyed, I pray, it may be ſhortly, becauſe of the fair weather: adding, you know what I mean [that is, the king's reconciliation to her].

Other occaſional ſpeeches of hers, were theſe. She ſaid concerning ſuch women as was ſet about her, that the king wiſt what he did, when he put two ſuch about her, as my lady *Boleyn*, and Mrs. *Coſins*. For they could tell her nothing of my lord, her father, and nothing elſe. But that ſhe defied them all. [Meaning any about her whoſoever, to be able to charge her with any diſhonourable act.] But then upon this, my lady *Boleyn* [her kinſwoman] ſaid to her, *Such deſire as you have had to ſuch tales*, [tale-carriers or tellers, as ſome perhaps of her women were] *have brought you to this.* Then ſaid Mrs. *Stoner*, [another gentlewoman about her] *Mark* [*Smeton*, the muſician, another committed to the *Tower*, an accuſer of the queen] is the worſt cheriſhed of any in the houſe. For he weareth irons. The queen ſaid, that was becauſe he was no gentleman. And he never was at my chamber; [and ſo could know leſs, ſhe meant, than any, what was done by her, or any with her there] but at *Wincheſter*, and there ſhe ſent for him, to play on the virginals: for there my lodging was above the king's. And I never ſpake with him ſince, but upon *Saturday* before *May* day [that fatal day, when the king firſt conceived his jealouſy].

jealouſy]. And then I found him ſtanding in the round window in my chamber of preſence. And I aſked him, why he was ſo ſad. And he anſwered and ſaid, it was no matter. And then ſhe ſaid, You may not look to have me ſpeak to you as I would do to a noble man: becauſe ye be an inferior perſon. No, no, ſaid he, a look ſufficeth me: and thus fare you well. This ſhews him to be ſome haughty perſon; and thought the queen gave him not reſpect enough. And ſo might take this opportunity to humble her; and revenge himſelf by this means on her: not thinking it would coſt him his own life.

Another letter of ſir *William Kyngſton* to *Crumwel*, giving an account of this queen's behaviour at her execution, is publiſhed in the Hiſtory of the *Reformation*. Which began thus; "Sir, this ſhall be to advertiſe you, "that I have received your letter; wherein you would have ſtrangers "conveyed out of the *Tower*. And ſo they be, by the means of *Richard* "*Greſham*, and *William Loke*, and *Withepole*. But the number of ſtrangers "paſt not thirty; and not many hothe [other.]" *Armed* is added in the ſaid Hiſtory, which word is not in the original letter. Other miſtakes there, this more exact tranſcription will rectify thus far in the letter.

Another letter of hers to the king, beginning, *Sir, your grace's diſpleaſure*, &c. is publiſhed in the ſaid Hiſtory. But this paſſage following wrote at the end of her letter, I think worthy to be tranſcribed, and ſet here, the reverend author of that book relating it imperfectly, *viz.*

The king ſending a meſſage to the queen *Anne*, being priſoner in the *Tower*; willing her to confeſs the truth, ſhe ſaid, "She could confeſs no "more, then ſhe had already ſpoken. And ſhe ſaid, ſhe muſt conceal "nothing from the king, to whom ſhe did acknowledge her ſelf ſo much "bound for many favours: for raiſing her firſt from a mean woman to "be a marqueſs; next to be his queen. And now, ſeeing he could be"ſtow no further honour upon her on earth, for purpoſing to make her, "by martyrdom, a ſaint in Heaven."

I add one remark more concerning this queen: that at this time of her being in the *Tower*, a former charge was revived againſt her: namely, the contract of marriage between her and the preſent earl of *Northumberland*, before her marrying with the king: deſigning, if they could prove this, to make her former marriage with the king unlawful and void; and to make the ſmoother way for his marrying with the lady *Jane*. But whatſoever the afflicted queen confeſſed to ſave her life, or to change the way of her execution, from burning to beheading, that there never was any ſuch precontract, the ſaid earl proteſted ſolemnly in a letter to ſecretary *Crumwel:* who it ſeems had now deſired to know the truth from himſelf. Therein telling him, how he had formerly before the two archbiſhops, *viz. Warham* and *Wolſey*, utterly denied it upon his oath, and the receiving of the ſacrament: ſo he now confirmed it in this letter.

[*See further* Fuller's Church Hiſt. *book* 5, *p.* 206, 207.]

VII. *The Trial of Sir* EDMOND KNEVET, *Knight, at* Greenwich, *for ſtriking a Perſon within the King's Palace there, 10th June,* 33 Hen. VIII. 1541.

[*The following trial, if ſo ſlight an account deſerves the name, we extract from* Stowe, *who borrows from* Hollingſhead. *The trial is alſo taken notice of in* Brooke's Abridgment, *under the title* Paine & Penance, *pl.* 16. *It occurred a few months after the ſtatute of* 33 Hen. VIII. *by which, malicious ſtriking in the palace where the king reſides, ſo as to draw blood, is puniſhable, not only by impriſonment for life and fine at diſcretion, but further by cutting off the right hand of the offender. Whether the proſecution was grounded on the ſtatute, is not explained by* Stowe; *and what renders it more doubtful is, that by the ſtatute,* drawing of blood *is eſſential, which circumſtance neither* Brooke *nor* Stowe *ſtates as part of ſir* Edmond Knevet*'s caſe.*

Cutting off the hand is a rare puniſhment by the Engliſh *law; and the cruelty of it being conſidered, it muſt give pleaſure to the humane reader to know, that there are very few inſtances of inflicting it. We are not aware, that there are any crimes, which by our law are liable to be ſo puniſhed, except drawing a weapon on one of the king's judges, and ſtriking in the king's courts or his palaces; and ſo unfrequent have been both thoſe crimes, that perhaps all our books do not furniſh ten caſes of the ſort.* 3. Inſt. 140. Dy. 188. *and the marginal caſes in the edition of* 1688.

The manner in which ſir Edmond Knevet *obtained a pardon of his offence, muſt ſtrike every reader of ſenſibility. The circumſtances do equal honour to ſir* Edmond *and his ſovereign; to the former for his manly requeſt to pay the forfeit by his left hand inſtead of his right, that he might be better able to ſerve his king and country; to the latter, for feeling the greatneſs of mind which ſuch a requeſt denoted.*]

Extract from Stowe's Annals, Howe*'s edit. p.* 581.

THE tenth of *June*, ſir *Edmond Knevet*, knight of *Norffolke*, was arraigned before the kings juſtices (ſitting in the great hall at *Greenewich*, maſter *Gage* comptrollor of the kings houſhold, maſter *Suthwell*, ſir *Anthony Browne*, ſir *Anthony Winkfield*, maſter *Wriſley*, and *Edmond Pecham* cofferer of the kings houſholde) for ſtriking of one maſter *Clere* of *Norffolke*, ſervant with the earle of *Surrey*, within the kings houſe in the *Tenice Court*. There was firſt choſen to goe vpon the ſaid *Edmond* a queſt of gentlemen, and a queſt of yeomen, to enquire of the ſaid ſtripe, by the which inqueſts he was found guilty, and had judgement, to looſe his right hand; whereupon was called to do the execution, firſt the ſergeant chirurgion, with his inſtrument appertaining to his office: the ſergeant of the woodyard with the mallet and a blocke, whereupon the hand ſhould lie: the maſter cooke for the king with the knife: the ſergeant of the larder to ſet the knife right on the ioynt: the ſergeant farrier with his ſearing yrons to ſeare the veines: the ſergeant of the poultry with a cocke, which cocke ſhould have his head ſmitten off vpon the ſame blocke, and with the ſame knife: the yeoman of the chandry with ſeare clothes: the yeomen of the ſcullery with a pan of fire to heate the yrons: a chafer of water to coole the ends of the yrons: and two fourmes for all officers to ſet their ſtuffe on: the ſergeant of the ſeller with wine, ale, and beere: the yeomen of the ewry in the ſergeants ſteed, who was abſent, with baſon, ewre, and towels. Thus every man in his office ready to doe the execution, there was called forth ſir *William Pickering* knight marſhall, to bring in the ſaid *Edmond Knevet*, and when hee was brought to the barre, the cheife juſtice declared to him his treſpaſſe, and the ſaid *Knevet* confeſſing himſelfe to be guilty, humbly ſubmitted him to the kings mercy: for this offence he was not onely iudged to looſe his hand, but alſo his body to remaine in priſon, and his landes and goods at the kings pleaſure. Then the ſayd ſir *Edmond Knevet* deſired that the king of his benigne grace, would pardon him of his right hand, and take the left: for (quoth he) if my right hand be ſpared, I may heareafter doe ſuch good ſeruice to his grace, as ſhall pleaſe him to appoint. Of this ſubmiſſion and requeſt the juſtices forthwith informed the king, who of his goodnes, conſidering the gentle heart of the ſaid *Edmond*, and the good report of lords and ladies, granted him pardon, that he ſhould looſe neither hand, land, nor goods, but ſhould go free at liberty.

VIII. *The Trial of Lord* LEONARD GREY, *at* Weſtminſter, *for* High Treaſon, 25*th* June, 33 Hen. VIII. 1540.

[Hall, Grafton, Stow, *and lord* Herbert, *all make mention of this trial. It is alſo noticed in* Ware's Annals of Ireland. *But* Hollingſhead *in the* Chronicles of Ireland, *and ſir* Richard Cox *in his* Hiſtory of Ireland, *are moſt particular; and therefore what we ſhall give will be an extract from theſe latter writers.*

In the earl of Strafford'*s caſe, Mr.* St. John, *arguing before the lords for the bill of attainder againſt the earl, cited this trial of lord* Leonard Grey, *particularly to prove, that treaſons committed in* Ireland *are triable here; and ſaid, that he had read the whole record of the caſe.* 8 Ruſhw. 689 694. 695. *But Mr.* St. John *repreſents the charges againſt lord* Leonard Grey *differently from the author of the* Iriſh Chronicles *and ſir* Richard Cox; *for, according to Mr.* St. John, *lord* Leonard *was attainted of high treaſon, for letting diverſe rebels out of the* Caſtle *of* Dublin, *and diſcharging* Iriſh *hoſtages given to ſecure the king's peace, and for not puniſhing one, who ſaid, that the king was an heretick.---It is obſervable, too, that Mr.* St. John *argues for a trial in* England, *independently of any ſtatute; and to prove his point, takes notice, that lord* Leonard Grey'*s caſe was before the* 35. Hen. VIII. *c.* 2. *as if that was the only ſtatute for trying foreign treaſons in* England. *But there are two other ſtatutes about the trial of foreign treaſons, which, being prior to lord* Leonard Grey'*s caſe, were material to be conſidered. See* 26. Hen. VIII. *c.* 13. § 4. 32. Hen. VIII. *c.* 4. *The* 33. Hen. VIII. *c.* 24. *on the ſame ſubject, ſeems ſubſequent ſeveral months; otherwiſe that alſo would have required obſervation.----We are the more particular in adverting to this omiſſion of Mr.* St. John; *becauſe there is a like one in our principal writers on Criminal Law, not one of whom, as well as we can recollect, pointedly attends to all the ſtatutes. We do not even except* Staundford, *though his work contains a chapter on the trial of crimes committed out of the realm. See* Staundf. Pl. c. 89. *a.*]

Extract from Hollingſhead's Chronicle *in the* Iriſh Hiſtory, *p.* 102.

THE gouernor, [*lord Leonard Grey*] turning the oportunitie of this ſkirmiſh [*with ſome Iriſh revolters*] to his aduantage, ſhortlie after rode to the north, preiding & ſpoiling *Oneale* with his confederats, who by reaſon of the late ouerthrow were able to make but little reſiſtance. In this iornie he raſed Saint *Patrike* his church in *Downe*, an old ancient citie of *Ulſter*, and burnt the monuments of *Patrike*, *Brigide*, and *Colme*, who are ſaid to haue beene there intoomed, as before is expreſſed in the deſcription of *Ireland*. This fact loſt him ſundrie harts in that countrie, alwaies after deteſting and abhorring his prophane tyrannie, as they did name it. Wherevpon conſpiring with ſuch of *Mounſter* as were enimies to his gouernment, they booked vp diuerſe complaints againſt him, which they did exhibit to the king and councell. The articles of greateſt importance laid to his charge were theſe.

1 *Inprimis*, That notwithſtanding he were ſtrictlie commanded by the king his maieſtie, to apprehend his kinſman the yong *Fitzgirald*, yet did he not onlie diſobeie the kings letters as touching that point by plaieng bopeepe, but alſo had priuie conference with the ſaid *Fitzgirald*, and laie with him two or three ſeuerall nights before he departed into *France*.

2 *Item*, That the cheefe cauſe that mooued him to inuegle *Thomas Fitzgirald* with ſuch faire promiſes, proceeded of ſet purpoſe to haue him cut off, to the end there ſhould be a gap ſet open for the yong *Fitzgirald* to aſpire to the earledome of *Kildare*.

3 *Item*, That he was ſo greedilie addicted to the pilling and polling of the king his ſubiects, namelie of ſuch as were reſiant in *Mounſter*, as the beds he laie in, the cups he dranke in, the plate with which he was ſerued in anie gentlemans houſe, were by his ſeruants againſt right and reaſon packt vp, and carried with great extortion awaie.

4 *Item*, That without anie warrant from the king or councell, he prophaned the church of Saint *Patrikes* in *Downe*, turning it to a ſtable, after plucked it downe, and ſhipt the notable ring of bels that did hang in the ſteeple, meaning to haue ſent them to *England:* had not God of his iuſtice preuented his iniquitie, by ſinking the veſſell and paſſengers wherein the ſaid belles ſhould haue beene conueied.

Theſe and the like articles were with ſuch odious preſumptions coloured by his accuſers, as the king and councell remembring his late faults, and forgetting his former ſeruices (for commonlie all men are of ſo hard hap, that they ſhall be ſooner for one treſpaſſe condemned, than for a thouſand good deſerts commended) gaue commandement, that the lord *Greie* ſhould not onelie be remooued from the gouernment of the countrie, but alſo had him beheaded on the *Tower-hill* the eight and twentith of *June*. But as touching the firſt article, that brought him moſt of all out of conceipt with the king, I mooued queſtion to the erle of *Kildare*, whether the tenor therof were true or falſe? His lordſhip thereto anſwered *bona fide*, that he neuer ſpake with the lord *Greie*, neuer ſent meſſenger to him, nor receiued meſſage or letter from him. Whereby maie be gathered, with how manie dangers they are inwrapped that gouerne prouinces, wherein diligence is twhackt with hatred, negligence is loden with tawnts, ſeueritie with perils menaced, liberalitie with thankleſſe vnkindneſſe contemned, conference to vndermining framed, flatterie to deſtruction forged, each in countenance ſmiling, diuerſe in heart pouting, open fawning, ſecret grudging, gaping for ſuch as ſhall ſucceed in gouernment, honouring magiſtrates with cap and knee as long as they are preſent, and carping them with toong and pen as ſoone as they are abſent.

Extract from 1 Cox's Hiſtory of Ireland, *p.* 264.

BEFORE we proceed farther in the affairs of *Ireland*, it will be fit to pay that reſpect to the memory of the late lord deputy (the lord *Grey)* as to give ſome account of his misfortunes and deſtiny. He had certainly performed conſiderable atchievements in *Ireland*, and great commendations of him are contained in moſt of the letters from the council to the king; and his majeſty did ſo well approve of his good ſervices, that he created him viſcount *Grany*; and although the earl of *Ormond*, the lord chancellor *Allen*, the vice-treaſurer *Brabazon*, and ſir *John Travers*, went with him, or immediately followed him into *England*, to impeach him, yet he was kindly received by the king, and carried the ſword before him on *Whitſunday:* nevertheleſs he was in a ſhort time after impriſoned in the *Tower*, and accuſed of very many articles; the principal of which are theſe;

Firſt, That *O Connor* feaſted him, and mended *Toghercroghan* for him; and that in favour of *O Molloy*, a rebel, he took a caſtle from *Dermond O Molloy*, whoſe father-in-law *O Carol* was a good ſubject; for which the lord *Grey* had a bribe, and *Stephen ap Harry* had twenty cows.

Secondly, That he took the caſtle of *Bir* from a loyal *O Carol*, and gave it to a rebel *O Carol*, who married the earl of *Kildare*'s daughter, and alſo took *Moderhern*, a caſtle belonging to the earl of *Ormond*, and gave it to the rebel *O Carol*, and waſted the earl of *Ormond*'s lands: for which, he had an hundred and forty kine, and *Stephen ap Harry* had forty, and *Girald Mac Gerrot* had a black hackny.

Thirdly, That he took forty kine from *O Kenedy*, a tenant of the earl of *Ormond*'s and his ſon for hoſtage.

Fourthly, That he held ſecret and private familiar correſpondence with *James* of *Deſmond*, and went to viſit him in his tents in his night-gown, and forced the abbot of *Owny* to give him forty pounds ſterling to preſerve that abby from ruine, and *O Brian* to give him thirty kine and hoſtages; and *Ulick Bourk*, a baſtard, gave him 100 marks to have *Ballimacleere-Caſtle*, and to be made *Mac William*; and that he carried the artillery in a ſmall veſſel to *Galway*, and made the town of *Galway* pay thirty-four pounds for that carriage.

Fifthly, That the exploits at *Bryans* bridge, &c. were in favour of *O Bryan* a rebel, *Deſmond*'s ſon-in-law, and to the prejudice of *Donough O Bryan*, a good ſubject; and that he took a bribe of eighty kine from *Macnemarra*.

Sixthly, That truſting *Deſmond* and *O Bryan*, he hazarded the king's army in a long and dangerous journey, wherein *Deſmond* quarrelled, and deſerted him, and *O Bryan* ſent but one man with a battle-ax to guide him.

Seventhly, That he rifled the abby of *Ballyclare*, and left neither chalice, croſs nor bell in it.

Eighthly, That he deſtroyed the caſtles of *Lecagh* and *Derriviclaghny*, in favour of *Ulick Burk*, though the rightful proprietor offered ſubmiſſion and rent to the king.

Ninthly, That he had ſecret conference with, and received a horſe from *O Connor Roe*, who was the chief inſtrument in conveying away the young *Fitz-Girald*.

Tenthly, That he took eighty kine from *O Maddin*, and forced *O Mlaghlin*'s ſon from Mr. *Dillon*, whoſe lawful priſoner he was; for which he had ſeventy kine.

And there was a commiſſion ſent to *Ireland*, to examine witneſſes; and they ſay that theſe articles were proved by the teſtimony of above ſeventy perſons; whereof ſome were of quality, that is, ſome of them ſwore to one article, and ſome to another; ſo that the lord *Grey* (who was ſon to the marqueſs of *Dorſet*, and viſcount *Grany* in *Ireland*, but no peer in *England)* being tried by a common jury, thought it his beſt way to confeſs the indictment, in hopes of the king's grace and pardon; but in that he was miſtaken; and although his ſervices did infinitely over-balance his faults, yet he was publickly executed on the twenty-eighth day of *July* 1541.

There are four other articles mentioned by others, to be laid to his charge.

1. His partiality to his nephew *Fitz-Girald* (afterwards earl of *Kildare)* whom they ſay he might have taken.

2. That his ſervants pillaged the gentlemen in *Munſter*, that entertained them.

3. That he had inveigled *Thomas Fitz-Gerald* to ſubmit, by promiſes which he had no commiſſion to perform; and that he did it, to deſtroy that lord, that his own nephew might come to be earl of *Kildare* (as afterwards he did.)

4. His ſacrilege at *Down*; but however that be, it was not long after his execution, before a commiſſion was directed to archbiſhop *Brown*, and *Cowly* maſter of the rolls, to make an eſtimate or ſurvey of the lord *Grey*'s eſtate in *Ireland*, and to deliver it to the lord deputy *Saintleger*, to be diſpoſed of as the king ſhall direct.

IX. *The Trial of* Henry *Earl of* Surrey, *for* High Treaſon, *before Commiſſioners of* Oyer *and* Terminer, *at* Guildhall, London, *the* 13*th* Dec. 1546; *with the Proceedings againſt his Father* Thomas *Duke of* Norfolk, *for the ſame Crime.*

[*The old chronicles give a very ſhort and unſatisfactory account of the intereſting proceſs againſt theſe two eminent noblemen. But lord* Herbert *and biſhop* Burnet *enter into the detail of it; and therefore we ſhall extract from them.*]

Extract from Lord Herbert's Hen. VIII. *p.* 263 *of* 2 Kenn. Compl. Hiſt. *2d ed.*

I SHALL conclude this year [1546.] with the diſaſter of the renowned lord the duke of *Norfolk*, and the execution of his ſon *Henry* the earl of *Surrey*, which paſs'd in this manner, as our records tell us.

The dutcheſs *Elizabeth*, daughter to *Edward Stafford* duke of *Buckingham*, having for many years entertain'd ſo violent jealouſies of the duke her huſband's matrimonial affection and loyalty, as it broke out at laſt to open rancour, divers occaſions of ſcandal were given: inſomuch, that not being content with having ſurmized a long while ſince two articles againſt him, ſhe again, in ſundry letters to the lord privy-ſeal, both averr'd the articles, and manifeſtly accus'd ſome of his minions, repeated divers hard uſages ſhe pretended to receive from them, and briefly diſcover'd all the ordinary paſſions of her offended ſex. This again being urg'd in a time when the king was in his declining age, and for the reſt, diſquieted with ſcruples that the duke's greatneſs or intereſt in ſequent times might interrupt the order he intended to give, was not unwillingly heard. So that notwithſtanding his many important and faithful ſervices, both in war and peace, at home and abroad, he and his ſon *Henry* earl of *Surrey* were expos'd to the malignity and detraction of their accuſers. This again fell out in an unfortunate time: for beſides that the lady his dutcheſs had now for above four years been ſeparated from him; his ſon the earl of *Surrey* was but newly, and perchance, ſcarce reconcil'd with him; his daughter *Mary* dutcheſs of *Richmond* not only inclined to the proteſtant party, (which lov'd not the duke) but grown an extream enemy of her brother: ſo that there was not only a kind of inteſtine diviſion in his family, but this again many ſecret ways fomented.

Among which, the induſtry of one Mrs. *Holland*, thought to be the duke's favourite, appear'd not a little, as deſirous (at what price ſoever) to conſerve her ſelf. Beſides, divers at the king's council diſaffected him, and particularly the earl of *Holland*, as knowing that after the king's death (now thought to be imminent) none was ſo capable to oppoſe him in the place he aſpir'd to of protector. All which circumſtances concurring, and being voiced abroad, incouraged divers of his adverſaries to declare themſelves: and the rather, becauſe it was notorious, how the king had not only withdrawn much of his wonted favour, but promiſed impunity to ſuch as could diſcover any thing concerning him.

The firſt that manifeſted himſelf was ſir *Richard Southwel*, *(a)* who ſaid that he knew certain things of the earl, that touched his fidelity to the king. The earl, before the lord chancellor *Wriotheſley*, the lord St. *John*, the earl of *Hertford*, and others, vehemently affirmed himſelf a true man, deſiring to be try'd by juſtice, or elſe offering himſelf to fight in his ſhirt with *Southwel*. *(b)* But the lords for the preſent only committed them. The duke this while, hearing his ſon was in trouble, ſends to divers of his friends to know the cauſe, and particularly to the biſhop of *Wincheſter*. *(c)* Thoſe letters yet (it is probable) fell into the king's council's hands; but could not preſerve him from being involved in his ſon's fortune: *(d)* So that he was ſent for, and the ſame day, not long after his ſon, committed to the *Tower*. Divers perſons alſo were examined concerning his affairs. Mrs. *Elizabeth Holland* being diſpoſed, confeſs'd, that the duke had told her, that none of the king's council loved him, becauſe they were no noblemen born themſelves; as alſo becauſe he believ'd too truly in the ſacrament of the altar. Moreover, that the king loved him not, becauſe he was too much lov'd in his country; but that he would follow his father's leſſon, which was, that the leſs others ſet by him, the more he would ſet by himſelf. As alſo, that the duke complain'd that he was not of the moſt ſecret (or, as it is there term'd, the privy council. And that the king was much grown of his body, and that he could not go up and down the ſtairs, but was let up and down by a device. And that his majeſty was ſickly, and could not long endure; and the realm like to be in an ill caſe thro' diverſity of opinions. And that if he were a young man, and the realm in quiet, he would aſk leave to ſee the *vernacle*; which he ſaid, was the picture of Chriſt given to women by himſelf as he went to death. As touching his arms, that ſhe had not heard the duke ſpeak of his own, but of his ſon's, that he liked them not, and that he had gather'd them, himſelf knew not from whence; and that he placed the *Norfolk*'s arms wrong, and had found fault with him: and therefore that ſhe ſhould take no pattern of his ſon's arms to work them with her needle in his houſe, but as he gave them. Furthermore, ſhe confeſs'd that the earl of *Surrey* lov'd her not, nor the dutcheſs of *Richmond* him; and that ſhe addicted her ſelf much to the ſaid dutcheſs.

Mary dutcheſs of *Richmond* being examin'd, confeſs'd, that the duke her father wou'd have had her marry ſir *Thomas Seymour*, brother to the earl of *Hertford*, which her brother alſo deſir'd, wiſhing her withal to endear her ſelf ſo into the king's favour, as ſhe might the better rule here as others had done; and that ſhe refuſed: and that her father would have had the earl of *Surrey* to have matched with the earl of *Hertford*'s daughter, which her brother likewiſe heard of (and that this was the cauſe of his father's diſpleaſure) as taking *Hertford* to be his enemy. And that her brother was ſo much incens'd againſt the ſaid earl, as the duke his father ſaid thereupon, his ſon would loſe as much as he had gather'd together.

Moreover, that the earl her brother ſhould ſay, theſe new men loved no nobility; and if God call'd away the king, they ſhould ſmart for it. And that her brother hated them all ſince his being in cuſtody in *Windſor-Caſtle*; but that her father ſeemed not to care for their ill will, ſaying, his truth ſhould bear him out. Concerning arms, ſhe ſaid, that ſhe thought that her brother had more than ſeven rolls; and that ſome, that he had added more of *Anjou*, and of *Lancelott Du-lac*. And that her father ſince the attainder of the duke of *Buckingham* (who bare the king's arms) where the arms of her mother (daughter to the ſaid duke) were rayned in his coat, had put a blank-quarter in the place, but that her brother had reaſſum'd them. Alſo that inſtead of the duke's coronet, was put to his arms a cap of maintenance purple, with powdred furr, and with a crown, to her judgment, much like to a cloſe crown; and underneath the arms was a cipher, which ſhe took to be the king's cipher, *HR*. As alſo that her father never ſaid that the king hated him, but his counſellors; but that her brother ſaid, the king was diſpleaſed with him (as he thought) for the loſs of the great journey. Which diſpleaſure, he conceiv'd, was ſet forward by them who hated him, for ſetting up an altar in the church at *Boulogne*. And that her brother ſhould ſay, God long ſave my father's life; for if he were dead, they would ſhortly have my head. And that he reviled ſome of the preſent council, not forgetting the old cardinal. Alſo that he diſſuaded her from going too far in reading the ſcripture. Some paſſionate words of her brother ſhe likewiſe repeated, as alſo ſome circumſtantial ſpeeches, little for his advantage; yet ſo, as they ſeemed much to clear her father.

Sir *Edmund Knevet* being examined, ſaid, he knew no untruth directly by the earl of *Surrey*, but ſuſpected him of diſſimulation and vanity; and that a ſervant of his had been in *Italy* with cardinal *Poole*, and was receiv'd again at his return. Moreover, that he kept one *Paſquil* an *Italian* as a jeſter, but more likely a ſpy, and ſo reputed. He mentioned alſo one *Peregrine* an *Italian* entertain'd by the ſaid earl; adding, that he lov'd to converſe with ſtrangers, and to conform his behaviour to them. And that he thought he had therein ſome great ill device.

One *Thomas Pope* alſo informed the council, that *John Freeman* told him, that the duke (at *Nottingham*, in the time of the commotion of the *North*) ſhould ſay, in the preſence of an hundred perſons, that the Act of Uſes was the worſt act that ever was made, and that *Freeman* affirm'd thoſe words before the lord *Audeley*, late lord chancellor. Theſe depoſitions, together with others (as it ſeems) being brought to the king's judges at *Norwich*, they ſignified by their letter unto the lords of the council, dated *Jan.* 7. that the king's ſolicitor and Mr. *Stamford* had brought the indictments, and that they were found true, and the duke and his ſon indicted thereupon of high-treaſon; and that they made haſte to bring the ſaid indictment to *London*; deſiring further to know whether ſir *Thomas Paſton*, ſir *Edmund Knevet*, ſir *John Peer*, and others, ſhould be of the ſame jury. Upon the thirteenth (the king being now dangerouſly ſick) the earl of *Surrey* was arraign'd in *Guild-hall* in *London*, before the lord chancellor, the lord mayor, and other commiſſioners. Where the earl, as he was of a deep underſtanding, ſharp wit, and deep courage, defended himſelf many ways: ſometimes denying their accuſations as falſe, and together weakning the credit of his adverſaries; ſometimes interpreting the words he ſaid, in a far other ſenſe than that in which they were repreſented. For the point of bearing his arms (among which thoſe of *Edmund* the Confeſſor are related) alledging that he had the opinion of heralds therein. And finally, when a witneſs was brought againſt him *viva voce*, who pretended

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(a) Dec. 2.

(b) Dec. 2.

(c) Dec. 3, 4.

(d) Dec. 12.

to repeat ſome high words of the earl's by way of diſcourſe, which concern'd him nearly, and that thereupon the ſaid witneſs ſhould return a braving anſwer; the earl reply'd no otherwiſe to the jury, than that he left it to them to judge, whether it were probable that this man ſhould ſpeak thus to the earl of *Surrey*, and he not ſtrike him again. In concluſion, he pleaded *not guilty*; but the jury (which was a common inqueſt, not of the peers, becauſe the earl was not a parliament lord) condemn'd him. Whereupon alſo judgment of death was given, and he beheaded at *Tower-hill.* And thus ended the earl; a man learned, and of an excellent wit, as his compoſitions ſhew.

This while the king (though his ſickneſs increaſed) omitted not to give order to ſeize on the duke's goods, and together to inform himſelf of all which might be material againſt him. Not forgetting alſo to cauſe *Wriotheſley* to advertiſe the king's ambaſſadors in foreign parts, that the duke of *Norfolk* and his ſon had conſpir'd to take upon them the government of the king, during his majeſty's life, as alſo after his death to get into their hands the lord prince; but that their devices were revealed, and they committed to the *Tower.* And that for preventing uncertain bruits, they were willing to communicate the premiſſes. But the duke, who had now as much merit of ancient ſervice to plead for him, as any ſubject of his time could pretend to, thought fit, from the *Tower*, to write unto the king in this manner *(a)*.

Moſt Gracious and moſt Sovereign Lord,

I *YOUR moſt humble ſubject proſtitute at your foot, do moſt humbly beſeech your highneſs to be my good and gracious lord. I am ſure ſome great enemy of mine hath informed your majeſty of ſome untrue matter againſt me. Sir, God doth know, in all my life, I never thought one untrue thought againſt you, or your ſucceſſion, nor can no more judge or caſt in my mind what ſhould be laid to my charge, than the child that was born this night. And certainly, if I knew that I had offended your majeſty in any point of untruth, I would declare the ſame to your highneſs. But (as God help me) I cannot accuſe my ſelf ſo much as in thought. Moſt noble and merciful ſovereign lord, for all the old ſervice I have done you in my life, be ſo good and gracious a lord unto me, that either my accuſers and I together may be brought before your royal majeſty; or if your pleaſure ſhall not be to take that pains, then before your council: then if I ſhall not make it apparent that I am wrongfully accus'd, let me, without more reſpite, have puniſhment according to my deſerts: Alas! moſt merciful prince, I have no refuge but only at your hands, and therefore at the reverence of Chriſt's paſſion have pity of me, and let me not be caſt away by falſe enemies informations. Undoubtedly, I know not that I have offended any man, or that any man was offended with me, unleſs it were ſuch as are angry with me for being quick againſt ſuch as have been accuſed for ſacramentaries. And as for all cauſes of religion, I ſay now, and have ſaid to your majeſty and many others, I do know you to be a prince of ſuch virtue and knowledge, that whatſoever laws you have in times paſt made, or hereafter ſhall make, I ſhall to the extremity of my power ſtick unto them as long as my life ſhall laſt. So that if any men be angry with me for theſe cauſes, they do me wrong. Other cauſe I know not why any man ſhould bear me any ill-will: and for this cauſe I know divers have done, as doth appear by caſting libels abroad againſt me. Finally, (moſt gracious ſovereign lord) I moſt humbly beſeech your majeſty to have pity of me, and let me recover your gracious favour, with taking of me all the lands and goods I have, or as much thereof as pleaſeth your highneſs to take, leaving me what it ſhall pleaſe you to appoint; and that according as is before-written, I may know what is laid to my charge, and that I may hear ſome comfortable word from your majeſty. And I ſhall during my life, pray for your proſperous eſtate long to endure.*

Your moſt ſorrowful ſubject,

THO. NORFOLK.

To the lords he wrote thus:

Item, *Moſt humbly to beſeech, my lords, that I might have ſome of the books that are at* Lambeth; *for unleſs I may have books to read ere I fall on ſleep, and after I wake again, I cannot ſleep, nor did not this dozen years.*

Alſo to deſire that I might have a ghoſtly father ſent to me, and that I might receive my Maker.

Alſo that I might have maſs, and to be bound upon my life to ſpeak no word to him that ſhall ſay maſs, which he may do in the other chamber, and I to remain within.

Item, *To have licenſe in the day-time to walk in the chamber without, and in the night to be lock'd in, as I am now. At my firſt coming I had a chamber without a-days. I would gladly have licenſe to ſend to* London, *to buy one book of St.* Auguſtin's, De Civitate Dei; *and of* Joſephus, De Antiquitatibus; *and another of* Sabellicus; *who doth declare moſt of any book that I have read, how the biſhop of* Rome *from time to time hath uſurp'd his power againſt all princes, by their unwiſe ſufferance.*

Item, *For ſheets.*

Nevertheleſs, the duke remained as condemn'd to perpetual priſon, without that his great ſervices formerly render'd, or his ſubmiſſion on this occaſion could reſtore him; which was in theſe words, as I find by our records in an original.

I *THOMAS* duke of *Norfolk*, do confeſs and acknowledge my ſelf moſt untruly, and contrary to my oath and allegiance, to have offended the king's moſt excellent majeſty, in the diſcloſing and opening of his privy and ſecret counſel, at divers and ſundry times, to divers and ſundry perſons, to the great peril of his highneſs, and diſappointing of his moſt prudent and regal affairs.

T. N.

Alſo, I likewiſe confeſs, That I have concealed high treaſon, in keeping ſecret the falſe and traiterous act, moſt preſumptuouſly committed by my ſon *Henry Howard* earl of *Surrey*, againſt the king's majeſty and his laws, in the putting and uſing the arms of St. *Edward* the Confeſſor, king of the realm of *England* before the Conqueſt, in his ſcutchion or arms: Which ſaid arms of St. *Edward* appertain only to the king of this realm, and to none other perſon or perſons; whereunto the ſaid earl by no means or way could make any claim or title, by me, or any of mine or his anceſtors. *T. N.*

Alſo, I likewiſe confeſs, That to the peril, ſlander, and diſinheriſon of the king's majeſty, and his noble ſon prince *Edward*, his ſon and heir apparent, I have againſt all right, unjuſtly, and without authority, born in the firſt quarter of my arms, ever ſince the death of my father, the arms of *England*, with a difference of the *labels* of ſilver, which are the proper arms of my ſaid prince, to be born for this realm of *England* only; whereby I have not only done prejudice to the king's majeſty, and the ſaid lord the prince, but alſo given occaſion that his highneſs might be diſturbed or interrupted of the crown of this realm, and my ſaid lord prince might be deſtroy'd, diſturb'd, and interrupted in fame, body, and title of the inheritance to the crown of this realm. Which I know and confeſs, by the laws of the realm, to be high treaſon.

T. N.

For the which my ſaid heinous offences, I have worthily deſerv'd, by the laws of the realm, to be attainted of high treaſon, and to ſuffer the puniſhment, loſſes and forfeitures that appertain thereunto. And although I be not worthy to have or enjoy any part of the king's majeſty's clemency and mercy to be extended to me, conſidering the great and manifold benefits that I and mine have received of his highneſs: Yet I moſt humbly, and with a moſt ſorrowful and repentant heart, do beſeech his highneſs to have mercy, pity, and compaſſion on me. And I ſhall moſt devoutly and heartily make my daily prayer to God for the preſervation of his moſt noble ſucceſſion, as long as life and breath ſhall continue in me.

T. N.

Written the twelfth day of the month of *January*, in the year of our Lord God 1546. after the computation of the church of *England*, and in the thirty-eighth year of our ſovereign lord *Henry* VIII. by the grace of God king of *England*, *France*, and *Ireland*, defender of the faith; and of the church of *England*, and alſo of *Ireland* the ſupream head. In witneſs of all the premiſſes, I the ſaid duke have ſubſcribed my name with my own hand, in the preſence of the lord *Wriotheſley*, lord chancellor; the lord St. *John*, lord preſident of the council; the earl of *Hertford*, lord great chamberlain; the viſcount *Liſle*, lord high admiral; ſir *Anthony Brown*, maſter of the horſe; ſir *William Paget*, ſecretary; ſir *Richard Rich*, ſir *John Baker*, of our ſaid ſovereign lord's privy-council; ſir *Richard Liſter*, ſir *Edward Montague*, the two chief juſtices.

Without compulſion, without force, without advice or counſel, I have and do ſubſcribe the premiſſes, ſubmitting me only to the king's moſt gracious pity and mercy, moſt humbly beſeeching his highneſs to extend the ſame unto me his moſt ſorrowful ſubject.

By me THO. NORFOLK.

Thomas Wriotheſley, Chancellor.
William St. John,
John Liſle,
William Paget,
John Baker,

E. Hertford,
Anth. Brown,
Rich. Rich,
Rich. Liſter.
Edward Montague.

Notwithſtanding all which ſubmiſſion, joined with the merits of his ſervices, it was thought that the duke would hardly eſcape, had not the king's death, following ſhortly after, reſerved him to more merciful times.

Extract from 1 Burn. Reformat. *p.* 345.

THE duke of *Norfolk* had been long lord treaſurer of *England:* He had done great ſervices to the crown on many ſignal occaſions, and ſucceſs had always accompanied him. His ſon the earl of *Surrey* was alſo a brave and noble perſon, witty and learned to an high degree, but did not command armies with ſuch ſucceſs. He was much provoked at the earl of *Hertfords* being ſent over to *France* in his room, and upon that had ſaid, *that within a little while they ſhould ſmart for it*; with ſome other expreſſions that ſavoured of revenge, and a diſlike of the king, and a hatred of the counſellors. The duke of *Norfolk* had endeavoured to ally himſelf to the earl of *Hertford*, and to his brother ſir *Thomas Seimour*, perceiving how much they were in the kings favour, and how great an intereſt they were like to have under the ſucceeding prince; and therefore would have engaged his ſon, being then a widower, to marry that earls daughter: and preſſed his daughter, the dutcheſs of *Richmond*, widow to the kings natural ſon, to marry ſir *Thomas Seimour*. But though the earl of *Surrey* adviſed his ſiſter to the marriage projected for her, yet he would not conſent to that deſigned for himſelf, nor did the propoſition about his ſiſter take effect. The *Seimours* could not but ſee the enmity the earl of *Surrey* bore them, and they might well be jealous of the greatneſs of that family; which was not only too big for a ſubject of it ſelf, but was raiſed ſo high by the dependence of the whole popiſh party, both at home and abroad, that they were like to be very dangerous competitors for the chief government of affairs, if the king were once out of the way; whoſe diſeaſe was now growing ſo faſt upon him, that he could not live many weeks. Nor is it unlikely that they perſuaded the king, that if the earl of *Surrey* ſhould marry the lady *Mary*, it might embroil his ſons government, and perhaps ruine him. And it was ſuggeſted, that he had ſome ſuch high project in his thoughts, both by his continuing unmarried, and

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(a) Jan. 19.

by his uſing the arms of *Edward* the Confeſſor, which of late he had given in his coat, without a diminution. But to compleat the duke of *Norfolks* ruine, his dutcheſs, who had complained of his uſing her ill, and had been ſeparated from him about four years, turned informer againſt him. His ſon and daughter were alſo in ill terms together. So the ſiſter informed all that ſhe could againſt her brother. And one Mrs. *Holland*, for whom the duke was believed to have an unlawful affection, diſcovered all ſhe knew. But all amounted to no more, than ſome paſſionate expreſſions of the ſon, and ſome complaints of the father, who thought he was not beloved by the king and his councellors, and that he was ill uſed, in not being truſted with the ſecret of affairs. And all perſons being encouraged to bring informations againſt them, ſir *Richard Southwell* charged the earl of *Surrey* in ſome points that were of a higher nature: which the earl denied, and deſired to be admitted, according to the martial law, to fight in his ſhirt with *Southwell*. But that not being granted, he and his father were committed to the *Tower*. That which was moſt inſiſted on was, their giving the arms of *Edward* the Confeſſor, which were only to be given by the kings of *England*. This the earl of *Surrey* juſtified, and ſaid, they gave their arms, according to the opinion of the kings heraulds. But all excuſes availed nothing, for his father and he were deſigned to be deſtroyed, upon reaſons of ſtate; for which, ſome colours were to be found out.

The earl of *Surrey* being but a commoner, was brought to his tryal at *Guildhall*; and put upon an inqueſt of commoners conſiſting of nine knights and three eſquires, by whom he was found guilty of treaſon, and had ſentence of death paſſed upon him, which was executed on the 19th of *January* at *Tower-hill*. It was generally condemned, as an act of high injuſtice and ſeverity, which loaded the *Seimours* with a popular odium that they could never overcome. He was much pitied, being a man of great parts and high courage, with many other noble qualities.

But the king, who never hated nor ruined any body by halves, reſolved to compleat the misfortunes of that family, by the attainder of the father. And as all his eminent ſervices were now forgotten, ſo the ſubmiſſions he made, could not allay a diſpleaſure, that was only to be ſatisfied with his life and fortune. He wrote to the king, proteſting his innocency: ‘ That he had never a thought to his prejudice, and could not imagine ‘ what could be laid to his charge: He had ſpent his whole life in his ‘ ſervice, and did not know that ever he had offended any perſon; or that ‘ any were diſpleaſed with him, except for proſecuting the breakers of ‘ the act about the ſacrament of the altar. But in that, and in every ‘ thing elſe, as he had been always obedient to the kings laws, ſo he was ‘ reſolved ſtill to obey any laws he ſhould make. He deſired he might be ‘ examined with his accuſers face to face, before the king, or at leaſt before his council; and if it did not appear that he was wrongfully accuſed, let him be puniſhed as he deſerved. In concluſion he begged ‘ the king would have pity on him, and reſtore him to his favour; taking ‘ all his lands, or goods from him, or as much of them as he pleaſed.’ Yet all this had no effect on the king. So he was deſired to make a more formal ſubmiſſion; which he did on the 12th of *January* under his hand, ten privy councellors being witneſſes. In it he confeſſed, ‘ Firſt, his diſcovering the ſecrets of the kings councel. Secondly, his concealing his ‘ ſons treaſon, in uſing to give the arms of St. *Edward* the Confeſſor, ‘ which did only belong to the king, and to which his ſon had no right. ‘ Thirdly, that he had ever ſince his fathers death, born in the firſt ‘ quarter of his arms, the arms of *England*: with a difference of the labells of ſilver, that are the proper arms of the prince; which was done ‘ in prejudice of the king and the prince: and gave occaſion for diſturbing or interrupting the ſucceſſion to the crown of the realm. This he ‘ acknowledged was high treaſon; he confeſſed he deſerved to be attainted ‘ of high treaſon; and humbly begged the kings mercy and compaſſion.’ He yielded to all this, hoping by ſuch a ſubmiſſion and compliance to have overcome the kings diſpleaſure. But his expectations failed him.

A parliament was called, the reaſon whereof was pretended to be the coronation of the prince of *Wales*. But it was thought the true cauſe of calling it, was, to attaint the duke of *Norfolk*: for which they had not colour enough, to do it in a tryal by his peers. Therefore an attainder by act of parliament was thought the better way. So it was moved, that the king intending to crown his ſon, prince of *Wales*, deſired they would go on with all poſſible haſte in the attainder of the duke of *Norfolk*; that ſo theſe places, which he held by patent, might be diſpoſed of by the king to ſuch as he thought fit, who ſhould aſſiſt at the coronation. And upon this ſlight pretence, ſince a better could not be found, the bill of attainder was read the firſt time on the 18th of *January*; and on the 19th and 20th it was read the ſecond and third time. And ſo paſſed in the houſe of lords: and was ſent down to the commons, who on the 24th ſent it up alſo paſſed. On the 27th the lords were ordered to be in their robes, that the royal aſſent might be given to it: which the lord chancellor, with ſome others joyned in commiſſion, did give by vertue of the kings letters patents. And it had been executed the next morning, if the kings death had not prevented it. Upon what grounds this attainder was founded, I can only give this account from the 34th act of the firſt parliament of queen *Mary*; in which this act is declared null and void, by the common law of the land; for I cannot find the act it ſelf upon record. In the act of repeal it is ſaid, ‘ That there was no ſpecial matter in the act ‘ of attainder, but only general words of treaſons and conſpiracies; and ‘ that out of their care of the preſervation of the king and the prince, ‘ they paſſed it. But the act of repeal ſays alſo, That the only thing ‘ with which he was charged, was, for bearing of arms which he and his ‘ anceſtors had born, both within and without the kingdom; both in ‘ the kings preſence, and in the ſight of his progenitors; which they ‘ might lawfully bear and give, as by good and ſubſtantial matter of record it did appear. It is alſo added, that the king dyed after the date ‘ of the commiſſion. That the king only empowered them to give his aſſent, but did not give it himſelf: and that it did not appear by any record, that they gave it. That the king did not ſign the commiſſion ‘ with his own hand, his ſtamp being only ſet to it, and that not to the ‘ upper, but the nether part of it, contrary to the kings cuſtom.’ All theſe particulars though cleared afterwards, I mention now, becauſe they give light to this matter.

As ſoon as the act was paſſed, a warrant was ſent to the lieutenant of the *Tower*, to cut off his head the next morning; but the king dying in the night, the lieutenant could do nothing on that warrant. And it ſeems it was not thought adviſable to begin the new kings reign with ſuch an odious execution. And thus the duke of *Norfolk* eſcaped very narrowly.

Extract from 3 Burn. Reformat. *p.* 167.

THE laſt tranſaction of importance in this reign, was the fall of the duke of *Norfolk*, and of the earl of *Surrey*, his ſon. I find in the council-book, in the year 1543, that the earl was accuſed for eating fleſh in *Lent*, without licence; and for walking about the ſtreets in the night, throwing ſtones againſt windows, for which he was ſent to the *Fleet*. In another letter, he is complained of for riotous living. Towards the end of the year 1546, both he and his father were put in priſon: And, it ſeems, the council wrote to all the king's ambaſſadors beyond ſea, an account of this, much aggravated, as the diſcovery of ſome very dangerous conſpiracy; which they were to repreſent to thoſe princes, in very black characters. I put in the Collection an account given by *Thirlby*, of what he did upon it. The letter is long; but I only copy out that which relates to this pretended diſcovery: Dated from *Hailbron*, on *Chriſtmaſs-day* 1546.

“ He underſtood by the council's letters to him, what ungracious and “ ingrateful perſons they were found to be. He profeſſes, he ever loved “ the father, for he thought him a true ſervant to the king: He ſays, “ he was amazed at the matter, and did not know what to ſay. God “ had not only on this occaſion, but on many others, put a ſtop to treaſonable deſigns againſt the king, who (next to God) was the chief “ comfort of all good men. He enlarges much on the ſubject, in the ſtile “ of a true courtier. The meſſenger brought him the council's letters, “ written on the 15th of *December*, on *Chriſtmas-eve*; in which he ſaw “ the malicious purpoſe of theſe two ungracious men: So, according to “ his orders, he went immediately to demand audience of the emperor; “ but the emperor intended to repoſe himſelf for three or four days, and ſo “ had refuſed audience to the nuncio, and to all other ambaſſadors; but “ he ſaid, he would ſend a ſecretary, to whom he might communicate “ his buſineſs. *Joyce*, his ſecretary, coming to him, he ſet forth the “ matter as pompouſly as the council had repreſented it to him. In particular, he ſpoke of the haughtineſs of the earl of *Surrey*, of all which “ the ſecretary promiſed to make report to the emperor, and likewiſe to “ write an account of it to *Grandvil*. *Thirlby* excuſes himſelf that he “ durſt not write of this matter to the king: He thought, it would renew “ in him the memory of the ingratitude of theſe perſons, which muſt “ wound a noble heart.”

After ſo black a repreſentation, great matters might be expected: But I have met with an original letter of the duke of *Norfolk*'s, to the lords of the council, writ indeed in ſo bad a hand, that the reading it was almoſt as hard as deciphering. It gives a very different account of that matter, at leaſt with relation to the father. “ He writes, that the lord great “ chamberlain, and the ſecretary of ſtate, had examined him upon divers particulars: The firſt was, Whether he had a cypher with any “ man? He ſaid, he had never a cypher with any man, but ſuch as he “ had for the king's affairs, when he was in his ſervice. And he does “ not remember that ever he wrote in cypher, except when he was in “ *France*, with the lord great maſter that now is, and the lord *Rochford*: “ Nor does he remember whether he wrote any letters then, or not; but “ theſe two lords ſigned whatſoever he wrote. He heard, that a letter of “ his was found among biſhop *Fox*'s papers, which being ſhewed to the “ biſhop of *Dureſme*, he adviſed to throw it into the fire. He was examined upon this: He did remember, the matter of it was, the ſetting “ forth the talk of the northern people, after the time of the commotions: “ But that it was againſt *Cromwell*, and not at all againſt the king:” (ſo far did they go back, to find matter to be laid to his charge) “ but whether that was in cypher, or not, he did not remember. He was next “ aſked, If any perſon had ſaid to him, that if the king, the emperor, “ and the *French* king came to a good peace, whether the biſhop of *Rome* “ would break that by his diſpenſation; and whether he inclined that way. “ He did not remember he had ever heard any man ſpeak to that purpoſe: “ But, for his own part, if he had twenty lives, he would rather ſpend “ them all, than that the biſhop of *Rome* ſhould have any power in this “ kingdom again. He had read much hiſtory, and knew well how his “ uſurpation began, and increaſed: And both to *Engliſh*, *French*, and “ *Scots*, he has upon all occaſions ſpoken vehemently againſt it. He was “ alſo aſked, if he knew any thing of a letter from *Gardiner* and *Knevet*, “ the king's ambaſſadors at the emperor's court, of a motion made to “ them for a reconciliation with that biſhop, which was brought to “ the king at *Dover*, he being then there.

“ In anſwer to this, he writes, He had never been with the king at “ *Dover* ſince the duke of *Richmond* died: But for any ſuch overture, he “ had never heard any thing of it; nor did any perſon ever mention it “ to him. It had been ſaid in council, when ſir *Francis Bryan* was like “ to have died, as a thing reported by him, that the biſhop of *Wincheſter* “ had ſaid, he could deviſe a way to ſet all things right between the king “ and the biſhop of *Rome*. Upon which, as he remembers, ſir *Ralph* “ *Sadler* was ſent to ſir *Francis*, to aſk the truth of that: But ſir *Francis* “ denied it; and this was all that ever he heard of any ſuch overture. It

“ ſeems, theſe were all the queſtions that were put to him; to which, thoſe were his anſwers. He therefore prayed the lords, to intercede with the king, that his accuſers might be brought face to face, to ſay what they had againſt him: And he did not doubt, but it ſhould appear, he was falſely accuſed. He deſir'd to have no more favour than *Cromwell* had; he himſelf being preſent when *Cromwell* was examined. He adds, *Cromwell* was a falſe man; but he was a true, poor gentleman. He did believe, ſome falſe man had laid ſome great thing to his charge. He deſired, if he might not ſee his accuſers, that he might at leaſt know what the matters were; and if he did not anſwer truly to every point, he deſired not to live an hour longer.

“ He had always been purſued by great enemies about the king; ſo that his fidelity was tried like gold. If he knew wherein he had offended, he would freely confeſs it. On *Tueſday* in the laſt *Whitſon*-week, he moved the king, that a marriage might be made between his daughter (the dutcheſs of *Richmond)* and ſir *Thomas Seymour*; and that his ſon *Surrey*'s children might, by croſs-marriages, be allied to my lord great chamberlain's children (the earl of *Hertford)*. He appealed to the king, whether his intention in theſe motions did not appear to be honeſt. He next reckons up his enemies. Cardinal *Wolſey* confeſſed to him at *Aſher*, that he had ſtudied for fourteen years, how to deſtroy him, ſet on to it by the duke of *Suffolk*, the marquis of *Exeter*, and the lord *Sandys*, who often told him, that if he did not put him out of the way, he would undo him. When the marquis of *Exeter* ſuffered, *Cromwell* examined his wife more ſtrictly concerning him, than all other men; of which ſhe ſent him word by her brother, the lord *Mountjoy*. And *Cromwell* had often ſaid to himſelf, that he was a happy man, that his wife knew nothing againſt him, otherwiſe ſhe would undo him. The late duke of *Buckingham*, at the bar, where his father ſate lord high ſteward, ſaid, that he himſelf was the perſon in the world, whom he had hated moſt, thinking he had done him ill offices with the king: But he ſaid, he then ſaw the contrary. *Rice*, that married his ſiſter, often ſaid, he wiſhed he could find the means to thruſt his dagger in him. It was well known to many ladies in the court, how much both his two nieces, whom it pleaſed the king to marry, had hated him. He had diſcovered to the king That for which his mother-in-law was attainted of miſpriſion of treaſon. He had always ſerved the king faithfully, but had of late received greater favours of him, than in times paſt: What could therefore move him to be now falſe to him? *A poor man, as I am, yet I am his own near kinſman. Alas! alas! my lords*, (writes he) *that ever it ſhould be thought any untruth to be in me.* He prays them to lay this before the king, and jointly to beſeech him, to grant the deſires contained in it. So he ends it with ſuch ſubmiſſions, as he hoped might mollify the king.”

Here I muſt add a ſmall correction, becauſe I promiſed it to the late ſir *Robert Southwell*, for whoſe great worth and virtues I had that eſteem, which he well deſerved. Sir *Richard Southwell* was concerned in the evidence againſt the duke of *Norfolk*: He gave me a memorandum, which I promiſed to remember when I reviewed my Hiſtory. There were two brothers, ſir *Richard* and ſir *Robert*, who were often confounded, an *R* ſerving for both their chriſtned names. Sir *Richard* was a privy-councellor to *Henry* the VIIIth, king *Edward*, and queen *Mary*: The ſecond brother, ſir *Robert*, was maſter of the rolls, in the time of *Henry* the eighth, and in the beginning of *Edward* the ſixth. I had confounded theſe, and in two ſeveral places called ſir *Richard* maſter of the rolls.

I have now ſet forth all that I find concerning the duke of *Norfolk*; by which it appears, that he was deſigned to be deſtroyed only upon ſuſpicion; and his enemies were put on running far back to old ſtories, to find ſome colours to juſtify ſo black a proſecution. This was the laſt act of the king's reign, which, happily for the old duke, was not finiſh'd, when the king's death prevented the execution.

Biſhop Thirleby'*s letter concerning the duke of* Norfolk *and his ſon.*

An Original.

I WOULD write unto you my harte (if I coulde) againſt thoſe two ungracious, ingrate, and inhumane *non homines*, the duke of *Norfolk* and his ſonne. The elder of whom, I confeſs that I did love, for that I ever ſuppoſed hym a true ſervant to his maſter; like as both his allegiance, and the manifold benefits of the king's majeſtie bounde him to have been; but nowe when I ſholde begyn to wright to you herin, before God I am ſo amaſed at the matter, that I know not what to ſay; therefore I ſhall leave them to receyve for their deeds, as they have worthily deſervyd; and thank God of his grace that hath openyd this in tyme, ſo that the king's majeſtie may ſee that reformed. And in this point, wher Almighty God hath not nowe alone, but often and ſondry tymes hertofore, not only letted the malice of ſuch as hathe imagenyd any treaſon againſt the king's majeſtie, the chiefe comforte, wealth, and proſperite of all good *Engliſhmen* next unto God; but hath ſo wonderfully manifeſt, that in ſuche tyme that his majeſties high wiſdom myght let that malice to take his effecte, all good *Engliſhe* cannot therſore thanke God enough. And for our parts, I pray God, that we may thorough his grace, ſo contynue his ſervants, that herafter we be not founde unworthy to receyve ſuche a benefyte at his hands. On *Chriſtmas-even*, about 10 of the clocke after noon here aryved *Somerſet* with the letters of the king's majeſties moſt honourable counſell, dated the 15th of *December* at *Weſtminſter*, whereby I perceyved the malicious purpoſe of the ſaid two ungracious men: and for the execution of the king's majeſties commandment declared in the ſame letters, I ſuyd immediately for audience to the emperor, who entred this town within halfe an houer after *Somerſet* was come. The emperor praied me of pacience, and to declare to the ſecretarie *Joyſe*, That I wolde ſaie to him. For he ſaid he had determyned to repoſe him ſelfe for 3 or 4 days; and had therfore for that tyme refuſed audience to the nuntio, the ambaſſador of *France*, and the ambaſſador of *Venice*, which had ſued for audience. On *Chriſtmas-day* on the morning, at nine of the clocke, *Joyſe* came to my lodginge, to whom I declared as well as I coulde the great benefits theis ungracious men had receyved at the king's majeſties hands, and how unkindly and traytorouſly they went abought to ſearve him, with the reſt as myn inſtructions led me. The king's majeſtie, my maſter (taking the ſame affection to be in the emperor, his good brother, towards him, that his highnes hathe to the emperor, *(ut amicorum omnia ſint communia, gaudere cum gaudentibus, flere cum flentibus,)* hath commanded me to open this matter to the emperor: that as naturally all men, and much more princes, ought to abhorre traytors, and ſpecially ſuche as had receyved ſo great benyfites as theis men had; ſo his majeſtie might rejoyſe that the king's highnes his good brother had founde forthe this matter, or the malice coulde be brought to execution. Secretary *Joyſe* ſaid that he would advertiſe the emperor herof accordingly, and after a little talke of the haughtineſs of the earle of *Surrey*, and a few ſalutations, he bad me fare well. When I aſked him for monſieur *de Grandevela*, to whom I ſaid, that I wolde tell this tale, for that I doubted not but that he, and all honeſt men wolde abhorre ſuch traytors; he ſaid that he was not yet come, but he wolde this day advertiſe him herof by his letters; for I wright (quoth he) daily to him. Albeit that this be the hole, and the effecte of that I have done in the execution of the king's majeſties commandment, declared in my ſaid lord's letters, yet I will as my dutie is, anſwer a-part their ſaid letters to the king's majeſtie. Herin I dare not wright. For, to enter the matter, and not to deteſt that as the cauſe requireth, I think it not convenient. And again on the other ſide, to renew the memorie of theſe mens ingratitude, (wherwith all noble and princely hartes above all others be ſore wounded) I thinke it not wiſdome. Therfore I beſeeche you hartely, amongſt other my good lords, there to make my moſt humble excuſe to his majeſtie for the ſame. This ungracious matter that hath happened otherwiſe then ever I could have thought, hath cauſed you to have a longer letter then ever I have bene accuſtomed to wright. Ye ſhall herwith receyve a ſcedule of courte newis, whiche havyng lernyd while I wrote this; ſecretary *Joyſe* hathe prayed me to ſende the letter herwith encloſed to the emperor's ambaſſador in *England*, which I pray you to cauſe to be delivered, and hartely fare you well. From *Halebourne* the *Chriſtmas-day* at night, 1546.

Your aſſured loving friend,

Tho. Weſtm'

Herewith ye ſhall allſo receyve the copie of my letters of the 19th of this mongth, ſent by *Skipperus*, &c.

A letter of the duke of Norfolk'*s, after he had been examined in the* Tower.

MY very good lords, whereas at the being here with me of my lord great chamberlayne, and Mr. Secretary, they examynd me of divers thyngs, which as near as I can call to my remembrance were the effects as here after doth enſew.

Firſt, Whether ther was any cipher betwene me and any other man: For anſwer wherunto, this is the truth, there was never cipher between me and any man, ſave only ſuch as I have had for the king's majeſtie, when I was in his ſervice. And as God be my judge, I do not remember that ever I wrote in cipher, but at ſuch time as I was in *France*; my lord great maſter that now is, and my lord of *Rochford* being in commiſſion with me. And whether I wrote any then, or not, as God help me, I do not remember; but and I wrote any thing, I am ſure both their hands were at it; and the maſter of the horſe privy to the ſame. I do remember that after the death of the biſhop of *Hereford*, *Fox*, it was ſhewed me that the ſaid biſhop had left a letter, which I had ſent him, amongſt his writings, which being found by a ſervant of his, that is now with maſter *Deny*, who ſhewd the ſame to the biſhop of *Durham* that now is, he cauſed him to throw the ſame in fier. As I do remember, it was my ſaid lord biſhop of *Durebam* that adviſed him to burn it; and as I alſo do remember, the matter that was conteyned therin, concerned lewde ſpeaking of the Northern men after the time of the comotion againſt the ſaid *Cromwell*. If there had been any thyng concerning the king's majeſtys affairs, neyther the biſhope, nor he, were he now alyve, would not have concealed the ſame; and whether any part of that was in cypher, or not, as I ſhall anſwer to God, I do not remember.

Theffect of another queſtion, there aſked me, was, as near as I can call to my remembrance, whether anie man had talked with me, that and ther were a good peace made betwene the king's majeſtie the emperor and the *French* king, the biſhope of *Rome* would brek the ſame againe by his diſpenſation? And whether I enclined that waies, or not, to that purpoſe? As God help me now, at my moſt nede, I cannot call to my remembrance, that ever I heard any man living ſpeak like words. And as for mine inclinations, that the biſhope of *Rome* ſhould ever have aucthority to do ſuch thing; if I had twentie lives, I would rather have ſpent them all againſt him, then ever he ſhould have any power in this realme. For no man knoweth that better then I, by reding of ſtories, how his uſurped power hath increaſed from time to time. Nor ſuch time as the king's majeſtie hath found him his enemy, no living man hath, both in his harte and with his tounge, in this realme, in *France*, and alſo to many *Scotiſh* jantlemen, ſpoken more ſore againſt his ſaid uſurped powre, then I have done, as I can prove by good witnes.

Alſo my ſaid lord and Mr. Secretary aſked me, whether I was ever made privy to a letter, ſent from my lord of *Wyncheſter* and ſir *Henry Knevet*, of any overture made by *Grandville* to them, for a way to be taken between his majeſtie and the biſhope of *Rome*; and that the ſaid letters ſhould have come to his majeſtie to *Dover*, I being there with him. Wherunto this is my true anſwer. I was never at *Dover* with his highnes ſince my lord of *Richmond* died, but at that time, of whoſe death word came to *Syttyngborne*: and as God be my helpe, I never heard of no ſuch overture, ſave that I do well remember, at ſuch time as ſir *Francis Biryan* was ſore ſike, and like to have died, it was ſpoken in the councill, that my lord of *Wincheſter* ſhould have ſaid, he cou'd deviſe a way, how the king's majeſtie might have all things upright with the ſaid biſhope of *Rome*, and his highnes honour ſaved. Suche were the words, or much like. Wherupon, as I had often ſaid in the councill, one was ſent to the ſaid ſir *Francis*, to know, if ever he heard the ſaid biſhope ſpeake like words; which he denied: and as I do remember, it was ſir *Rauf Sadeler*, that was ſent to the ſaid ſir *Francis*. And to ſay that ever I heard of any ſuch overture made by *Grandville*, or that ever I commoned with any man conſerning any ſuch mater, other then this of the biſhope of *Wincheſter*, as God be my help, I never dyd; nor unto more, thenne this, I was never prevye.

Now, my good lords, having made anſwer according to the truth of ſuch queſtions as hath been aſked me, moſt humblie I beſeeche you all to be mediators for me to his moſt excellent majeſtie, to cauſe ſuch as have accuſed me (if it might be with his high pleaſure) to come before his majeſtie, to lay to my charge afore me, face to face, what they can ſay againſt me: and I am in no dout, ſo to declare my ſelfe, that it ſhall appere I am falſly accuſed. And if his pleaſure ſhall not be, to take the paine in his royall perſon, then to give you commandment to do the ſame. My lords, I truſt ye think *Cromwell*'s ſervice and mine hath not be like; and yet my deſire is, to have no more favour ſhew'de to me, than was ſhew'de to him, I being preſent. He was a fals man; and ſewerly I am a trewe poore jantleman.

My lords, I think ſurelie there is ſome fals man, that have laid ſome great cauſe to my charge, or elſe I had not be ſent hither. And therefore, eftſonyts moſt humblie I beſeeche to finde the names, if they and I may not be brought face to face, yet let me be made privy what the cauſes are; and if I do not anſwer truely to every point, let me not live one howre after. For ſewerlie I would hide nothing of any queſtions that I ſhall know, that doth concern my ſelf, nor any other creature.

My lords, there was never gold tried better by fier and watter then I have been, nor hath had greater enemys about my ſoveraign lord, then I have had; and yet (God be thanked) my trouth hath ever tried me, as I dout not it ſhall do in theis cauſes. Suerly, if I knew any thought I had offended his majeſtie in, I would ſuerly have declared it to his perſon.

Upon the *Tuyſdaye* in *Whitſonweek* laſt paſt, I broke unto his majeſtie, moſte humbley beſeeching him to helpe, that a mariage might be had between my daughter and ſir *Thomas Semour*: and wheras my ſon of *Surey* hath a ſon and divers daughters; that, with his favour, a croſſe mariage might have been made between my lord great chamberline and them: and alſo wher my ſon *Thomas* hath a ſon, that ſhall (be his mother) ſpend a thouſand marks a yere, that he might be in like wiſe maried to one of my ſaid lord's daughters. I report me to your lordſhips, whether myn intent was honeſt in this motion, or not. And whereas I have written, that my truth hath been ſeverely tried, and that I have had great enemies. Firſt, The cardinall did confes to me at *Aſſer*, that he had gone about fourteen years to have deſtroyed me; ſaying, he did the ſame by the ſetting upon of my lord of *Suffolk*, the marquis of *Exeter*, and my lord *Sands*; who ſaid often to him, that if he found not the means to put me out of the way, at length I ſhould ſeuerly undo him.

Cromwell, at ſuch tyme as the marquis of *Exeter* ſuffred, examined his wife more ſtreitly of me, then of all other men in the realme, as ſhe ſent me word by her brother, the lord *Montjoy*. He hath ſaid to me himſelf many times, my lord, ye are an happy man, that your wife knoweth no hurt by you; for if ſhe did, ſhe would undo you.

The duke of *Buckingham* confeſſed openly at the bar, (my father ſitting as his judge) that of all men living he hated me moſt, thinking I was the man that had hurt him moſt to the king's majeſtie: which now, quoth he, I perceive the contrary.

Rice, who had maried my ſiſter, confeſſed, that (of all men living) he hated me moſt; and wiſhed many times, how he might find the meanes to thruſt his dagger in me.

What malice both my neecys, that it pleaſed the king's highnes to marie, did bere unto me, is not unknown to ſuch ladies as kept them in this ſute; as my lady *Herberd*, my lady *Tirwit*, my lady *Kynſton*, and others, which heard what they ſaid of me. Who tried out the falſhod of the lord *Darcy*; ſir *Robert Conſtable*, ſir *John Bulmer*, *Aſke*, and many others, for which they ſuffer'd for? but only I. Who ſhewed his majeſtie of the words of my mother-in-law, for which ſhe was attainted of miſpriſion? but only I. In all times paſt unto this time, I have ſhewed my ſelf a moſt trewe man to my ſoveraign lord. And ſince theſe things done in tymes paſt, I have received more proffight of his highnes, then ever I did afore. Alas! who can think, that I, having been ſo long a trew man, ſhould now be falſe to his majeſtie? I have received more proffight then I have deſerved: and a poore man, as I am, yet I am his own near kinſman. For whoſe ſake ſhould I be an untrewe man to them? Alas, alas, my lords, that ever it ſhould be thought any ontruthe to be in me.

Fynally my good lords eftſonys moſt humble I beſeech you to ſhew this ſcrible letter to his majeſtie, and all joyntle to beſeech his highnes to grante me the peticions that are conteyned in the ſame, and moſt eſpecyall to remyt out of his moſt noble gentle hart ſuch diſpleaſure as he hath conceyved againſt me: and I ſhall dewryng my lyff pray for the continuence of his moſt royall eſtate long to endure,

By his highnes poor priſoner,

T. Norfolk.

X. *Proceedings againſt various Perſons in the Reign of* Henry VIII. *for Treaſon, in denying the King's Supremacy, and other capital Crimes, principally relating to Religion.*

[*Biſhop* Burnet *cloſes the firſt volume of his* Hiſtory of the Reformation *with a ſummary account of various trials and attainders, in the reign of* Hen. VIII. *in order to exhibit at one view the ſeverities practiſed by that prince againſt the popiſh party; and as very few of the trials mentioned are included in the preſent collection of* State Trials, *we flatter ourſelves, that our inſertion of this part of the biſhop's work will not be deemed foreign to the preſent undertaking.* 1 Burn. Reform. 351. *to* 362. *It is obſervable, that, though by the biſhop's own acknowledgment, the king's ſeverity to the popiſh party furniſhes great ground for juſt cenſure; and though he ſtates many inſtances of violating the firſt principles of juſtice and humanity; yet he denies, that there is any thing to juſtify all the clamours of the* Roman Catholicks *againſt his memory, inſiſting too, that his cruelties were far ſhort both in number and degree of thoſe in queen* Mary's *reign. But really this is writing too tenderly of* Henry; *for there is not only grievous, but almoſt equal cauſe to deteſt the memories of both him and* Mary, *the barbarities exerciſed in the reign of each being too numerous to leave room for much diſtinction between them. When two princes both with characters of ſo dark a complection are to be delineated, it calls for very nice touches to diſcriminate them in the colouring.*]

Extract from 1 Burn. Reformat. *from p.* 351. *to* 362.

IN the latter part of his reign, there were many things that ſeem great ſeverities, eſpecially as they are repreſented by the writers of the *Roman* party; whoſe relations are not a little ſtrengthened by the faint excuſes, and the miſtaken accounts, that moſt of the proteſtant hiſtorians have made. The king was naturally impetuous, and could not bear provocation; the times were very tickliſh; his ſubjects were generally addicted to the old ſuperſtition, eſpecially in the northern parts; the monks and friers were both numerous and wealthy; the pope was his implacable enemy; the emperor was a formidable prince, and being then maſter of all the *Netherlands*, had many advantages for the war he deſigned againſt *England*. Cardinal *Pole*, his kinſman, was going over all the courts of *Chriſtendom*, to perſwade a league againſt *England*; as being a thing of greater neceſſity and merit than a war againſt the *Turk*. This being, without the leaſt aggravation, the ſtate of affairs at that time, it muſt be confeſſed he was ſore put to it. A ſuperſtition that was ſo blind and headſtrong, and enemies that were both ſo powerful, ſo ſpiteful, and ſo induſtrious, made rigour neceſſary: nor is any general of an army more concerned to deal ſeverely with ſpies and intelligencers, than he was to proceed againſt all the popes adherents, or ſuch as kept a correſpondence with *Pole*. He had obſerved in hiſtory, that upon much leſs provocation than himſelf had given, not only ſeveral emperors and forreign princes had been diſpoſſeſſed of their dominions; but two of his own anceſtors *Henry* the 2d and king *John* had been driven to great extremities, and forced to unuſual and moſt indecent ſubmiſſions by the means of the popes and their clergy.

The popes power over the clergy was ſo abſolute, and their dependence and obedience to him was ſo implicite; and the popiſh clergy had ſo great an intereſt in the ſuperſtitious multitude, whoſe conſciences they governed, that nothing but a ſtronger paſſion could either tame the clergy, or quiet the people. If there had been the leaſt hope of impunity, the laſt part of his reign would have been one continued rebellion; therefore to prevent a more profuſe effuſion of blood, it ſeemed neceſſary to execute laws ſeverely in ſome particular inſtances.

There is one calumny that runs in a thread through all the hiſtorians of the popiſh ſide, which not a few of our own have ignorantly taken up; that many were put to death for not ſwearing the kings ſupremacy. It is an impudent falſhood; for not ſo much as one perſon ſuffered on that account; nor was their any law for any ſuch oath before the parliament in the 28th year of the kings reign, when the unſufferable bull of pope *Paul* the 3d, engaged him to look a little more to his own ſafety. Then indeed in the oath for maintaining the ſucceſſion of the crown, the ſubjects were required, under the pains of treaſon, to ſwear that the king was ſupream head of the church of *England*; but that was not mentioned in the former oath, that was made in the 25th, and enacted in the 26th year of his reign. It cannot but be confeſſed, that to enact under paine of death that none ſhould deny the kings titles, and to proceed upon that againſt offenders, is a very different thing from forcing them to ſwear the king to be the ſupream head of the church. (a)

The firſt inſtance of theſe capital proceedings was in *Eaſter-Term*, in the beginning of the 27th year of his reign. Three priors, and a monk, of the *Carthuſian* order, were then endited of treaſon, for ſaying, *that the king was not ſupream head under Chriſt of the church of* England. Theſe were *John Houghton* prior of the *Charter-houſe* near *London*, *Auguſtin Webſter* prior of *Axholme*, *Robert Laurence* prior of *Bevoll*, and *Richard Reynolds* a monk of *Sion*. This laſt was eſteemed a learned man, for that time, and that order. They were tried in *Weſtminſter-Hall* by a commiſſion of *oyer* and *terminer*: they pleaded *not guilty*, but the jury found them guilty, and judgment was given that they ſhould ſuffer as traitors. The record mentions no other particulars; but the writers of the popiſh ſide make a ſplendid recital of the courage and conſtancy they expreſſed both in their tryal, and at their death. It was no difficult thing for men ſo uſed to the legend, and the making of fine ſtories for ſaints and martyrs of their orders, to dreſs up their narratives with much pomp. But as their pleading *not guilty* to the endictment, ſhews no extraordinary reſolution, ſo the account that is given by them of one *Hall* a ſecular prieſt that died with them, is ſo falſe, that their is good reaſon to ſuſpect all. He is ſaid to have ſuffered on the ſame account; but the record of his attaindor gives a very different relation of it.

He and *Robert Feron* were endited at the ſame time for having 'ſaid 'many ſpiteful and treaſonable things; as, that the king was a tyrant, 'an heretick, a robber, and an adulterer; that they hoped he ſhould die 'ſuch a death as king *John* and *Richard* the 3d died; that they looked 'when thoſe in *Ireland* and *Wales* ſhould invade *England*; and they were 'aſſured that three parts of four in *England* would be againſt the king: 'they alſo ſaid that they ſhould never live merrily till the king and the 'rulers were plucked by the pates, and brought to the pot, and that it 'would never be well with the church till that was done.' *Hall* had not only ſaid this, but had alſo written it to *Feron* the 10th of *March* that year. When they were brought to the bar, they at firſt pleaded *not guilty*; but full proof being brought, they themſelves confeſſed the enditement, before the jury went aſide, and put themſelves on the kings mercy: upon which, this being an imagining and contriving both war againſt the king, and the kings death, judgment was given as in caſes of treaſon: but no mention being made of *Ferons* death, it ſeems he had his pardon. *Hall* ſuffered with the four *Carthuſians*, who were hanged in their habits.

They proceeded no further in *Eaſter-Term*: but in *Trinity-Term* there was another commiſſion of *oyer* and *terminer*, by which *Humphrey Middlemore*, *William Exmew*, and *Sebaſtian Nudigate*, three monks of the *Charter-houſe* near *London*, were endited of treaſon, for having ſaid on the 25th of *May*, 'that they neither could nor would conſent to be obedient to 'the kings highneſs, as true lawful and obedient ſubjects; to take him 'to be ſupream head on earth of the church of *England*.' They all pleaded *not guilty*, but were found guilty by the jury; and judgment was given. When they were condemned, they deſired that they might receive the body of Chriſt before their death. But (as judge *Spelman* writ) the court would not grant it, ſince that was never done in ſuch caſes but by order from the king. Two days after that, they were executed. Two other monks of that ſame order, *John Rocheſter* and *James Wolver*, ſuffered on the ſame account at *York* in *May* this year. Ten other *Carthuſian* monks were ſhut up within their cells, where nine of them dyed. The tenth was hanged in the beginning of *Auguſt*. Concerning thoſe perſons I find this ſaid in ſome original letters, that they had brought over into *England*, and vented in it, ſome books that were written beyond ſea, againſt the kings marriage, and his other proceedings; which being found in their houſe, they were preſſed to peruſe the books that were written for the king, but obſtinately refuſed to do it. They had alſo been involved in the buſineſs of the Maid of *Kent*, for which, though all the complices in it, except thoſe who ſuffered for it, were pardoned by act of parliament, yet ſuch as had been concerned in it, were ſtill under jealouſie: and it is no wonder that upon new provocations they met with the uttermoſt rigor of the law.

Theſe tryals made way for two others that were more ſignal: of the biſhop of *Rocheſter*, and ſir *Thomas More*. The firſt of theſe had been a priſoner above a year, and was very ſeverely uſed: he complained in his letters to *Cromwell*, that he had neither cloaths nor fire, being then about fourſcore. This was underſtood at *Rome*, and upon it, pope *Clement*, by an officious kindneſs to him, or rather in ſpite to king *Henry*, declared him a cardinal, and ſent him a red-hat. When the king knew this, he ſent to examine him about it; but he proteſted he had uſed no endeavours to procure it, and valued it ſo little, that if the hat were lying at his feet, he would not take it up. It never came nearer him than *Picardy*: yet this did precipitate his ruine. But if he had kept his opinion of the kings ſupremacy to himſelf, they could not have proceeded further. He would not do that, but did upon ſeveral occaſions ſpeak againſt it, ſo he was brought to his tryal on the 17th of *June*. The lord chancellor, the duke of *Suffolk*, and ſome other lords, together with the judges, ſate upon him by a commiſſion of *oyer* and *terminer*. He pleaded *not guilty*, but being found guilty, judgment was paſſed on him to die as a traitor; but he was by a warrant from the king, beheaded. Upon the 22d of *June*, being the day of his execution, he dreſſed himſelf with more than ordinary care; and when his man took notice of it, he told him, he was to be that day a bridegroom. As he was led to the place of execution, being ſtopt in the way by the croud, he opened his New Teſtament, and prayed to this purpoſe; that, as that book had been his companion and chief comfort in his impriſonment, ſo then ſome place might turn up to him, that might comfort him in his laſt paſſage. This being ſaid, he opened the book at a venture, in which theſe words of St. *Johns* Goſpel turned up: *this is life eternal to know thee the only true God, and Jeſus Chriſt whom thou haſt ſent.* So he ſhut the book with much ſatiſfaction, and all the way was repeating and meditating on them. When he came to the ſcaffold he pronounced the *Te Deum*, and after ſome other devotions his head was cut off.

Thus died *John Fiſher* biſhop of *Rocheſter*, in the 80th year of his age. He was a learned and devout man, but much addicted to the ſuperſtitions in which he had been bred up: and that led him to great ſeverities againſt all that oppoſed them. He had been for many years confeſſor to the kings grand-mother, the counteſs of *Richmond*; and it was believed that he perſuaded her to thoſe noble deſigns for the advancement of learning, of founding two colledges in *Cambridge*, St. *Johns* and *Chriſts Colledge*, and divinity profeſſors in both univerſities. And in acknowledgment of this, he was choſen chancellor of the univerſity of *Cambridge*. *Henry* the 7th gave him the biſhoprick of *Rocheſter*, which he, following the rule of the primitive church, would never change for a better. He uſed to ſay his church was his wife, and he would never part with her, becauſe ſhe was poor. He continued in great favour with the king, till the buſineſs of the divorce was ſet on foot; and then he adhered ſo firmly to the queens cauſe, and the popes ſupremacy, that he was carried by that headlong into great errors; as appears by the buſineſs of the Maid of *Kent*. Many thought the king ought to have proceeded againſt him rather upon that, which was a point of ſtate, than upon the ſupremacy, which was matter of conſcience. But the king was reſolved to let all his ſubjects ſee, there was no mercy to be expected by any that denied his being ſupream head of the church; and therefore made him and *More*, two examples for terrifying the reſt. This being much cenſured beyond ſea, *Gardiner*, that was never wanting in the moſt ſervile compliances, wrote a vindication of the kings proceedings. The lord *Herbert* had it in his hands, and tells us it was written in elegant *Latin*, but that he thought it too long, and others judged it was too vehement, to be inſerted in his hiſtory.

On the 1ſt of *July*, ſir *Thomas More* was brought to his tryal. The ſpecial matter in his endictment, is, that on the 7th of *May* preceding, before *Cromwell*, *Bedyll*, and ſome others that were preſſing him concerning the kings ſupremacy, he ſaid he would not meddle with any ſuch matter, and was fully reſolved to ſerve God, and think upon his paſſion, and his own paſſage out of this world. He had alſo ſent diverſe meſſages by one *George Gold* to *Fiſher* to encourage 'him in his obſtinacy; 'and ſaid, the act of parliament is like a ſword with two edges; for if a 'man anſwer one way, it will confound his ſoul; and if he anſwer another 'way, it will confound his body.' He had ſaid the ſame thing on the 3d of *June*, in the hearing of the lord chancellor, the duke of *Norfolk*, and others; and that he would not be the occaſion of the ſhortning his own life. And when *Rich* the kings ſollicitor came to deal with him further about it, but proteſted that he came not with any authority to examine him, they diſcourſed the matter fully. *Rich* preſſed him, 'that 'ſince the parliament had enacted that the king was ſupream head, the 'ſubjects ought to agree to it; and ſaid *Rich*, what if the parliament 'ſhould declare me king, would you not acknowledge me? I would, 'ſaid *More*, *quia* (as it is in the indictment) *rex per parliamentum fieri* '*poteſt*, & *per parliamentum deprivari*. But *More* turned the argument on

(a) [*This ſounds more like an apology, than juſt reaſoning. Enforcing the oath of ſupremacy by the penalty of treaſon, was reſorting to the higheſt puniſhment known to our law. Wherein, too, conſiſted the material difference, in point of rigor, between treaſon for not ſwearing to the king's ſupremacy, and treaſon for denying it? Was it not equally the object of the ſtatutes creating both crimes, to compel an acknowledgment of the king's ſupremacy by the ſame extremity of puniſhment? Can there be any reaſon to ſuppoſe, that thoſe who were concerned in the deaths of biſhop* Fiſher *and ſir* Thomas More *for denying the ſupremacy, if it had been requiſite, would have been ſo ſcrupulous as to heſitate about conſtruing the refuſal of the oath a denial? When it is objected to* Henry *as a cruelty, that many were put to death for not ſwearing to his ſupremacy, without doubt every denial of it, whether impliedly by refuſing the oath, or expreſsly by words, was meant: Therefore it is foreign to the ſpirit of the remark to ſay, that they were thus puniſhed for denying the ſupremacy, not for refuſing to ſwear to it. So verbal an anſwer to the animadverſion of* Henry's *enemies would ſcarce have eſcaped the learned biſhop, if he had not been inſenſibly influenced by a fear, leſt the juſtice and propriety of the Reformation ſhould be prejudiced by the cruelty of* Henry's *meaſures in its commencement. But the cauſe of truth is never finally helped by an ill-founded argument. The Reformation reſts on a better foundation than the humanity of* Henry's *actions; nor is there any neceſſary connection between the one and the other, bad and cruel princes being frequently the caſual inſtruments of great good to ſociety.*]

‘ *Rich*, and ſaid, what if the parliament made an act that God was not God? *Rich* acknowledged it could not bind, but replyed to *More*, that ſince he would acknowledge him king, if he were made ſo by act of parliament, why would he not acknowledge the king ſupream head, ſince it was enacted by parliament? To that *More* anſwered, that the parliament had power to make a king, and the people were bound to acknowledge him, whom they made; but for the ſupremacy, though the parliament had enacted it, yet thoſe in foreign parts had never aſſented to it.’ This was carried by *Rich* to the king, and all theſe particulars were laid together, and judged to amount to a denyal of the ſupremacy. Judge *Spelman* writ, that *More*, being on his tryal, pleaded ſtrongly againſt the ſtatute that made it treaſon to deny the ſupremacy, and argued that the king could not be ſupream head of the church. When he was brought to the bar, he pleaded *not guilty*, but being found guilty, judgment was given againſt him as a traitor. He received it with that equal temper of mind, which he had ſhewed in both conditions of life, and then ſet himſelf wholly to prepare for death. He expreſſed great contempt of the world, and that he was weary of life, and longed for death; which was ſo little terrible to him, that his ordinary facetiouſneſs remained with him even on the ſcaffold. It was cenſured by many, as light and undecent. But others ſaid, that way having been ſo natural to him on all other occaſions, it was not at all affected; but ſhewed that death did no way diſcompoſe him, and could not ſo much as put him out of his ordinary humour. Yet his rallying every thing on the ſcaffold was thought to have more of the Stoick than the Chriſtian in it. After ſome time ſpent in ſecret devotions, he was beheaded on the 6th of *July*.

Thus did ſir *Thomas More* end his days, in the 53d year of his age. He was a man of rare vertues, and excellent parts. In his youth he had freer thoughts of things, as appears by his *Utopia*, and his letters to *Eraſmus*; but afterwards he became ſuperſtitiouſly devoted to the intereſts and paſſions of the popiſh clergy: and as he ſerved them when he was in authority, even to aſſiſt them in all their cruelties; ſo he employed his pen in the ſame cauſe, both in writing againſt all the new opinions in general, and in particular againſt *Tindal*, *Frith*, and *Barnes*, as alſo an unknown writer, who ſeemed of neither party, but reprooved the corruptions of the clergy, and condemned their cruel proceedings. *More* was no divine at all, and it is plain to any that reads his writings, that he knew nothing of antiquity, beyond the quotations he found in the canon-law and in the maſter of the ſentences (only he had read ſome of St. *Auſtins* treatiſes): for upon all points of controverſie, he quotes only what he found in theſe collections; nor was he at all converſant in the critical learning upon the ſcriptures; but his peculiar excellency in writing, was, that he had a natural eaſie expreſſion, and preſented all the opinions of popery with their fair ſide to the reader, diſguiſing or concealing the black ſide of them with great art; and was no leſs dextrous in expoſing all the ill conſequences that could follow on the doctrine of the reformers: and had upon all occaſions great ſtore of pleaſant tales, which he applied wittily to his purpoſe. And in this conſiſts the great ſtrength of his writings, which were deſigned rather for the rabble, than for learned men. But for juſtice, contempt of money, humility, and a true generoſity of mind, he was an example to the age in which he lived.

But there is one thing unjuſtly added to the praiſe of theſe two great men, or rather feigned, on deſign to leſſen the kings honour; that *Fiſher* and he penned the book which the king wrote againſt *Luther*. This *Sanders* firſt publiſhed, and *Bellarmin* and others ſince have taken it up upon his authority. Strangers may be pardoned ſuch errors, but they are inexcuſable in an *Engliſhman*. For in *Mores* printed works there is a letter written by him out of the *Tower* to *Cromwell*, in which he gives an account of his behaviour concerning the kings divorce and ſupremacy. Among other particulars one is, ‘ that when the king ſhewed him his book againſt *Luther*, in which he had aſſerted the popes primacy to be of divine right, *More* deſired him to leave it out; ſince as there had been many conteſts between popes and other princes, ſo there might fall in ſome between the pope and the king; therefore he thought it was not fit for the king to publiſh any thing, which might be afterwards made uſe of againſt himſelf; and adviſed him either to leave out that point, or to touch it very tenderly: but the king would not follow his counſel,’ being perhaps ſo fond of what he had writ, that he would rather run himſelf upon a great inconvenience, than leave out any thing that he fancied ſo well written. This ſhews that *More* knew that book was written by the kings own pen; and either *Sanders* never read this, or maliciouſly concealed it, leſt it ſhould diſcover his foul dealing.

Theſe executions ſo terrified all people, that there were no further provocations given: and all perſons either took the oaths, or did ſo dextrouſly conceal their opinions, that till the rebellions of *Lincolnſhire*, and the north, broke out, none ſuffered after this upon a publick account. But when theſe were quieted, then the king reſolved to make the chief authors and leaders of thoſe commotions publick examples to the reſt. The duke of *Norfolk* proceeded againſt many of them by martial law. There were alſo tryals at common law of a great many more that were taken priſoners, and ſent up to *London*. The lords *Darcy* and *Huſſie* were tryed by their peers, the marqueſs of *Exceter* ſitting ſteward. And a commiſſion of *oyer* and *terminer* being iſſued out for the tryal of the reſt, ſir *Robert Conſtable*, ſir *John Bulmer* and his lady, ſir *Francis Pigot*, ſir *Stephen Hamilton*, and ſir *Thomas Piercy*, and *Aſk*, that had been their captain, with the abbots of *Whalley*, *Jerveux*, *Bridlington*, *Lenton*, *Woburn*, and *Kingſtead*, and *Mackrall* the monk that firſt raiſed the *Lincolnſhire* rebellion, with ſixteen more, were indicted of high treaſon, for the late rebellions. And after all the ſteps of the rebellion were reckoned up, it is added in the indictment, that they had met together on the 17th of *January*, and conſulted how to renew it, and proſecute it further, being encouraged by the new riſings that were then in the north; by which they had forfeited all the favour to which they could have pretended, by vertue of the indemnity that was granted in the end of *December*, and of the pardons which they had taken out. They were all found guilty, and had judgment as in caſes of treaſon. Divers of them were carried down into *Lincolnſhire* and *Yorkſhire*, and executed in the places where their treaſons were committed; but moſt of them ſuffered at *London*, and among others the lady *Bulmer* (whom others call ſir *John Bulmers* harlot) was burnt for it in *Smithfield*.

The only cenſure, that paſſed on this, was, that advantages were taken on too ſlight grounds to break the kings indemnity and pardon: ſince it does not appear, that after their pardon they did any thing more than meet and conſult. But the kingdom was ſo ſhaken with that rebellion, that, if it had not been for the great conduct of the duke of *Norfolk*, the king had by all appearance loſt his crown. And it will not ſeem ſtrange, that a king (eſpecially ſo tempered as this was) had a mind to ſtrike terror into the reſt of his ſubjects, by ſome ſignal examples, and to put out of the way the chief leaders of that deſign: nor was it to be wondered at, that the abbots and other clergymen, who had been ſo active in that commotion, were ſeverely handled. It was by their means that the diſcontents were chiefly fomented. They had taken all the oaths that were enjoyned them, and yet continued to be ſtill practiſing againſt the ſtate; which, as it was highly contrary to the peaceable doctrines of the Chriſtian religion, ſo it was in a ſpecial manner contrary to the rules, which they profeſſed. That obliged them to forſake the world, and to follow a religious and ſpiritual courſe of life.

The next example of juſtice was a year after this, of one *Forreſt* an *Obſervant* frier. He had been, as *Sanders* ſaid, confeſſor to queen *Katharine*, but it ſeems departed from her intereſts; for he inſinuated himſelf ſo into the king, that he recovered his good opinion. Being an ignorant and lewd man, he was accounted by the better ſort of that houſe, to which he belonged in *Greenwich*, a reproach to their order (concerning this, I have ſeen a large account in an original letter written by a brother of the ſame houſe). Having regained the kings good opinion, he put all thoſe, who had favoured the divorce under great fears, for he proceeded cruelly againſt them. And one *Rainſcroft*, being ſuſpected to have given ſecret intelligence of what was done among them, was ſhut up, and ſo hardly uſed, that he dyed in their hands, which was (as that letter relates) done by frier *Forreſts* means. This frier was found to have denyed the kings ſupremacy: for though he himſelf had ſworn it, yet he had infuſed it into many in confeſſion, that the king was not the ſupream head of the church. Being queſtioned for theſe practices, which were ſo contrary to the oath that he had taken, he anſwered, ‘ that he took that oath with his outward man, but his inward man had never conſented to it.’ Being brought to his tryal, and accuſed of ſeveral heretical opinions that he held, he ſubmitted himſelf to the church. Upon this, he had more freedom allowed him in the priſon; but ſome coming to him diverted him from the ſubmiſſion he had offered; ſo that when the paper of abjuration was brought him, he refuſed to ſet his hand to it: upon which he was judged an obſtinate heretick. The records of theſe proceedings are loſt; but the books of that time ſay, that he denied the goſpel. It is like it was upon that pretence, that without the determination of the church it had no authority; upon which ſeveral writers of the *Roman* communion have ſaid undecent and ſcandalous things of the holy ſcriptures. He was brought to *Smithfield*, where were preſent the lords of the council, to offer him his pardon if he would abjure. *Latimer* made a ſermon againſt his errors, and ſtudied to perſuade him to recant; but he continued in his former opinions, ſo he was put to death in a moſt ſevere manner. He was hanged in a chain about his middle, and the great image that was brought out of *Wales*, was broken to pieces, and ſerved for fewel to burn him. He ſhewed great unquietneſs of mind, and ended his life in an ungodly manner, as *Hall* ſays, who adds this character of him, ‘ that he had little knowledge of God and his ſincere truth, and leſs truſt in him at his ending.’

In winter that year a correſpondence was diſcovered with cardinal *Pole*, who was barefaced in his treaſonable deſigns againſt the king. His brother ſir *Geofrey Pole* diſcovered the whole plot. For which the marqueſs of *Exceter*, (that was the kings couſin-german by his mother, who was *Edward* the 4ths daughter), the lord *Montacute*, the cardinals brother ſir *Geofrey Pole*, and ſir *Edward Nevill*, were ſent to the *Tower* in the beginning of *November*. They were accuſed for having maintained a correſpondence with the cardinal, and for expreſſing an hatred of the king, with a diſlike of his proceedings, and a readineſs to riſe upon any good opportunity that might offer it ſelf.

The ſpecial matter brought againſt the lord *Montacute*, and the marqueſs of *Exceter*, who were tried by their peers on the 2d and 3d of *December*, in the 30th year of this reign, is, ‘ that whereas cardinal *Pole*, and others, had caſt off their allegiance to the king, and gone and ſubmitted themſelves to the pope, the kings mortal enemy, the lord *Montacute* did on the 24th of *July* in the 28th year of the kings reign, a few months before the rebellion broke out, ſay, that he liked well the proceedings of his brother the cardinal, but did not like the proceedings of the realm; and ſaid, I truſt to ſee a change of this world; I truſt to have a fair day upon thoſe knaves that rule about the king; and I truſt to ſee a merry world one day.’ Words to the ſame purpoſe were alſo charged on the marqueſs. The lord *Montacute* further ſaid, ‘ I would I were over the ſea with my brother, for this world will one day come to ſtripes: it muſt needs ſo come to paſs, and I fear we ſhall lack nothing ſo much as honeſt men.’ He alſo ſaid, ‘ he had dreamed that the king was dead, and though he was not yet dead, he would die ſuddenly; one day his leg will kill him, and then we ſhall have jolly ſtirring;’ ſaying alſo, ‘ that he had never loved him from his childhood, and that cardinal *Wolſey* would have been an honeſt man, if he had had an honeſt maſter.’ And the king having ſaid to the lords he would leave them one day, having ſome apprehenſions he might ſhortly die, that lord ſaid, ‘ If he will ſerve us ſo, we ſhall be happily rid; a time will come, I fear we ſhall not tarry the time, we ſhall do well enough.’ He had alſo ſaid, ‘ he was ſorry the lord *Abergavenny* was dead, for he could have made ten thouſand men; and for his part he would go and live in the weſt, where the marqueſs of *Exceter* was ſtrong:’ and had alſo ſaid upon the breaking of the northern rebellion, ‘ that the lord *Darcy* played the fool, for he went to pluck away the council, but he ſhould have begun with the head firſt, but I beſhrew him for leaving

‘ off ſo ſoon.’ Theſe were the words charged on thoſe lords, as clear diſcoveries of their treaſonable deſigns; and that they knew of the rebellion that broke out, and only intended to have kept it off to a fitter opportunity: they were alſo accuſed of correſpondence with cardinal *Pole*, that was the kings declared enemy. Upon theſe points the lords pleaded *not guilty*, but were found guilty by their peers, and ſo judgment was given.

On the 4th of *December* were indicted ſir *Geofrey Pole*, for holding correſpondence with his brother the cardinal, and ſaying that he approved of his proceedings, but not of the kings; ſir *Edward Nevill*, brother to the lord *Abergavenny*, for ſaying, the king was a beaſt, and worſe than a beaſt; *George Crofts*, chancellor of the cathedral of *Chicheſter*, for ſaying, *the king was not, but the pope was, ſupream head of the church*; and *John Collins*, for ſaying, *the king would hang in hell one day for the plucking down of abbeys.* All thoſe, ſir *Edward Nevill* only excepted, pleaded *guilty*, and ſo they were condemned; but ſir *Geofrey Pole* was the only perſon of the number that was not executed, for he had diſcovered the matter. At the ſame time alſo, cardinal *Pole*, *Michael Throgmorton* gentleman, *John Hilliard* and *Thomas Goldwell* clerks, and *William Peyto* a *Franciſcan* of the *Obſervants*, were attainted in abſence; becauſe they had caſt off their duty to the king, and had ſubjected themſelves to the biſhop of *Rome*, *Pole* being made cardinal by him; and for writing treaſonable letters, and ſending them into *England*. On the 4th of *February* following, ſir *Nicholas Carew*, that was both maſter of the horſe, and knight of the garter, was arraigned for being an adherent to the marqueſs of *Exeter*, and having ſpoke of his attaindor as unjuſt and cruel. He was alſo attainted and executed upon the 3d of *March*. When he was brought to the ſcaffold, he openly acknowledged the errors and ſuperſtition in which he had formerly lived; and bleſſed God for his impriſonment, ‘ for he then began to reliſh the life and ſweetneſs of Gods holy word, ‘ which was brought him by his keeper, one *Phillips*, who followed the ‘ Reformation, and had formerly ſuffered for it.’

After theſe executions, followed the parliament in the year 1539, in which not only theſe attaindors that were already paſſed were confirmed, but new ones of a ſtrange and unheard-of nature were enacted. It is a blemiſh never to be waſhed off, and which cannot be enough condemned, and was a breach of the moſt ſacred and unalterable rules of juſtice, which is capable of no excuſe; it was the attainting of ſome perſons, whom they held in cuſtody, without bringing them to a tryal. Concerning which, I ſhall add what the great lord chief juſtice *Cook* writes: ‘ Although I queſtion not the power of the parliament, for without queſ‘ tion the attaindor ſtands of force in law, yet this I ſay of the manner ‘ of proceeding, *Auferat oblivio, ſi poteſt, ſi non utrumque ſilentium tegat.* ‘ For the more high and abſolute the juriſdiction of the court is, the more ‘ juſt and honourable it ought to be in the proceedings, and to give ex‘ ample of juſtice to inferior courts.’ The chief of theſe were the marchioneſs of *Exceter* and the counteſs of *Sarum*. The ſpecial matter charged on the former, is her confederating her ſelf to ſir *Nicolas Carew*, in his treaſons; to which is added, ‘ that ſhe had committed divers ‘ other abominable treaſons. The latter is ſaid to have confederated ‘ her ſelf with her ſon the cardinal, with other aggravating words.’ It does not appear by the Journal that any witneſſes were examined; only that day that the bills were read the third time in the houſe of lords, *Cromwell* ſhewed them a coat of white ſilk, which the lord admiral had found among the counteſs of *Sarums* cloaths, in which the arms of *England* were wrought on the one ſide, and the ſtandard that was carried before the rebels was on the other ſide. This was brought as an evidence that ſhe approved of the rebellion. Three *Iriſh* prieſts were alſo attainted for carrying letters out of *Ireland*, to the pope and cardinal *Pole*, as alſo ſir *Adrian Forteſcue* for endeavouring to raiſe rebellion, *Thomas Dingley* a knight of St. *John* of *Jeruſalem*, and *Robert Granceter* merchant, for going to ſeveral foreign princes, and perſuading them to make war upon the king, and aſſiſt the lords *Darcy* and *Huſſie* in the rebellion they had raiſed. Two gentlemen, a *Dominican* frier, and a yeoman, were by the ſame act attainted, for ſaying that *that venemous ſerpent the biſhop of* Rome *was ſupream head of the church of* England. Another gentleman, two prieſts, and a yeoman are attainted for treaſon in general, no particular crime being ſpecified. Thus ſixteen perſons were in this manner attainted, and if there was any examination of witneſſes for convicting them, it was either in the *Star-Chamber*, or before the privy council; for there is no mention of any evidence that was brought in the *Journals:* There was alſo much haſte made in the paſſing this bill: it being brought in the 10th of *May*, was read that day for the firſt and ſecond time, and the 11th of *May* for the third time. The commons kept it five days before they ſent it back, and added ſome more to thoſe that were in the bill at firſt; but how many were named in the bill originally, and how many were afterwards added, cannot be known. *Forteſcue* and *Dingley* ſuffered the 10th of *July*. As for the counteſs of *Sarum*, the lord *Herbert* ſaw in a record, ‘ that bulls from the pope were found in her houſe, that ſhe ‘ kept correſpondence with her ſon, and that ſhe forbade her tenants to ‘ have the New Teſtament in *Engliſh*, or any other of the books that ‘ had been publiſhed by the kings authority.’ She was then about ſeventy years of age, but ſhewed by the anſwers ſhe made, that ſhe had a vigorous and maſculine mind. She was kept two years priſoner in the *Tower*, after the act had paſſed, the king by that reprieve deſigning to oblige her ſon to a better behaviour; but upon a freſh provocation by a new rebellion in the north, ſhe was beheaded, and in her, the name and line of *Plantagenet* determined. The marchioneſs of *Exceter* died a natural death. In *November* this year were the abbots of *Reading*, *Glaſſenbury* and *Colcheſter* attainted of treaſon, of which mention was made formerly.

In the parliament that ſate in the year 1540 they went on to follow that ſtrange precedent, which they had made the former year. By the 56th act *Giles Heron* was attainted of treaſon, no ſpecial matter being mentioned.

By the 57th act, *Richard Fetherſtoun*, *Thomas Abell*, and *Edward Powel* prieſts, and *William Horn* a yeoman were attainted, for denying the kings ſupremacy, and adhering to the biſhop of *Rome:* by the ſame act the wife of one *Tirrell* eſq. was attainted, for refuſing her duty of allegiance, and denying prince *Edward* to be prince and heir of the crown; and one *Laurence Cook* of *Doncaſter* was alſo attainted for contriving the kings death.

By the 58th act, *Gregory Buttolph*, *Adam Damplip*, and *Edward Brindeholm* clerks, and *Clement Philpot* gentleman, were attainted, for adhering to the biſhop of *Rome*, for correſponding with cardinal *Pole*, and endeavouring to ſurprize the town of *Callais:* By the ſame act *Barnes*, *Gerrard*, and *Jerome*, were attainted, of whoſe ſufferings an account has been already given.

By the 59th act, *William Bird* a prieſt, and chaplain to the lord *Hungerford*, was attainted, for having ſaid to one that was going to aſſiſt the king againſt the rebels in the north, ‘ I am ſorry thou goeſt, ſeeſt thou ‘ not how the king plucketh down images and abbies every day? And ‘ if the king go thither himſelf, he will never come home again, nor any ‘ of them all which go with him, and in truth it were pity he ſhould ‘ ever come home again; and at another time upon ones ſaying, O good ‘ Lord, I ween all the world will be hereticks in a little time: *Bird* ſaid, ‘ Doeſt thou marvel at that? I tell thee it is no marvel, for the great ‘ maſter of all is an heretick, and ſuch a one as there is not his like in ‘ the world.’

By the ſame act the lord *Hungerford* was likewiſe attainted. ‘ The ‘ crimes ſpecified are, that he knowing *Bird* to be a traitor, did entertain ‘ him in his houſe as his chaplain; that he ordered another of his chap‘ lains, ſir *Hugh Wood*, and one Dr. *Maudlin* to uſe conjuring, that ‘ they might know how long the king ſhould live, and whether he ſhould ‘ be victorious over his enemies or not; and that theſe three years laſt ‘ paſt he had frequently committed the deteſtable ſin of ſodomy with ſe‘ veral of his ſervants:’ All theſe were attainted by that parliament. The lord *Hungerford* was executed the ſame day with *Cromwell*; he dyed in ſuch diſorder that ſome thought he was frenetick, for he called often to the executioner to diſpatch him, and ſaid he was weary of life, and longed to be dead, which ſeemed ſtrange in a man that had ſo little cauſe to hope in his death. For *Powel*, *Fetherſtoun*, and *Abell*, they ſuffered the ſame day with *Barnes* and his friends, as hath been already ſhewn.

This year *Sampſon* biſhop of *Chicheſter*, and one doctor *Wilſon* were put in the *Tower*, upon ſuſpition of a correſpondence with the pope. But upon their ſubmiſſion they had their pardon and liberty. In the year 1541, five prieſts and ten ſecular perſons, ſome of them being gentlemen of quality, were raiſing a new rebellion in *Yorkſhire*; which was ſuppreſſed in time, and the promoters of it being apprehended, were attainted and executed, and this occaſioned the death of the counteſs of *Sarum*, after the execution of the ſentence had been delayed almoſt two years.

The laſt inſtance of the kings ſeverity was in the year 1543, in which one *Gardiner* that was the biſhop of *Wincheſters* kinſman and ſecretary, and three other prieſts, were tryed, for denying the kings ſupremacy, and ſoon after executed. But what ſpecial matter was laid to their charge, cannot be known, for the record of their attainder is loſt.

Theſe were the proceedings of this king againſt thoſe that adhered to the intereſts of *Rome:* in which, though there is great ground for juſt cenſure, for as the laws were rigorous, ſo the execution of them was raiſed to the higheſt that the law could admit; yet there is nothing in them to juſtifie all the clamours, which that party have raiſed againſt king *Henry*, and by which they purſue his memory to this day; and are far ſhort, both in number and degrees, of the cruelties of queen *Maries* reign, which yet they endeavour all that is poſſible to extenuate or deny.

To conclude, we have now gone through the reign of king *Henry* the 8th, who is rather to be reckoned among the *great* than the *good* princes. He exerciſed ſo much ſeverity on men of both perſuaſions, that the writers of both ſides have laid open his faults, and taxed his cruelty. But as neither of them were much obliged to him, ſo none have taken ſo much care to ſet forth his good qualities, as his enemies have done to enlarge on his vices: I do not deny that he is to be numbred among the *ill* princes, yet I cannot rank him with the *worſt*.

XI. *The Trials of* JOHN DUDLEY *Duke of* Northumberland, WILLIAM PARR *Marquis of* Northampton, *and* JOHN DUDLEY *Earl of* Warwick, *for* High Treaſon, *in the Court of the Lord High Steward, at* Weſtminſter, 18*th* Auguſt, 1 Mary, 1553; *and alſo of Sir* JOHN GATES, *Sir* HENRY GATES, *Sir* ANDREW DUDLEY, *and Sir* THOMAS PALMER, *at* Weſtminſter, *for the ſame Crime, the Day following.*

[*The proceedings againſt theſe noblemen and others, for aſſerting the title of lady* Jane Grey *to the crown, and oppoſing that of queen* Mary, *ſeem to deſerve a place in this collection, chiefly on account of the queſtions of law propoſed to the court by the duke of* Northumberland, *previouſly to his confeſſion of the indictment. The* Harleian Manuſcript, *which we ſhall firſt lay before the reader, is copied from* Hollingſhead, *except the latter part about the marquis of* Northampton *and the earl of* Warwick. *The next account of the tranſaction is immediately taken from the tranſlation of biſhop* Godwin's Annals of Mary, *in* Kennet's Complete Hiſtory of England, *but is acknowledged by biſhop* Godwin *to be extracted from the great* French *hiſtorian of his own time, the preſident* de Thou.]

Extract from one of the Harleian Manuſcripts.

THOMAS duke of *Norfolke* ſittinge as high ſteward of *England*, on the eighteenth day of *Auguſt* were brought before him *John Dudley* duke of *Northumberland*, *William Parre* marqueſſe of *Northampton*, and the earle of *Warwicke*, ſonne to the duke of *Northumberland.*

The duke of *Northumberland*, att his cominge to the barre, vſed greate reverence towards the judges, and proteſtinge his ffaith and obedience to the queene's majeſty, whome he confeſſed greivouſly to haue offended, he ſaid; that hee meant not to ſpeake any thinge in defence of himſelfe; but would firſt vnderſtand the opinion of the courte in two points.

Firſt, Whether a man, doinge an acte by the authority of the prince and counſell, and by warrant of the greate ſeale of *England*, and doeinge nothinge without the ſame, may bee charged for treaſon for any thinge which hee might doe by warrant thereof?

Secondly, Whether any ſuch perſons, as were equally culpable in that crime, and thoſe by whoſe letters and commaundements he was directed in all his doeings, might bee his judges, or paſſe vpon his tryall att his death?

Wherevnto was anſweared, that, as concerninge the firſt, the greate ſeale, which hee layd for his warrant, was not the ſeale of the lawfull queene of the realme, nor paſſed by authority, but the ſeale of an uſurper, and therefore would bee noe warrant for him.

And to the ſecond, it was alleadged, that, if any were as deepely to bee touched as himſelfe in that caſe, yet as longe as noe atteindor were of record againſt them, they were neverthleleſſe perſons able in the lawe to paſſe vpon any tryall, and not to bee challenged therefore, but att the princes pleaſure.

After which anſwere, the duke vſinge fewe words, declared his earneſt repentance in the caſe, (for hee ſaw, that to ſtand vpon vtteringe any reaſonable matter would little prevaile) and moved the duke of *Norfolke* to bee a meanes vnto the queene for mercy, and without further anſweare confeſſed the indictment; by whoſe example alſoe the other priſoners arraigned with him did likewiſe confeſſe the indictment produced againſt them, and therevpon had judgement.

The judgement beinge pronounced, hee craved favour of ſuch a death as was executed on noblemen, and not the other; hee beſeeching alſo that a favourable regard might bee had of his children in reſpect of theire age, and that hee might bee permitted to conferre with ſome learned divine for the ſettlinge of his conſcience; and laſtly, that her majeſtie would bee pleaſed to ſend vnto him fowre of her counſell for the diſcovery of ſome things which might concerne the ſtate.

The marqueſſe of *Northampton* pleaded to his indictment, that after the beginninge of theſe tumults hee had forborne the execucion of any publique office; and that all the while hee, intent to huntinge and other ſports, did not partake in the conſpiracy; but it beinge manifeſt that hee waſt party with the duke of *Northumberland*, ſentence paſſed on him likewiſe.

The earle of *Warwicke*, fyndinge that the judges in ſoe greate a cauſe, admitted noe excuſe of age, with greate reſolucion heard his condemnacion pronounced againſt him, cravinge only this favour; that, whereas the goods of thoſe who are condemned for treaſon are totally confiſcated; yet her majeſtie would bee pleaſed, that out of them his debts might bee payd.

After this they were all returned agayne to the *Tower*.

Extract from 2 Kenn. Compl. Hiſt. 2*d ed. p.* 334.

ON the 18th of *Auguſt*, the duke of *Norfolk* ſitting as lord high ſteward, thoſe concern'd in the rebellion were try'd at *Weſtminſter*; where the duke of *Northumberland*, with his eldeſt ſon the earl of *Warwick*, and the marquis of *Northampton*, were found guilty of high treaſon. The account of that day's proceedings, and of the day following, I ſhall here tranſcribe from *Thuanus*, a writer of great fame; becauſe, tho' I do not entirely approve all he has ſet down, I think he keeps very near to truth, and the reader, perhaps, will not be ill entertain'd with the variety of opinions upon this matter.

‘ The duke of *Northumberland*, ſays he, alledg'd, That he did nothing but by order of the council, yet this would not excuſe him; ſo that he was condemn'd as a traytor. When the ſentence was pronounc'd, he beg'd that it might be mitigated, as to the manner of his death, and that his children, in regard to their tender years, might find mercy; and that he might have the liberty of ſpeaking with ſome learned divine (for the ſettling of his conſcience). And laſtly, that her majeſty wou'd be pleas'd to ſend to him four of her privy-council, to whom he had ſome things to communicate, relating to the publick. Then came on the tryal of the marquis of *Northampton*, who pretended, that he had not any hand in the rebellion, nor was engag'd in any party, but having no publick poſt, had ſpent all the time in his uſual diverſion of hunting, and other ſports (*a*). However, it appear'd that he was engag'd on *Northumberland*'s ſide, and therefore he was likewiſe condemn'd. Afterwards, the earl of *Warwick*, *Northumberland*'s eldeſt ſon, when the plea of his youth wou'd not be admitted in excuſe of ſo great a crime, receiv'd his ſentence of death with a wonderful conſtancy; and only pray'd her majeſty, that out of his eſtate confiſcated, his debts might be diſcharged. Theſe were preſently ſent back to the *Tower*. The next day, ſir *Andrew Dudley*, *Northumberland*'s brother, and ſir *John Gates*, who was ſuppos'd the firſt author of ſetting up lady *Jane*, with his brother *Henry Gates*, and ſir *Thomas Palmer*, were condemn'd. The 22d of *Auguſt* they were brought out to execution, having two days before receiv'd the ſacrament in priſon. *Northumberland*, by the perſuaſion of *Heath* (afterwards archbiſhop of *York*) made a ſpeech to the people, in which he confeſs'd his crime and repentance, and adviſ'd all who were preſent to adhere to the ancient religion of their forefathers, and rejecting the new opinions, as the ſource of all the evils that had befallen 'em for 30 years paſt, to drive the preachers of 'em, as trumpeters of ſedition, out of the kingdom, if they wou'd approve themſelves innocent before God and the publick. He declar'd that in his heart he had always been for the old religion, and appeal'd for the truth of this to his intimate friend the biſhop of *Worceſter*, but he had temporiz'd out of ambition, for which he now was a ſincere penitent; and laſtly, that he willingly ſubmitted to his death, which he own'd he had deſerv'd. Having ſaid this, he recommended himſelf to God, and deſiring the prayers of the ſpectators, prepar'd to receive the ſtroke; and immediately the executioner perform'd his office. *Northumberland*'s exhortations variouſly affected the minds of the people, who were amaz'd to hear him ſpeak againſt that religion, which he had profeſs'd for above 30 years; and on the account of which chiefly he had adviſ'd king *Edward* to exclude his ſiſters. Moſt have written, that being a cunning man, and fond of life, he did this in hopes of a pardon; and that when he look'd round him and ſaw he was deceiv'd, he repented of it (*b*). He was charg'd (upon no trivial conjectures) with having poiſon'd the late king. But nothing of this was mention'd at his trial, becauſe his judges undertook not the examination into king *Edward*'s death, but only the buſineſs of the rebellion againſt queen *Mary*. *Gates* too and *Palmer* underwent the ſame puniſhment.'

(*a*) The contrary to which was notorious; for *Northampton* was one of queen *Jane*'s privy-counſellors, and ſigned a letter, *July* the 9th, among the reſt of her privy-council, to the lady *Mary*, (as they ſtiled her) requiring her to deſiſt, and be quiet and obedient; beſides his going along with the duke in all his counſels. *Kennet.*

(*b*) *Fox*, who lived in theſe times, confirms and clears this matter: who writes, that the duke had a promiſe made him of a pardon; yea, though his head were upon the block, on condition he would recant, and hear maſs. On which promiſe he firmly relied, and did what was required; and ſtill born up with the ſame hope, on the ſcaffold denied, in word and outward profeſſion, that true religion which he had often, both in king *Henry*'s and king *Edward*'s days, evidently declared himſelf to favour and further. *Id.*

XII. *The Trial of* PHILIP HOWARD *Earl of* Arundel, *for* High Treaſon, *in the Court of the Lord High Steward of* England, *the* 18*th of* April, *in the* 32*d of* Eliz. 1589.

[*An account of this trial is in the* 1*ſt volume of the preſent work, with a reference in a note to* Camden's Elizabeth*, as if the trial was extracted from that work. See* 1*ſt vol. fol.* 163. *But the fact is, that they are different relations of the ſame trial; and as Mr.* Camden's *account, though not ſo full, appears to us more clear and intelligible, and at the ſame time occupies little room, we thought that it would not be unacceptable to our readers. It is therefore here given from the* Engliſh *tranſlation of* Camden, *in* Biſhop Kennet's Complete Hiſtory of England. 2 Kenn. Compl. Hiſt. 551.

There are two other narratives of this trial; one amongſt the Harleian Manuſcripts *at the* Britiſh Muſeum; *the other in Mr.* Collins's Peerage, *under the title of* The Duke of Norfolk. *But on compariſon, we find the former to be only an old tranſlation from the* Latin *edition of* Camden's Elizabeth. *As to the latter, though* Collins *cites a manuſcript in the poſſeſſion of the* Howard *family, yet he adds ſcarce any thing of conſequence unnoticed by or different from* Camden, *except that* Bennett, *one of the witneſſes againſt the earl, is repreſented previouſly to the trial, to have addreſſed a letter to him, in which he acknowledged, that he was forced into a confeſſion to the injury of the earl, by fear of the rack, and therefore prayed his forgiveneſs.—We endeavoured to procure acceſs to the manuſcript cited by* Collins, *with an intention to have gratified our readers with a copy of it; but the application failed of ſucceſs.*]

Extract from 2 Kenn. Compl. Hiſt. 2*d ed. p.* 551.

THE very ſame month [*April* 18th 1589,] was *Philip Howard*, earl of *Arundel*, arraign'd in *Weſtminſter-hall*, and tried by his peers, before *Henry* earl of *Derby*, who was created lord-high-ſteward of *England* on this particular occaſion.

The perſons ſummoned to attend this trial, were theſe following peers.

William Cecil lord *Burleigh*, lord-high-treaſurer of *England.*
William lord marqueſs of *Wincheſter.*
Edward earl of *Oxford*, lord-great-chamberlain of *England.*
Henry earl of *Kent.*
Henry earl of *Suſſex.*
Henry earl of *Pembroke.*
Edward earl of *Hertford.*
Henry earl of *Lincoln.*
The lord *Hunſdon.*
The lord *Willoughby* of *Ereſby.*
The lord *Morley.*
The lord *Cobham.*
The lord *Grey.*
The lord *Darcy* of the north.
The lord *Sands.*
The lord *Wentworth.*
The lord *Rich.*
The lord *Willoughby* of *Parham.*
The lord *North.*
The lord St. *John* of *Bletneſho.*
The lord *Buckhurſt.*
The lord *La-Ware.* And
The lord *Norris.*

Being order'd to hold up his hand, he did ſo, and moreover uſed this expreſſion, *Behold here a clean hand, and an honeſt heart!* The heads of his impeachment were much the ſame with thoſe mention'd before, *Ann.* 1586. *viz.* ‘That he held a very ſtrict intimacy and correſpondence ‘ with cardinal *Allen*, *Parſons* the Jeſuit, and other conſpirators, who attempted the ruin of their prince and country, by ſtirring up foreigners ‘ and the queen's natural ſubjects to bring in popery, to the total deſtruction of both: That he had engaged by letters convey'd by *Weſton*, alias *Burges*, a prieſt, to aſſiſt the ſaid cardinal in advancing the ‘ catholick cauſe, and to that purpoſe had deſign'd to withdraw privately ‘ out of the kingdom: That he was privy to the bull of *Sixtus Quintus*, ‘ which dethroned the queen, and made over her dominions to the *Spaniards:* That when he was a priſoner in the *Tower*, he had cauſed maſs ‘ to be ſaid for the happy ſucceſs of the *Spaniſh* armada, and had himſelf ‘ compoſed a ſpecial prayer on that occaſion.’

Being demanded to anſwer, whether he was *guilty*, or *not guilty?* he turned himſelf to the court and judges, and made theſe challenges one after another, *whether ſuch a number of articles might lawfully be put into one and the ſame impeachment?* They anſwer'd in the affirmative. Then he demanded, *whether preſumptive arguments bore any weight in an indictment?* He was anſwer'd, *that he might except againſt them as far as he pleas'd.* Another demand was, *whether he could ſtand accus'd of thoſe things charged to be treaſon in the* 13*th of queen* Elizabeth, *after the time limited in the ſaid act?* They then promiſed him, *he ſhould not be try'd upon any other law or act of high-treaſon, but an ancient one of* Edward III. In the laſt place, he demanded, *if that were a fair indictment, which fail'd groſly as to circumſtances both of place and time?* The anſwer was, *that theſe things ſignified little, if the matter of fact were proved.* After this, being aſked a ſecond time, whether he were *guilty* or *not?* he anſwer'd, *not guilty*, and ſubmitted himſelf to God and his peers; but deſired them to ſpare his memory, which was impair'd by his impriſonment, and ill health, and not to over-charge it with too much variety.

Puckering, the queen's ſerjeant at law, open'd the firſt part of the charge, *viz.* That cardinal *Allen* having engag'd with the Jeſuits and others againſt his prince and country, upon which account he was baniſh'd the kingdom; yet he the ſaid earl had kept up a correſpondence with him by letters, and had expreſly written to him to advance the catholick intereſt, which, by a fair and modeſt conſtruction, was a plain inviting of him to invade *England.* The earl made anſwer, That all he intended by it, was the promotion of that faith, by the acceſſion of new proſelytes. *Popham*, the queen's attorney-general, endeavour'd to prove, by the confeſſions of *Savage*, *Throckmorton*, and *Babington*, that this could not poſſibly be underſtood of a free converſion upon the ſtrength of argument; but of a publick invaſion by force of arms. *Shuttleworth*, a ſerjeant at law, made it appear out of the form of the proclamations put out againſt the Jeſuits and ſeminary prieſts, on what deſigns they were ſent into *England:* That they were traitors, he proved from the earl's own words; who, upon the hearing of *Valonger*'s cauſe in the *Star-Chamber*, in relation to a ſcandalous libel of his, ſaid publickly, *that an hearty papiſt could not but be as thorow a traitor.* But for all this, men of this very principle were among the earl's greateſt intimates. 'Twas urged moreover, That he had eſpouſed the faith of the *Romiſh* church, and became of conſequence a ſubject to the *Romiſh* ſee; but this he flatly deny'd, and demanded that any evidence might be produced to prove him a profeſſed catholick. He acknowledged indeed, that he had in ſome inſtances made *Burges* his confeſſor; whereupon it was debated, that none were admitted to the ſacraments of the church of *Rome*, but ſuch as were reconciled to her doctrine and worſhip; but he was admitted by *Gratley*, a prieſt, and therefore a papiſt before, at leaſt in his heart. This *Popham* labour'd to prove from his own letters, and that he intended likewiſe to withdraw beyond ſea; that he was an abſolute creature of cardinal *Allen*, and conform'd entirely to his meaſures; for which he was guilty of high-treaſon. He then produced *Gratley*'s and *Morgan*'s letters to the queen of *Scots*, and made from thence this inference, that the earl owed his change in religion more to ſourneſs and ſpleen, than to conſcience and conviction. Then was produced an emblematical piece found in the earl's cabinet, which had on one ſide an hand ſhaking a ſerpent into the fire, with this motto, *If God be with us, who ſhall be againſt us?* and on the other, a lion rampant, without claws, and with this inſcription, *Yet a lion.* He moreover added, that the earl deſigning to quit the kingdom, was perſuaded by the cardinal to alter his purpoſe, as being a perſon likely to do the church of *Rome* more ſervice by his ſtay in *England*, than his departure thence; that in a letter to the queen, the earl had reflected ſeverely on the juſtice of the laws, in reference to the ſentence of death denounced againſt his grand-father and father; that the queen of *Scots* had recommended him to *Babington*, as the great patron of the catholick intereſt; that *Allen* had owned that the aforeſaid bull was procured by the applications of a perſon of figure in *England*; which could be no other than the earl, becauſe no one nobleman beſides, was ſo intimate with *Allen* as himſelf, and whom therefore *Allen* muſt needs know to be ill-affected to his country, by what he had heard paſs before in the *Star-Chamber.* Then were read alſo the confeſſions of the lord *William*, the earl's brother, with thoſe of his ſiſter, the lady *Margaret*, and his own letters, when he had thoughts of leaving the kingdom. And this gave occaſion to magnify the queen's clemency afreſh, who would not ſuffer him (at that very time) to be examin'd on an article of treaſon, but barely on a point of contempt. To theſe charges the earl anſwer'd in the groſs, ‘That as for the picture, 'twas a trifle preſented him by his man: That ‘ indeed he had promiſed to aſſiſt the cardinal in the promotion of the ‘ catholick faith, but never at the expence of his prince and country: ‘ That what he had written in relation to the ſentence of his grand-father and father, was extant upon record, and ſo any one might read it: ‘ That he was not at all concerned in what the cardinal or the queen of ‘ *Scots* might write about him, ſince he ſtood clear as to fact: That it ‘ was impoſſible to reſtrain other mens pens: That he had indeed ſome ‘ deſign of acting under the prince of *Parma*, in the wars abroad, ſince ‘ the rigour of the laws againſt catholicks made it not ſafe for him to ſtay ‘ at home: That the attorney had managed the letters and confeſſions, ‘ at the ſame rate that ſpiders do flowers; that is, ſuck'd all the poiſon ‘ out of them; but he, for his part, was able to extract out of them ‘ ſomething more uſeful, might he be permitted to ſee them.’ Then were read *Allen*'s letters to the queen of *Scots*, with thoſe of the biſhop of *Roſs*, about invading *England*, that very year he deſign'd to quit it; and the bull of *Sixtus Quintus*, and ſeveral remarks made on *Allen*'s memorial to the *Engliſh*, printed at *Antwerp* the year before. He was likewiſe charged with having aſſumed this title, *Philip* duke of *Norfolk*, which was found among his papers; and it was *Allen*'s advice, that he ſhould in ſome degree mend his title. Theſe things were brought againſt him as convictions of treaſon before his impriſonment. *Egerton*, the ſollicitor-general, having ſumm'd up and repeated the particulars of the charge, proceeded upon a threefold diſtinction of time, *viz.* 'Before the arrival of the *Spaniſh* fleet; at the inſtant of its coming; and after it fled: And that he had been guilty of treaſon ſince his confinement: Before the fleet appeared, he had been guilty of treaſon, in wiſhing it happy ſucceſs; when it was arrived, in making a form of prayer ſuitable to his wiſhes, and cauſing the maſs of the Holy Ghoſt to be ſaid, and a courſe of devotions to be uſed for 24 hours together: And then when the fleet was gone, in lamenting its defeat with all the marks of an extraordinary ſorrow; as if he had fix'd his laſt hope, and beſt confidence, in the *Spaniſh* armada, which was fitted out with a deſign to ruin his prince and country.' Theſe particulars were all made out againſt him by ſir *Tho. Gerard* kt. *Will. Shelley*, condemn'd for treaſon, *ann.* 1586. *Bennet*, a popiſh prieſt, and ſome other priſoners. He then mutter'd in a broken and imperfect kind of tone, that the prayers he made, and the maſſes he perform'd, were in order to deprecate a maſſacre he had heard was deſigned againſt the catholicks. *Gerard*'s evidence he roundly deny'd; and as he adjured him to declare nothing but the truth, and repreſented before him the dreadful ſolemnity of the laſt day, he ſo terrified and ſcared the evidence, that he hardly was able to ſpeak one word to the purpoſe. *Bennet*'s atteſtations he endeavour'd to invalidate, as being a man of a tarniſh'd reputation, and who had contradicted himſelf in his confeſſions. The reſt he taxed as perſons impeach'd, and priſoners, and men likewiſe of a looſe and profligate character; who were far from deſerving credit, and who might be ſuſpected to have the liberty of uſing his converſation with a deſign to enſnare him in the querks of the law. Having received a check for this, as too indecent and bold a challenge upon the evidence for the queen, at the ſolicitor's motion, an ancient law of *Richard* II. was read, whereby it was declared, that the crown of *England* was under the command of none but God alone, and that the biſhop of *Rome* had no manner of authority over it. It now growing towards night, and nothing being produced farther againſt him, the earl was order'd to withdraw: He threw himſelf wholly upon the judgment of his peers, proteſting his obedience to the queen, and heartily praying they might come to ſuch an iſſue, as might be moſt for the glory of God, the ſafety of the queen, and the integrity of their own honour and conſcience. They then went aſide, and held a debate, which laſted an hour, and in points of law they conſulted the opinion of the judges and ſerjeants. Being returned to their ſeats, the clerk of the crown demanded of them, Whether the earl were *guilty* or *not?* At which every one of 'em putting his hand to his breaſt, as the cuſtom was, declared upon his honour and conſcience, that he was *guilty*. Then being aſked if he had any thing farther to ſay, why ſentence of death ſhould not paſs upon him? he only ſaid the ſame words which his father had done before him, in the ſame place, *God's will be done*. Sentence being pronounced, he deſired leave to ſpeak with his wife, and that he might ſee his young ſon, who was born ſince his confinement; that he might have the liberty to ſpeak with his ſtewards, who had the accounts of his eſtate, and that his debts might be diſcharged: He likewiſe humbly deſired the queen would take his young ſon into her favour and patronage. Then the lord ſteward brake his ſtaff, the badge of his place; and the earl was carry'd back to the *Tower*, the ax being carry'd before him, with the edge towards him. There were a great many that moſt heartily lamented the untimely fall of this young nobleman, (for he was not above 33 years of age at the moſt) and as many on the other ſide were ready to cry up the queen's wiſdom and caution, who by this example had ſtruck a kind of terror into the more powerful part of the *Romiſh* faction. The queen after all gave him his life, and was well enough ſatisfy'd in having leſſen'd the power of ſo conſiderable a man, and one who was ſo great a bulwark of the catholick cauſe.

XIII. *The Caſe of Impoſitions, on an Information in the* Exchequer *by the Attorney-General againſt Mr.* John Bates *Merchant.* Michaelmas, 4 James I. 1604.

[*This famous caſe involved in it a conſtitutional queſtion of the firſt magnitude*; *Mr.* Bates *the defendant having been proſecuted for refuſing to pay a duty on foreign currants impoſed by a mere act of the crown. The attempt, to enforce a ſubmiſſion to this duty by legal proceſs, was certainly a principal and early part of that raſh and unwarrantable ſcheme to eſtabliſh in the crown a right of taxing the ſubject, which diſturbed the reigns of the two firſt princes of the* Stuart *line.* James *the firſt claimed the right of impoſing duties on imported and exported merchandize by prerogative. His ſon and immediate ſucceſſor, the unfortunate* Charles, *not only perſiſted in the claim, but added to it the equally formidable pretenſion of ſhip-money. Realized, theſe claims, with loans benevolences monopolies and the other ſubſidiary branches of the ſame extravagant deſign, would have comprized nearly a compleat ſyſtem of extra-parliamentary taxation; for impoſition at the ports was calculated to ſerve the purpoſe externally, ſhip-money to operate internally. Had they been acquieſced in, parliaments would ſoon have become unneceſſary aſſemblies; the mildneſs of a limited monarchy would gradually have degenerated into the harſhneſs of an abſolute one; a legal government would have been corrupted into a tyranny. To the great diſgrace of the profeſſion of the law, ſome, who in other reſpects were its brighteſt ornaments, gave their aid to theſe attempts againſt the rights of parliament. We make the acknowledgment with concern; but it is a truth, which neither can nor ought to be concealed. The great luminary of ſcience, lord* Bacon, *exerciſed his eloquence to reconcile parliament to impoſitions by prerogative. Sir* John Davis, *ſo juſtly admired for his writings about* Ireland, *compoſed a treatiſe to prove the right of the crown. Both diſplayed the greatneſs of their talents on the occaſion, though they managed the argument in different ways; the former ſpeciouſly profeſſing to claim the prerogative in queſtion from and to limit it by law; the latter boldly adventuring to exalt the ſame prerogative above law, and deſcribing it to be like another* Sampſon *too ſtrong to be bound.* 2. Bac. *4to. ed.* 1778. *p.* 223. Dav. on Impoſit. 131. *Even the judges deigned to be inſtruments for ſubjugating their country to an illegal taxation. Though the ſtatute-book was full of legiſlative declarations againſt taxes without conſent in parliament, though not ſo much as one recognition of the claim could be found in the records of juſtice, the court of* Exchequer *in* Bates'*s caſe gave judgment for impoſitions by prerogative on imports and exports; and in Mr.* Hampden'*s caſe, though ſome very recent admonitions and warnings of duty had intervened, all the judges of* Weſtminſter-hall, *two only excepted, joined to give the ſanction of a judicial opinion to ſhip-money. Nor were monopolies, loans, and benevolences, wholly uncountenanced by the courts of juſtice. But, during this criſis, the houſes of parliament did not forget their duty. They purſued the ſeveral devices for illegal taxation, till all were hunted down, and had yielded to the tide of law and conſtitution. In* 1610, *the houſe of commons, alarmed by the judgment in* Bates'*s caſe, formally debated the right of the crown to impoſe on merchandize at the ports; and at length by a petition to the king complained of ſuch impoſitions as a grievance, which in the ſubſequent parliaments was followed with frequent remonſtrances of the like kind. In* 1623, *monopolies were curbed and regulated by ſtatute. In* 1627, *gifts, loans, and benevolences, were pointedly declared contrary to law by the Petition of Right, with general words to comprehend all ſorts of taxes and charges out of parliament. In* 1640, *the legiſlature cruſhed ſhip-money almoſt in its birth, by declaring the judgment for it contrary to law and vacating the record. In the ſame year the final blow was given to taxation by prerogative; an act for tonnage and poundage being paſſed, with a declaration againſt the king's claim to impoſe ſuch duties. Thus the victory over all the ſeveral inventions to tax the ſubject by prerogative became compleat; before the civil wars broke out, before the conteſt with the crown degenerated from reſiſtance of its uſurped powers into an invaſion of its juſt claims. Fortunately too, when the country emerged from the anarchy and miſery of the ſcene which followed, the extravagance of joy did not extinguiſh a due remembrance of the conſtitution. One of the firſt acts, after the Reſtoration, was a grant of tonnage and poundage, with words which renewed a part of the former declarations againſt taxing by prerogative; for it anxiouſly recited, that ' no rates can be impoſed on merchandize ' imported or exported by ſubjects or aliens, but by common conſent in parliament.'* 12. Cha. 2. *c.* 4. §. 6.—*It was once our intention to have traced more fully the hiſtory of the long conteſt about taxes out of parliament, from the acceſſion of the houſe of* Stuart, *till it was finally decided againſt the crown in* 1641; *our plan being to have minutely and diſtinctly ſtated the proceedings on each ſpecies of device to elude the conſtitution, and to have given a general view of the arguments by which each was ſuſtained or repelled. But though we had already made many reſearches, and collected ſeveral materials on the ſubject, it was found impoſſible to do juſtice to it, without more time, than was conſiſtent with preſent convenience to allow. We therefore reſerve the detail of the ſubject for ſome future occaſion. As to the attempts at extra-parliamentary taxation in the previous period, they are fully inveſtigated in ſome of the pieces which we now preſent to the reader.*

The only ſtate of this important caſe, and of the arguments in it, is in Lane's Reports, *and in a ſhort note added to* Dyer's Reports *by the learned editor of the improved edition. See* Lane's Rep. *p.* 22. *and* Dy. *ed.* 1688, *fo.* 165-*b. in the margin. The report in* Lane, *being the fulleſt, ſhall be laid before the reader; to which we ſhall ſubjoin a ſpeech made in parliament by lord* Bacon *in* 1610, *when the judgment of the* Exchequer *in the caſe in queſtion was formally diſcuſſed by the houſe of commons. We ſhall next add a tranſcript from an original manuſcript, deſcribed by Mr.* Carte *to be in the hand-writing of the famous ſir* John Davis; *being in ſubſtance like the latter part of the printed* Treatiſe on Impoſitions *with his name, but differing much in the language, and more likely to be correct. Theſe pieces together comprize the principal arguments for the prerogative of impoſitions claimed by the crown. But, without ſomething more, it would be a very partial view of the ſubject. In juſtice, therefore, as well to that excellent conſtitution, to the injury of which the claim of impoſitions by prerogative operated, as to thoſe who ſo honourably for themſelves and ſo happily for their country reſiſted the invaſion, we ſhall add two moſt learned and able arguments on the oppoſite ſide of the queſtion; one delivered by Mr.* Hakewill *in the ſame parliament with lord* Bacon'*s argument; the other alſo cotemporary, and ſaid to have been compoſed by ſir* Henry Yelverton, *afterwards the judge of that name. Both of theſe valuable remnants of the debates in parliament on impoſitions by the crown are very rare; having been printed ſeparately, and not being to be found in any publiſhed collections of the time. What is very remarkable, they are not only unnoticed by Mr.* Hume, *Mr.* Carte, *and the authors of the* Parliamentary Hiſtory; *but have even eſcaped the obſervation of our deſervedly celebrated female hiſtorian. That the two former writers ſhould not be ſtudious to draw the attention of their readers to two arguments, ſo fit to counteract the reception of their particular prejudices, is eaſy to be accounted for; eſpecially in the inſtance of Mr.* Carte, *whoſe bias in favour of the prerogative is more avowed and apparent than Mr.* Hume'*s. But Mrs.* Macaulay'*s ſilence cannot be explained in the ſame way; and therefore we attribute it to the accident of her not having met with either of the arguments. Perhaps our obſervation on Mr.* Hume *and Mr.* Carte *may ſound as harſh to ſome perſons. But we can aſſure ſuch, that it is not intended to write diſreſpectfully of either of thoſe authors. We feel ſtrongly the merit of Mr.* Carte, *as a moſt elaborate hiſtorian; as one, to whoſe familiar knowledge and ſkilful uſe of records, with the other moſt authentick materials of the hiſtory of his country, all, who follow him in the ſame line, are infinitely obliged. For ſtrength clearneſs and elegance of ſtile, for profoundneſs in remark, for beautiful arrangement and cloſe compreſſion of matter, we conſider Mr.* Hume'*s work as a model of hiſtorical compoſition. Such being the characters of theſe eminent writers, it becomes the more neceſſary to know, on which ſide their prejudices operate. Otherwiſe the authority of their works might have an improper influence in ſettling the opinions of their readers on the controverted points of our government and conſtitution, and ſo lead to the diſſemination of dangerous and pernicious errors. The truth ſeems to be, that a general hiſtory of*

England, *compoſed with that rigid impartiality ſo eſſential to a perfectly juſt idea of our conſtitution, is ſtill wanting. Hitherto the beſt of our writers, who have engaged in that arduous taſk, have been betrayed into extremes. One is ſwayed by predilection for the* Stuart *family; whilſt another loſes his temper from averſion to them. Some write from favor to abſolute monarchy; others are votaries to the paſſion of republicaniſm. Too many have been ſeduced by zeal for a particular party in the ſtate; and ſo, according to the occaſion, have practiſed the arts of apology, or adopted the ſevere and vehement language of ſatire. But the author, who wiſhes to fix the true point of our antient conſtitution in the ſcale of government, muſt baniſh from his mind all ſuch corruptives of judgment.*

Beſides the arguments by Hakewill *and* Yelverton, *againſt impoſitions on merchandize by prerogative, there are ſome very forcible reaſons with the ſame view by lord* Coke *in his ſecond* Inſtitute, *where he comments on the 30th chapter of* Magna Charta. *See* 2. Inſt. *page* 57. *to* 63.—*Some obſervations alſo occur on the ſubject in the* 12*th part of lord* Coke's Reports. *But, in this latter book, he writes with more favor to the judgment for impoſitions in* Bates's *caſe; for, though he diſclaims all idea of the crown's having a right to impoſe duties at the ports, in form of a tax and for a revenue, yet he contends, that, for the benefit of the ſubject, and in the way of advancement and regulation of trade, the crown may charge. This diſtinction ſeems to be of dangerous tendency, and not quite reconcileable with the ſame great lawyer's ſentiments in his 2d* Inſtitute, *where he condemns the judgment in* Bates's *caſe without any reſerve. However it ſhould be conſidered, that lord* Coke's *12th* Report *contains only his firſt thoughts, before the queſtion had undergone a parliamentary inveſtigation; and further, that the 12th* Report *is of ſmall authority, being not merely poſthumous, but apparently nothing more than a collection from papers neither digeſted nor intended for the preſs by the writer.* 12. Co. Rep. 33.

Thoſe inclined to purſue the ſubject ſtill further may conſult 4. Inſt. 32. *the caſe of* Sheppard *againſt* Goſwell *and others in* Vaughan's Rep. 159. *the title* Taxes *in* Cotton's Abridgment of Records, *the caſe of cuſtoms* Dav. Rep. 7. Forſter's Dig. of Laws relat. to Cuſtoms, 15. Gilbert's Treatiſe on the Exchequer, *chap.* 15. Maddox's Hiſtory of the Exchequer, *chap.* 18. *and the title* Prerogative *in the* Law-Abridgements.]

Extract from Lane's Reports, *page* 22.

AN information was exhibited againſt *Bates* a merchant of the *Levant*; and it was recited, that the king by his letters patents under the great ſeal had commanded his treaſurer, that he command the cuſtomers and receivers, that they ſhould aſk and receive of every merchant denizen, who brings within any port within his dominions, any currants, five ſhillings a hundred for impoſt, above two ſhillings and ſix pence, which was the poundage by the ſtatute of every hundred; and it was alledged, that *Bates* had notice thereof, and that he had brought in currants into the port of *London*, and refuſed to pay the ſaid 5. s. in contempt of the king. Whereunto *Bates* came, and ſaid, that he is an *Engliſh* merchant, and adventurer and a denizen, and that he made a voyage to *Venice*, and there bought currants, and imported them into *England*; and he recited the ſtatute of the firſt of king *James cap.* 33. which grants 2. s. 6. d. for poundage, and he ſaid, that he had paid that, and therefore he had refuſed to pay the 5. s. becauſe it was impoſed unjuſtly, and unduly againſt the lawes of the land; whereupon the kings attorney demurred in law.

This matter had been divers times argued at the bar, and at the bench, by *Snig* and *Savil* barons, and now by *Clark* and *Flemming* chief baron, whoſe arguments only I heard.

And *Clark*, who argued firſt this day, ſaid, that this caſe being of ſo great conſequence, great reſpect and conſideration is to be had, and it ſeemeth to me ſtrange, that any ſubjects would contend with the king, in this high point of prerogative; but ſuch is the kings grace, that he had ſhewed his intent to be, that this matter ſhall be diſputed and adjudged by us according to the antient law and cuſtome of the realm; and becauſe that the judgement of this matter cannot be well directed by any learning delivered in our books of law, the beſt directions herein are precedents of antiquitie, and the courſe of this court, wherein all actions of this nature are to be judged, and the acts of parliament recited in arguments of this caſe prove nothing to this purpoſe. The beſt caſe in law is the caſe of Mines in Mr. *Plowden Com.* where this ground is put, that the precedents of every court ought to be a direction to that court, to judge of matters which are aptly determinable therein, as in the *Kings Bench* for matters of the crown, in the *Common Pleas* for matters of inheritance and civil contracts, and in the *Exchequer* for matters of the kings prerogative his revenue and government. And as it is not a kingdome without ſubjects and government, ſo he is not a king without revenues, for without them he cannot preſerve his dominions in peace, he cannot maintain war, nor reward his ſervants, according to the ſtate and honor of a king; and the revenue of the crown is the very eſſential part of the crown, and he who rendeth that from the king pulleth alſo his crown from his head, for it cannot be ſeparated from the crown. And ſuch great prerogatives of the crown, without which it cannot be, ought not to be diſputed; and in theſe caſes of prerogative the judgement ſhall not be according to the rules of the common law, but according to the precedents of this court, wherein theſe matters are diſputable and determinable. As for example, an action of accompt lies not by the common law againſt him, who had the land of the accomptant by mean conveyance. But if one be an accomptant to the king, and had land in fee, and alien it unto *A.* who alien it unto *B. B.* by reaſon of this land ſhall be charged with this accompt. In 14. *E.* 3. a coroner was elected by the king's writ as he ought to be, by the countie, and after he was amerced, and becauſe he was not ſufficient to anſwer the amercement the countie was charged therewith, and that appears of record here. And in 30. *E.* 3. Rot. 6. as appears alſo of record, in this court, one *William Porter* was *magiſter monetæ*, and had received bullion of divers merchants, and coyned it in the kings mint, and did not reſtore the coyne to the merchants, but was inſufficient, and the king paid the merchants, and inquired of the ſureties for the coyne, and it was found that he had none; then it was inquired who recommended him unto the king, and it was found by whom he was recommended; and they, who only recommended him as friends, were charged with the debt. And if one be outlawed in a perſonal action, and debt is due to him upon a contract, this ſhall be forfeited to the king, and this is ordinary by the precedents of this court; and yet this ſeems to be contrary to law, and is againſt our books. And the kings debtor ſhall have a *quo minus* againſt executors upon a ſimple contract, and therein he cannot releaſe, nor be non-ſuited. And I put theſe caſes to prove, that the precedents of this court ought to be purſued and obſerved, although they ſeem to croſs the common law, and the books thereof. A caſe was here betwixt the king and *Jourden*. *Jourden* was receiver, and ſold his office to one *D.* and he not being able to pay *Jourden* for his office at the day limited, it was agreed, that *Jourden* ſhould come to the next receipt, and when *D.* received the kings money, that *Jourden* ſhould take it for his office, which was done accordingly. After *D.* was indebted to the king, and this matter appearing as above, &c. *Jourden* was charged with the money which he had received. And as *Stamford* in his firſt *cap.* of prerogative ſaith, that the king is the moſt worthy part of a common-wealth, ſo is he the preſerver, nouriſher, and defender of the people; and true it is, that the weal of the king is the publick weal of the people, and he for his pleaſure may aforreſt the word of any ſubject, and he thereby ſhall be ſubject to the law of the forreſt; and he may take the proviſion of any man by his purveyor for his own uſe, but at reaſonable prices, and without abuſe, the abuſe of which officer hath been reſtrained by divers ſtatutes; and the king may take wines for his proviſion, and alſo timber for his ſhips, caſtles, or houſes in the wood of any man, and this is for publick benefit; and the king may allay or inhaunce coyne at his pleaſure, for the plentie of the king is the peoples peace. And theſe impoſts are not only for the benefit of the people, and for the kings profit, but are alſo impoſed many times for the increaſe of merchandiſe and commerce, as the ſtatute of *Aulnageors* made in the 2. *E.* 3. *cap.* 14. which was made principally to make cloathes more vendible. And ſo corporations granted by the king with immunities and priviledges, and to ſeclude other ſubjects from them, are well limited and good; for it is for the increaſe of the peoples wealth, and thereby the kings revenue is increaſed. And ſometimes there is contained in grants a prohibition to other ſubjects, that they uſurp not upon the priviledges of ſuch corporations upon a pain, as in the cuſtome of forraign bought and forraign ſold in *London*, and *York*; and divers cuſtomes are permitted to ſuch corporations, as in the chamberlain of *Londons* caſe, *Cook* 5. and the breach or violation of theſe cuſtomes is a decay of the corporations, and ſo an impairing of the revenues of the crown; and therefore the king may make them, and alſo give them priviledges, and make inhibitions to others, not to uſurp upon them. King *Edward* the third in the ſixteenth year of his raign proclaimed, that no man ſhould ſell woolfels, or leather, under ſuch a price, ſo that theſe ſtaple commodities might not be debaſed, and this at no place but at *Northampton* and *Anwick*; and this proclamation was the cauſe, wherefore the merchant in 43. *aſſiſe* 38. was puniſhed for uſing deceit to abate the prices. And for precedents in this matter of impoſt, there are many of antiquitie. And firſt for wines. In 16. *E* 1. the cuſtom for a tun of wine was 4. s. and in 21. and 24. *E.* 3. it was increaſed to————————and 12. 13. & 14. of *H.* 8. it was increaſed to 17. s. the tun. And after in the 4th. of *Mary* it was increaſed to 4 marks; and as it appears by the records of this court, it was anſwered upon accompt for all this time according to that rate. And it is apparent, that no act of parliament gave this to the king, but that it was impoſed by his abſolute power; and ſhall it now be doubted if it be lawful? God defend. Priſage, that the king ſhall have one hogs-head before the maſt, and another hogs-head behinde, is not given to the king by any ſtatute, but was only an impoſt by the kings power. The impoſt upon cloathes in 31. *E.* 1. was two ſhillings for a ſcarlet, and 18. d. for other cloathes in grain, and after in the 37th year of *E.* 3. it was raiſed again, and in the 37. *E.* 3. an act was made for the length of cloathes; in the 33. *H.* 8. it was raiſed again; and in the time of queen *Mary*, becauſe that the making of ſo many cloathes made the impoſt of wooll to be of ſo ſmall value, therefore the impoſt of every cloath was raiſed by her to a noble; and in the firſt of *Eliz.* an impoſt was impoſed, for the overlength of cloathes; and it appears in 30. *E.* 3. that the impoſt of the cloath was for a ſtranger 2. s. 8. d. and for a denizen 1 s. and all for cloathes. Another impoſt was for woolfels, and leather. The 31 *E.* 1. it was for wooll half a mark for a ſack, and after that to 10. s. and in the time of *E.* 3. to 20. s. and after to 40. s. and after to 3. l. and ſo of woolfels and leather; and as the benefit and price of commodities did riſe, ſo was the impoſt raiſed, and no act of parliament for the firſt impoſing, and increaſe thereof. And ſo much for woolfels and leather. Now for allom. Upon every kintal of allom was impoſed 3. s. 4. d. which was anſwered upon accompt; and in the caſe of *Smith*, it was not doubted, if it ſhall be paid, as here it is, but if it were contained in *Smiths* patent or not. The impoſition impoſed upon coles. Now the 1. s. increaſe is paid. The impoſition upon tobacco was never doubted to be unjuſt as this is.

And ſo much for precedents. And now for ſtatutes. The ſtatute of *Magna Charta*, *cap.* 30. which was objected, that thereby all merchants may have ſafe &c. to buy and ſell, without ill tolnets; but there is a ſaving, *viz.* by the antient and old cuſtoms. The ſtatute of *Articuli ſuper chartas*, *cap.* 2. hath a ſaving in the end of it, that the king or his councel did not intend thereby to increaſe the antient prices due and accuſtomed. So are all the other ſtatutes of purveyors. The ſtatute of the 45. *E.* 3. *cap.* 4. which hath been ſo much urged, that no new impoſition ſhall be impoſed upon woolſels, wooll, or leather, but only the cuſtome and ſubſidie granted to the king; this extends only to the king himſelf, and ſhall not binde his ſucceſſors; for it is a principal part of the crown of *England*, which the king cannot diminiſh. And the ſame king 24. of his raign granted divers exemptions to certain perſons; and becauſe that it was in derogation of his ſtate imperial, he himſelf recalled and adnulled the ſame. As to that which was objected, that the defendant had paid poundage granted by the ſtatute of the firſt of the king, that is nothing to this purpoſe; for that is a ſubſidie, and not a cuſtome; for when any impoſition is granted by parliament, it is only a ſubſidie, and not a cuſtome, for the nature thereof is changed, and the impoſt of wine is paid over and above the poundage, and ſo ſhould it be here. And whereas it was objected, that if it were in the time of war, it is ſufferable, but in peace not, this ſeems no reaſon; for the king cannot be furniſhed to make defence in war, if he provide not in peace, and the proviſion is too late made, when it ought to be uſed. And as to that which was ſaid, that the ſubject ought to have recompence, and valuable ſatisfaction, it ſeemeth to me that he hath; for he hath the kings protection within his ports, and his ſafe conduct upon the land, and his defence upon the ſea. And all the ports of the realm belong to the king, and in this court there is a precedent where one in the time of queen *Eliz.* claimed to have a port to himſelf as his own, and it was adjudged that he could not, for it belonged to the queen, and it could not be ſevered; and the king only ſhall have the cuſtomes, for landing throughout all the land. And in the 17. of *E.* 3. there is a notable precedent, where he reciteth all the benefits which the ſubject had in his forraign traffick, by the kings power and protection, and therefore he impoſed a new impoſt. The writ of *ne exeat regnum* comprehends a prohibition to him to whom it is directed, that he ſhall not go beyond the ſeas; and this may be directed at the kings pleaſure to any man who is his ſubject; and ſo conſequently may he prohibite all merchants; and as he may prohibite the perſons, ſo may he the goods of any man, *viz.* that he ſhall export or import at his pleaſure. And if the king may generally inhibite that ſuch goods ſhall not be imported, then by the ſame reaſon may he prohibite them, upon condition or *ſub modo*, *viz.* that if they import ſuch goods, that then they ſhall pay &c. And if the general be lawful, the particular cannot be unjuſt; and the words in the writ of *ne exeat regnum*, *viz. et quamplurima nobis, et coronæ noſtræ præjudicialia ibidem proſequi intendis* are not traverſable by the ſubject, but he ought dutifully to obey his ſovereign. As to that which is ſaid, that this command to the treaſurer is not ſufficient under the great ſeal, that is otherwiſe; for before the ſtatute of *R.* 2. for matter of cuſtomes no command was directed to the treaſurer, but alwayes the king ſignified his pleaſure to his cuſtomers under his privy ſeal, and this gave authoritie to them to collect cuſtomes, and the ſame authority is given now to the treaſurer, and derived from him to the cuſtomers. As to that which is ſaid, that the concluſion is evil, *becauſe it is in contempt of the king*; without doubt it is a contempt, for the king may inhibit traffick into any part of the world, if he will, or inflict a pain upon any who ſhall trade into ſuch place inhibited. So may he do upon any commoditie either inhibit it generally, or upon a pain or impoſt; and if a ſubject uſe the trade after ſuch inhibition, or import his wares, and pay not the impoſt, it is a contempt, and the king ſhall puniſh him for it at his pleaſure. And as to that which is ſaid, that it is a burthen to the merchant, that is not ſo; for the burthen layeth it only upon the better part of the ſubjects; and if it were a burthen, it is no more than they themſelves impoſed, which was in their hands by commiſſion in the time of queen *Eliz.* and they have raiſed the prices to ſubjects more than the value of the impoſt; and it is not to be intended, that the king by any impoſt will prejudice the cauſe of merchants, for the trade in general is to him more beneficial, than any particular impoſt. The caſe of the 11. and 14. *H.* 4. of *Aulnageor* is not to be compared to this caſe; for there the king had made a grant to a ſubject, and it was alſo of a thing which was granted before to a maior, and alſo of a commoditie within the land, and not tranſported. And for the caſe of *Darcy*, for the monopoly of cards, it is not like; for that is of a commoditie within the land, and betwixt the patentee and the king, and not between the king and the ſubject. And as to the exception taken to the information, that it is *uſitat.* and doth not preſcribe, this needeth not; for it is a prerogative wherein lieth no preſcription, for every prerogative is as antient as the crown. And as to the concluſion of the information it was objected, that it is not good, for the informer ought to pray the forfeiture; but this belongs to the court to judge of what ſhall be loſt or forfeited, the offence being a contempt, and therefore the concluſion good enough. And ſo for all theſe reaſons, judgement ſhall be given for the king.

Flemming chief baron. Touching the exceptions to the information, they are of no force. For the firſt *uſitat.* &c. it hath been well ſaid, that the king needs not preſcribe in any prerogative, for it is as antient as his crown is, 2. *E.* 3. and for the concluſion *viz.* that he in contempt &c. that deſerves no other anſwer, but that which hath been given before, for it is enough, without doubt warranted by infinite precedents. But for the bar, it is an increaſe of the defendants contempt, and no ſufficient matter to anſwer, an indigeſted and confuſed tale, with an improper and diſobedient concluſion, and there is in it *multa non multum*; but the concluſion is without precedent, or example, for he ſaith, that the impoſition, which the king had laid, is *indebitè, injuſtè, et contra leges Angliæ impoſita*, and therefore he refuſed &c. In the caſe of *Smith* for allom, the concluſion was moderate, and beſeeming a ſubject, *judgement if he ſhall have impoſt by his grant*; and in the caſe of mines, the defendant, being a great peer of the realm, concluded upon his grant and intereſt in the ſoyl, and that he took the mettal, as it was lawful for him, and did not confront his ſoveraign with terms of *injuſtè, indebitè*, and the like. And the king, as it is commonly ſaid in our books, cannot do wrong; and if the king ſeiſe my land without cauſe, I ought to ſue to him in humble manner, *humillimè ſupplicavit &c.* and not with ſuch terms of oppoſition in the information; and all his matter had been ſaved to him then as well as now, or he might have pleaded his matter, and ſaid wherefore he refuſed, as it was lawful for him. But for the matter it is of great conſequence, and hath two powerful objects, which it principally reſpecteth. The one is the king, his power, and prerogative, his treaſure, and the revenues of his crown; and to impair and derogate from any of theſe was a part moſt undutiful in any ſubject. The other is the trade and traffick of merchantdiſe, tranſportation in and out of the land of commodities, which further publick benefit ought much to be reſpected, and nouriſhed as much as may be. The ſtate of the queſtion is touching a new cuſtome. The impoſitions or cuſtoms are duties or ſumms of money newly impoſed by the king without parliament upon merchantdiſe, for the augmentation of his revenues. All the queſtions ariſing in the caſe are, *aut de perſonis, de rebus, vel de actionibus, viz.* form and proceeding. The perſons are firſt the king, his power, and authoritie; ſecondly, not *Bates* the defendant, nor the *Venetians*, but all men who import currants. The impoſition is properly upon currants, and for them, and is not upon the defendant, nor his goods, who is a merchant; for upon him no impoſition ſhall be, but by parliament. The things are currants, a forraign commoditie, and a victual; the 5 s. for impoſt, which is ſaid to be great. The action formed or proceſs is the command by the great ſeal, and the words therein are *petere et recipere*, if they be ſufficient, and if good without proclamation or other notice, and how notice ſhall be given, and if it be good without an *ad quod damnum*. And the caſe of Mines in *Plowden*, which is the ſole caſe in the printed books of law, to this purpoſe hath in it foure reaſons of the judgement First, the excellency of the king, or his perſon. Secondly, the neceſſitie of coyn for his ſtate. Thirdly, the utillitie of coyn for commerce. Fourthly, the inconvenience, if the ſubject ſhould have ſuch royal poſſeſſions. And theſe reaſons are not extracted out of the books of law, but are only reaſons of policy; for *rex eſt legalis et politicus*, and reaſons pollitick are ſufficient guides to judges in their arguments, and ſuch caſes and precedents are good directions in caſes of judgement, for they are demonſtrations of the courſe of antiquitie. Whereupon my judgement ſhall conſiſt upon reaſons pollitick, and precedents. The caſe in *Dyer* 1. *Eliz. fo.* 165. was not like to the caſe in queſtion, but only a conference; and the caſe there was for an impoſt upon cloath, a domeſtick commoditie. In this caſe, are recited their grievances, but it was paid, and it is denied here; but there was no reſolution thereof. At the ſame time, was the impoſt of wines increaſed, and paid, and no petition or complaint thereof. And the cuſtoms for *Englands* commodities were at the firſt impoſed by the king's will, for no ſtatute giveth them, *viz.* for wool, woolfels and leather, and it was called the great cuſtome; and that it was paid, it will not be denied; and yet now it is doubted, if the king can impoſe it upon forraign commodities. The king may reſtrain the perſon, as it is in *Fitz. Nat. Br. à fortiori* he may reſtrain the goods. There was no cuſtom for home commodities, but the great cuſtome aforeſaid, which was after increaſed by parliament, which was called the *petit* cuſtome. It is a great grace in the king to the merchants, that he will command, and permit this matter to be diſputed between him and his ſubject, and the moſt fit place is in this court, and the beſt rules herein are the precedents thereof, and pollitick reaſons, which I ſhall give, and apply them to the particulars before recited. And firſt, for the perſon of the king, *omnis poteſtas à Deo, et non eſt poteſtas niſi pro bono.* To the king is committed the government of the realm and his people; and *Bracton* ſaith, that for his diſcharge of his office, God had given to him power, the act of government, and the power to govern. The kings power is double, ordinary and abſolute, and they have ſeveral lawes and ends. That of the ordinary is for the profit of particular ſubjects, for the execution of civil juſtice, the determining of *meum*; and this is exerciſed by equitie and juſtice in ordinary courts, and by the Civillians is nominated *jus privatum*, and with us common law; and theſe laws cannot be changed, without parliament; and although that their form and courſe may be changed, and interrupted, yet they can never be changed in ſubſtance. The abſolute power of the king is not that which is converted or executed to private uſe, to the benefit of any particular perſon, but is only that which is applied to the general benefit of the people, and is *ſalus populi*; as the people is the body, and the king the head; and this power is guided by the rules, which direct only at the common law, and is moſt properly named pollicy and government; and as the conſtitution of this body varieth with the time, ſo varieth this abſolute law, according to the wiſdome of the king, for the common good; and theſe being general rules and true as they are, all things done within theſe rules are lawful. The matter in queſtion is material matter of ſtate, and ought to be ruled by the rules of pollicy; and if it be ſo, the king hath done well to execute his extraordinary power. All cuſtomes, be they old or new, are no other but the effects and iſſues of trades and commerce with forraign nations; but all commerce and affairs with forrainers, all wars and peace, all acceptance and admitting for current forrain coyn, all parties and treaties whatſoever are made by the abſolute power of the king; and he who hath power of cauſes, hath power alſo of effects. No exportation or importation can be, but at the kings ports. They are the gates of the king, and he hath abſolute power by them to include or exclude whom he ſhall pleaſe; and ports to merchants are their harbours, and repoſe; and for their better ſecuritie he is compelled to provide bulwarks, and fortreſſes, and to maintain, for the collection of his cuſtoms and duties, collectors and cuſtomers; and for that charge it is reaſon, that he ſhould have this benefit. He is alſo to defend the merchants from pirates at ſea in their paſſage. Alſo, by the power of the king they are to be relieved, if they are oppreſſed by forraign princes, for they ſhall have his treaty, and embaſſage; and if he be not remedied thereby, then *lex talionis* ſhall be executed, goods for goods, and tax for tax; and if this will not redreſs the matter, then war is to be attempted, for the cauſe of merchants. In all the kings courts, and of other princes, the judges in them are paid by the king, and maintained by him to do juſtice to the ſubjects, and therefore he hath the profits of the ſaid courts. It is reaſonable that the king ſhould have as much power over forraigners and their goods, as over his own ſubjects; and if the king cannot impoſe upon forrain commodities a cuſtome, as wel as forrainers may upon their own commodities, and upon the commodities of this land when they come to them, then forrain ſtates ſhall be enriched, and the king impoveriſhed, and he ſhall not have equal profit with them; and yet it will not be denied, but his power herein is equal with other ſtates. And ſo much for the perſon of *Bates* the ſubject. It is ſaid, that an impoſition may not be upon a ſubject without parliament. That the king may impoſe upon a ſubject, I omit; for it is not here the queſtion, if the king may impoſe upon the ſubject or his goods; but the impoſt here is not upon a ſubject, but here it is upon *Bates*, as upon a merchant, who imports goods within this land, charged before by the king; and at the time when the impoſt was impoſed upon them, they were the goods of the *Venetians*, and not the goods of a ſubject, nor within the land, but only upon thoſe which ſhall be after imported; and ſo all the arguments, which were made for the ſubject, fail. And where it is ſaid, that he is a merchant, and that he ought to have the ſea open and free for him, and that trades of merchants and merchandiſe are neceſſary to export the ſurplus of our commodities, and then to import other neceſſaries, and ſo is favourably to be reſpected; as to that it is well known, that the end of every private merchant is not the common good, but his particular profit, which is only the means which induceth him to trade and traffick. And the impoſt to him is nothing, for he rateth his merchandiſe according to that. The impoſt is impoſed upon currants; and he, who will buy them, ſhall have them ſubject to that charge; and it is a great contempt to denie the payment. And ſo much for the perſon. I will give a brief anſwer to all the ſtatutes alledged on the contrary part, with this expoſition, that the ſubjects and merchants are to be freed of *Maletolt*; and this was toll unjuſtly exacted by *London*, *Southampton*, and other ports within this realm; but they are with this ſaving, that they pay the duties and cuſtomes, due, or which hereafter ſhall be due to the king; which is a full anſwer to all the ſtatutes. The commoditie of currants is no commoditie of this land, but forrain. And whereas it is ſaid, that it is victual and neceſſary food, it is no more neceſſary than wine, and impoſt for that hath been always paid, without contradiction; and without doubt, there are many drinkers of wine, who are alſo eaters of currants. That which ſhould be ſaid victual for the common-wealth is that, which ariſeth from agriculture, and of the earth within this land, and not nice and delicate things imported by merchants, ſuch as theſe currants are. They are rather delicacy or medicine than a victual; and it is no reaſon that ſo many of our good and ſtaple commodities ſhould be exported to *Venice* for ſuch a ſlight delicacy, and that all the impoſt ſhall be paid to the *Venetians* for them, and the king ſhould have none for their commoditie: and although that the price be thereby raiſed, this hurteth not the merchant, nor no other, but only a ſmal number of delicate perſons, and thoſe alſo who are of moſt able and beſt eſtate, for their pleaſure. But when the king is in want, he is to be relieved by a general impoſition or ſubſidie upon all the ſubjects. The impoſition, which is here, is ſaid to be ſo great and intollerable as an evil precedent; for, if he may do ſo much, he may do it in *infinitum*, and upon all other merchandiſe. For the impoſition I ſay, that it is reaſonable, for it is no more than foure times ſo much than was before; and that there hath been as much done in antient time in other impoſts, as in that of wooll, which was at firſt but a noble a ſack, and is now at 50. s. The impoſt of wine was in antient time 3. s. 4. d. a tun, and now is foure marks. The leſſening of cuſtome and impoſt is much to be guided by intelligence from forrain nations; for the uſage and behaviour of a forrain prince may impoſe a neceſſitie of raiſing cuſtome of theſe commodities. And ſo it was in the particular of currants. The duke of *Venice* impoſed upon them a ducket by the hundred, which by the wiſdom of the ſtate was foreſeen to be a means, that in time will waſte and conſume the treaſure of the land; whereupon the queen writ to the duke, that he would abate his cuſtome, which he refuſed. Wherefore to prevent, that ſo great a quantitie of this commoditie ſhould not be imported into the land, the queen granted to the company of merchants of the *Levant*, that none ſhould bring in currants, but by their licence; and thoſe merchants impoſed upon them who did import, which were not of their company, if he were denizen 5. s. if he were a ſtranger 10. s. And this was paid by the merchants without contradiction. But there was a clauſe in the patent, that when the duke of *Venice* abated his impoſt, that the patent ſhould be void, and after the duke was ſolicited again, that he would abate the impoſt, but he refuſed, and the firſt commiſſion was recalled, and after a new grant was made, which was executed all the queens life time, which was as aforeſaid. And whereas it is ſaid, that if the king may impoſe, he may impoſe any quantitie what he pleaſes, true it is, that this is to be referred to the wiſdom of the king, who guideth all under God by his wiſdome, and this is not to be diſputed by a ſubject; and many things are left to his wiſdome for the ordering of his power, rather than his power ſhall be reſtrained. The king may pardon any fellon; but it may be objected, that if he pardon one fellon he may pardon all, to the damage of the common-wealth; and yet none will doubt, but that is left to his wiſdome. And as the king may grant a protection for one year, ſo it may be ſaid, that he may grant it for many years, which is a miſchief, and ſo ought to grant none, which will not be denied but that he may. So it may be ſaid, that the queen may grant a ſafe conduct to a ſtranger; for if ſhe may do that, then ſhe may grant to all, which would be burthenſome to the inhabitants; and yet it will not be denied but that ſhe may grant to any or all, as in her wiſdome ſhall ſeem convenient. And the wiſdome and providence of the king is not to be diſputed by the ſubject; for by intendment they cannot be ſevered from his perſon, and to argue *a poſſe ad actum* to reſtrain the king and his power, becauſe that by his power he may do ill, is no argument for a ſubject. To prove the power of the king by precedents of antiquitie in a caſe of this nature may eaſily be done; and if it were lawful in antient time, it is lawful now; for the authoritie of the king is not diminiſhed, and the crown hath the ſame attributes, that then it had. And in antient time ſuch impoſts were never denied; and that which is given by parliament is not an impoſt but a ſubſidie. In antient time ſmall traffick or intercourſe was betwixt the inhabitants of this land and forrain nations, ſo that the principal cuſtom was of the commodities of this land, which were woolfels and leather; and that the cuſtome for wools, which was a noble for a ſack, was an impoſition, appears by the ſtatute of the 14. of *Ed.* 3. *St.* 1. *cap.* 21. It is objected, that merchants cannot be reſtrained, but only perſons ſuſpected, as the writ of *ne exeat regnum* is. But as it is ſaid in *Dyer* before cited, it is without doubt, that the cauſe is not traverſable, and that the king may inhibit any man; for if it be not traverſable, it is not material. And the reaſon, wherefore any man may be reſtrained, is for defence of the realm; and it may be done by privie ſeal, privie ſignet, great ſeal, or proclamation; and that appears by the writ of *licentia tranſportandi* in the regiſter, which containeth licence for one to travail, and limits him to what place he ſhall go, and when he ſhall return, and with what goods, ſo that the king may prohibit body and goods. And when a man is beyond the ſeas, the king may command him to return; and if he doth not obey ſuch command, he ſhall forfeit his goods. Now for reſtraint of commodities many precedents are to prove it. In the time of *H.* 3. and *E.* 1. it was forbidden, that the wooll ſhould be tranſported into *Flanders*; and in *E.* 1. a commiſſion was awarded to enquire, who had done againſt this ordinance, and the goods of one *Freeſton* were ſeiſed; and therefore, an attachment awarded againſt the ſhips of *Hull*, for tranſporting contrary to the ordinance. In the 22. *E.* 1. it was forbidden, that no merchant ſhould trade with *France*; for trade with forrainers is a forrain thing, which is only referred to the king. In the 17. *H.* 6. all merchants were forbidden to import wares from *Flanders* into this land; and the cittizens of *London* complained of certain merchants, which had done contrary to this ordinance to the lords of the privie councel, which I have here ready; for the record mentions it, and the kings attorney was commanded to exhibit an information againſt the merchants, which he did; and they pleaded that the proclamation was made here upon *Eaſter* eve, and that they were then at *Bruges*, and upon the *Wedneſday* after *Bruges* market they bought the wares before notice of the proclamation, and before it were poſſible that they could have notice of it, and pray judgement, &c. And ſo much for reſtraint of the perſon and goods. By the ſtatute of 31. *E.* 3. *cap.* 8. times were appointed in which wools ſhould be tranſported; and alſo *cap.* 9. authoritie was given to the chancellor and treaſurer, to defer the paſſage at their pleaſure. But that this was the common law, and that the king by his ſupream authoritie might do it, it ſeems to me it is apparent by the ſtatute of the 26. *H.* 8. *cap.* 10. which gives power to the king by his letters patents, to limit the time for importing of wines againſt the ſtatute of 23. *H.* 8. *cap.* 7. which was no more but a reſtoring of his power abridged before; and ſo was the ſtatute of 31. *E.* 3. for otherwiſe the parliament would never have given him authoritie to contradict an act of parliament by his letters patents, or to revive theſe acts. Impoſitions are meerly a new cuſtome. And ſo are they ſtiled in the margent of the roll of the 3. *E.* 1. in this court, where it is recorded, that the king had aſſigned merchants to receive (uſing the ſame words which are uſed here) half a mark for every ſack of wool, and a mark of every laſt of leather, and that if the merchant, who is ſo appointed tranſport any after, it ſhall be forfeited; and out of this record I obſerve, that three hundred pelts make a ſack of wool. From the 21. *Ed.* 1. unto the 28. *E.* 1. the cuſtoms for wools was 40. s. a ſack, and in 25. *E.* 1. the impoſition of *Maletolt* was repealed by act of parliament, which *Maletolt* was an increaſe of impoſt upon ſtaple commodities; and therefore was given to the king a great ſubſidie with this cauſe, that it ſhould never be drawn into precedent; which ſhews, that this *Maletolt* was rightly impoſed, otherwiſe the parliament would never have given him ſo great a recompenſe for the abrogation of it. But after in the 13. of *E.* 3. becauſe it was a thing of ſo great conſequence to the crown, it was revived and made 40. s. for wool, and woolfels, and 3. l. for leather for denizens, and double for ſtrangers. In the 14. *Ed.* 3. a petition in parliament to abate it; and for a great ſubſidie it was releaſed; and in the 18. of *Ed.* 3. it was again revived, and a new petition was made in parliament, and this petition was continued until the 36. of *Ed.* 3. and then it was abated; and alſo by the 45. *E.* 3. it was again abated; ſo that it ſeems, that between theſe times it was revived; but after it did not continue long, for in 48. *E.* 3. it was again revived, and for wool the impoſt was 50. s. *et ſic de ſingulis*, and in 1. *R.* 2. after it was anſwered to the king, as it appears in the accompts here, and in 5. *R.* 2. it was again ſuppreſſed by parliament for a ſubſidie granted to the king with a ſaving of antient rights. All theſe ſtatutes prove expreſly, that the king had power to increaſe the impoſt, and that upon commodities of the land, and that he continually uſed this power notwithſtanding all acts of parliament againſt it. And ſo much for commodities of this land. But for forrain commodities it appears by no act of parliament, or other precedent, that ever any petition or ſuit was made to abate the impoſt of forrain commodities, but of them the impoſt was paid without denial. As for example, for wines in the 16. *E.* 1. as appears in this court upon record, it was commanded to the bailiff of *Dover* to levie and collect of every tun of wine of a ſtranger 4. s. and in the 22. *E.* 1. 2. s. thereof was releaſed, at the ſuit of the *French* ambaſſador. In the 26. of *E.* 3. the king granted priviledges to merchants ſtrangers; but there was given for it an increaſe of cuſtome; and this was anſwered as it appears upon accompt in the times of *E.* 1. and *E.* 2. The caſe of allom was as it hath been recited by my brother *Clark*. It is objected, that the merchant ought to have free paſſage upon the ſea; but that doth not conclude the king, but that he ſhall have his impoſt if he cometh into his ports, and here the queſtion is for merchandiſe after that they are brought into the port. But it is ſaid, that they cannot come into the port but by the ſea. That is true; but if this reaſon ſhould hold, then the king could not grant murage, pontage, and the like, becauſe the common channel to them is free, and average is for ſecuritie as wel as ports. Another objection, that the defendant here is not reſtrained; but that is anſwered, for if a pain be inflicted upon them who import, this is an inhibition upon a pain to all. Another objection was, that there was no conſideration of the impoſition; and if it be demanded what differences between the caſes, I anſwer, as much as is between the king and a ſubject; and it is not reaſonable, that the king ſhould expreſs the cauſe and conſideration of his actions, for they are *arcana regis*, and no ſatisfaction needeth, for if the profits to the merchant faileth he will not trade, and it is for the benefit of every ſubject, that the kings treaſure ſhould be increaſed. An objection was made againſt the form of proceeding; becauſe it was by the great ſeal to the treaſurer, and that he by the cuſtomers *peteret et reciperet*; and this could not be better, as it was anſwered before. It was objected that it ſhould be by proclamation; and that needs not, for it toucheth not all the ſubjects, but only thoſe who are traders in merchandiſing, and the beſt and apteſt means to give them notice is by the cuſtomers, and it is alledged by the information expreſly, that he had notice. It was laſtly objected, that there ought to be a *quod damnum* in the caſe before the grant. That is not ſo; for that ſhall be only when the king granteth any thing which appertaineth to his prerogative, and not when he maketh charters to his ſervants to levy his duties due to his crown. Wherefore I think, that the king ought to have judgment, which was after given accordingly.

Argument of ſir Francis Bacon, *the king's ſollicitor, in the lower houſe of parliament, in* 1610, *for impoſitions by the crown*; *from volume* 2. *of the laſt* 4*to. edition of his works, p.* 223.

AND it pleaſe you, Mr. Speaker, this queſtion touching the right of impoſitions is very great; extending to the prerogative of the king on the one part, and the liberty of the ſubject on the other; and that in a point of profit and value, and not of conceit or fancy. And therefore, as weight in all motions increaſeth force, ſo I do not marvel to ſee men gather the greateſt ſtrength of argument they can to make good their opinions. And ſo you will give me leave likewiſe, being ſtrong in mine own perſuaſion, that it is the king's right, to ſhew my voice as free as my thought. And for my part, I mean to obſerve the true courſe to give ſtrength to this cauſe, which is, by yielding thoſe things which are not tenable, and keeping the queſtion within the true ſtate and compaſs; which will diſcharge many popular arguments, and contract the debate into a leſs room.

Wherefore I do deliver the queſtion, and exclude or ſet by, as not in queſtion, five things. Firſt, the queſtion is *de portorio*, and not *de tributo*, to uſe the *Roman* words for explanation ſake; it is not, I ſay, touching any taxes within the land, but of payments at the ports. Secondly, it is not touching any impoſt from port to port, but where *claves regni*, the keys of the kingdom, are turned to let in from foreign parts, or to ſend forth to foreign parts; in a word, matter of commerce and intercourſe, not ſimply of carriage or vecture. Thirdly, the queſtion is, as the diſtinction was uſed above in another caſe, *de vero et falſo*, and not *de bona et malo*, of the legal point, and not of the inconvenience, otherwiſe than as it ſerves to decide the law. Fourthly, I do ſet apart three commodities, wools, woolfells, and leather, as being in different caſe from the reſt; becauſe the cuſtom upon them is *antiqua cuſtuma.* Laſtly, the queſtion is not, whether in matter of impoſing the king may alter the law by his prerogative, but whether the king have not ſuch a prerogative by law.

The ſtate of the queſtion being thus cleared and freed, my propoſition is, that the king by the fundamental laws of this kingdom hath a power to impoſe upon merchandiſe and commodities both native and foreign. In my proof of this propoſition all that I ſhall ſay, be it to confirm or confute, I will draw into certain diſtinct heads or conſiderations which move me, and may move you.

The firſt is an univerſal negative. There appeareth not in any of the king's courts any one record, wherein an impoſition laid at the ports hath been overthrown by judgment; nay more, where it hath been queſtioned by pleading. This plea, *quod ſumma praedicta minus juſte impoſita fuit, et contra leges et conſuetudines regni hujus Angliae, unde idem Bates illam ſolvere recuſavit, prout ei bene licuit*, is *primae impreſſionis. Bates* was the firſt man *ab origine mundi*, for any thing that appeareth, that miniſtered that plea; whereupon I offer this to conſideration. The king's acts that grieve the ſubject are either againſt law, and ſo void; or according to ſtrictneſs of law, and yet grievous. And according to theſe ſeveral natures of grievance, there be ſeveral remedies. Be they againſt law? Overthrow them by judgment. Be they too ſtrait and extreme, though legal? Propound them in parliament. Foraſmuch then as impoſitions at the ports, having been ſo often laid, were never brought into the king's courts of juſtice, but ſtill brought to parliament, I may moſt certainly conclude, that they were conceived not to be againſt law. And if any man ſhall think that it was too high a point to queſtion by law before the judges, or that there ſhould want fortitude in them to aid the ſubject; no, it ſhall appear from time to time, in caſes of equal reach, where the king's acts have been indeed againſt law, the courſe of law hath run, and the judges have worthily done their duty.

As in the caſe of an impoſition upon linen cloth for the alnage; overthrown by judgment.

The caſe of a commiſſion of arreſt and committing of ſubjects upon examination without conviction by jury, diſallowed by the judges.

A commiſſion to determine the right of the exigenter's place, *ſecundum ſanam diſcretionem*, diſallowed by the judges.

The caſe of the monopoly of cards overthrown and condemned by judgment.

I might make mention of the juriſdiction of ſome courts of diſcretion, wherein the judges did not decline to give opinion. Therefore, had this been againſt law, there would not have been *altum ſilentium* in the king's courts. Of the contrary judgments I will not yet ſpeak; thus much now, that there is no judgment, no nor plea againſt it. Though I ſaid no more, it were enough, in my opinion, to induce you to a *non liquet*, to leave it a doubt.

The ſecond conſideration is, the force and continuance of payments made by grants of merchants, both ſtrangers and *Engliſh*, without conſent of parliament. Herein I lay this ground, that ſuch grants conſidered in themſelves are void in law: for merchants, either ſtrangers or ſubjects, they are no body corporate, but ſingular and diſperſed perſons; they cannot bind ſucceſſion, neither can the major part bind the reſidue: how then ſhould their grants have force? No otherwiſe but thus; that the king's power of impoſing was only the legal virtue and ſtrength of thoſe grants; and that the conſent of a merchant is but a concurrence, the king is *principale agens*, and they are but as the patient, and ſo it becomes a binding act out of the king's power.

Now if any man doubt that ſuch grants of merchants ſhould not be of force, I will alledge but two memorable records, the one for the merchants ſtrangers, the other for the merchants *Engliſh.* That for the ſtrangers is upon the grant of *chart. mercator.* of three pence in value *ultra antiquas cuſtumas*; which grant is in uſe and practice at this day. For it is well known to the merchants, that That which they call ſtranger's cuſtom, and erroneouſly double cuſtom, is but three pence in the pound more than *Engliſh.* Now look into the ſtatutes of ſubſidy of tonnage and poundage, and you ſhall find, a few merchandiſe only excepted, the poundage equal upon alien and ſubject; ſo that this difference or exceſs of three pence hath no other ground than that grant. It falleth to be the ſame in quantity; there is no ſtatute for it, and therefore it can have no ſtrength but from the merchants grants; and the merchants grants can have no ſtrength but from the king's power to impoſe.

For the merchants *Engliſh*, take the notable record in 17 *E.* III. where the commons complained of the forty ſhillings upon the ſack of wool as a mal-toll ſet by the aſſent of the merchants without conſent of parliament; nay, they diſpute and ſay it were hard that the merchants conſent ſhould be in damage of the commons. What ſaith the king to them? Doth he grant it or give way to it? No; but replies upon them, and ſaith, it cannot be rightly conſtrued to be in prejudice of the commons, the rather becauſe proviſion was made, that the merchants ſhould not work upon them, by colour of that payment to increaſe their price; in that there was a price certain ſet upon the wools. And there was an end of that matter: which plainly affirmeth the force of the merchants grants. So then the force of the grants of merchants both *Engliſh* and ſtrangers appeareth; and their grants, being not corporate, are but noun adjectives without the king's power to impoſe.

The third conſideration is of the firſt and moſt ancient commencement of cuſtoms; wherein I am ſomewhat to ſeek; for, as the poet ſaith, *ingrediturque ſolo, et caput inter nubila condit*, the beginning of it is obſcure: but I rather conceive that it is by common law, than by grant in parliament. For, firſt, Mr. *Dyer*'s opinion was, that the ancient cuſtom for exportation was by the common laws; and goeth further, that that ancient cuſtom was the cuſtom upon wools, woolfells, and leather. He was deceived in the particular, and the diligence of your ſearch hath revealed it; for that cuſtom upon theſe three merchandiſes grew by grant of parliament 3 *E.* I. But the opinion in general was ſound; for there was a cuſtom before that: for the records themſelves, which ſpeak of that cuſtom, do term it a new cuſtom, *alentour del novel cuſtome*, as concerning the new cuſtom granted, *etc.* This is pregnant, there was yet a more ancient. So for the ſtrangers, the grant in 31 *E.* I. *chart. mercator.* is, that the three pence granted by the ſtrangers ſhould be *ultra antiquas cuſtumas*, which hath no affinity with that cuſtom upon the three ſpecies, but preſuppoſeth more ancient cuſtoms in general. Now if any man think, that thoſe more ancient cuſtoms were likewiſe by act of parliament, it is but a conjecture. It is never recited *ultra antiquas cuſtumas prius conceſſas*, and acts of parliament were not much ſtirring before the great charter, which was 9 *H.* III. And therefore I conceive with Mr. *Dyer*, that whatſoever was the ancient cuſtom was by the common law. And if by the common law, then what other means can be imagined of the commencement of it but by the king's impoſing?

The fourth conſideration is of the manner that was held in parliament in the aboliſhing of impoſitions laid: wherein I will conſider, firſt, the manne of the petitions exhibited in parliament; and more ſpecially the nature of the king's anſwers.

For the petitions I note two things; firſt, that to my remembrance there was never any petition made for the revoking of any impoſition upon foreign merchants only. It pleaſed the Decemviri in 5 *E.* II. to deface *chart. mercator.* and ſo the impoſition upon ſtrangers, as againſt law. But the opinion of theſe reformers I do not much truſt, for they of their gentleneſs did likewiſe bring in doubt the demy-mark, which it is manifeſt was granted by parliament, and pronounced by them the king ſhould have it, *ſ'il avoit le droit*: but this is declared void by 1 *E.* III. which reneweth *chart. mercator.* and void muſt it needs be, becauſe it was an ordinance by commiſſion only, and that in the time of a weak king, and never either warranted or confirmed by parliament. Secondly, I note that petitions were made promiſcuouſly for taking away impoſitions ſet by parliament as well as without parliament; nay, that very tax of the *neufieſme*, the ninth ſheaf or fleece, which is recited to be againſt the king's oath and in blemiſhment of his crown, was an act of parliament, 14 *E.* III. So then to infer that impoſitions were againſt law, becauſe they are taken away by ſucceeding parliaments, it is no argument at all; becauſe the impoſitions ſet by the parliaments themſelves, which no man will ſay were againſt law, were nevertheleſs afterwards pulled down by parliament. But indeed the argument holdeth rather the other way, that becauſe they took not their remedy in the king's courts of juſtice, but did fly to the parliament, therefore they were thought to ſtand with law.

Now for the king's anſwers. If the impoſitions complained of had been againſt law, then the king's anſwer ought to have been ſimple, *tanquam reſponſio categorica, non hypothetica*; as, let them be repealed, or, let the law run. But contrariwiſe, they admit all manner of diverſities and qualifications: for,

Sometimes the king diſputeth the matter and doth nothing; as 17 *E.* III.

Sometimes the king diſtinguiſheth of reaſonable and not reaſonable, as 38 *E.* III.

Sometimes he aboliſheth them in part, and letteth them ſtand in part, as 11 *E.* II. the record of the *mutuum*, and 14 *E.* III. the printed ſtatute, whereof I ſhall ſpeak more anon.

Sometimes that no impoſition ſhall be ſet during the time that the grants made of ſubſidies by parliament ſhall continue, as 47 *E.* III.

Sometimes that they ſhall ceaſe *ad voluntatem noſtram.*

And ſometimes that they ſhall hold over their term prefixed or aſſeiſſed.

All which ſheweth, that the king did not diſclaim them as unlawful, for *actus legitimus non recipit tempus aut conditionem.* If it had been a diſaffirmance by law, they muſt have gone down *in ſolido*; but now you ſee they have been tempered and qualified as the king ſaw convenient.

The fifth conſideration is of that which is offered by way of objection; which is, firſt, that ſuch grants have been uſually made by conſent of parliament; and ſecondly, that the ſtatutes of ſubſidies of tonnage and poundage have been made as a kind of ſtint and limitation, that the king ſhould hold himſelf unto the proportion ſo granted and not impoſed further; the rather becauſe it is expreſſed in ſome of theſe ſtatutes of tonnage and poundage, ſometimes by way of proteſtation, and ſometimes by way of condition, that they ſhall not be taken in precedent, or that the king ſhall not impoſe any further rates or novelties, as 6 *R.* II. 9 *R.* II. 13 *H.* IV. 1 *H.* V. which ſubſidies of tonnage and poundage have ſuch clauſes and cautions.

To this objection I give this anſwer. Firſt, that it is not ſtrange with kings, for their own better ſtrength, and the better contentment of their people, to do thoſe things by parliament, which nevertheleſs have perfection enough without parliament. We ſee their own rights to the crown which are inherent; yet they take recognition of them by parliament. And there was a ſpecial reaſon why they ſhould do it in this caſe; for they had found by experience, that, if they had not conſent in parliament to the ſetting of them up, they could not have avoided ſuit in parliament for the taking of them down. Beſides, there were ſome things requiſite in the manner of the levy for the better ſtrengthening of the ſame, which percaſe could not be done without parliament; as the taking the oath of the party touching the value, the inviting of the diſcovery of concealment of cuſtom by giving the money to the informer, and the like.

Now in ſpecial for the ſtatutes of ſubſidies of tonnage and poundage, I note three things. Firſt, that the conſideration of the grant is not laid to be for the reſtraining of impoſitions, but expreſsly for the guarding of the ſea. Secondly, that it is true, that the ancient form is more peremptory, and the modern more ſubmiſs; for in the ancient form ſometimes they inſert a flat condition that the king ſhall not further impoſe; in the latter they humbly pray, that the merchants may be demeaned without oppreſſion, paying thoſe rates. But whether it be ſupplication, or whether it be condition, it rather implieth the king hath a power; for elſe both were needleſs, for *conditio annectitur ubi libertas praeſumitur*, and the word oppreſſion ſeemeth to refer to exceſſive impoſitions. And thirdly, that the ſtatutes of tonnage and poundage are but *cumulative* and not *privative* of the king's power precedent, appeareth notably in the three pence overplus, which is paid by the merchants ſtrangers, which ſhould be taken away quite, if thoſe ſtatutes were taken to be limitations; for in that, as was touched before, the rates are equal in the generality between ſubjects and ſtrangers; and yet that impoſition, notwithſtanding any ſuppoſed reſtriction of theſe acts of ſubſidies of tonnage and poundage, remaineth at this day.

The ſixth conſideration is likewiſe to an objection, which is matter of practice, *viz.* that from *R.* II.'s time to Q. *Mary*, which is almoſt 200 years, there was an intermiſſion of impoſitions, as appeareth both by records and the cuſtom-books.

To which I anſwer; both that we have in effect an equal number of years to countervail them, namely, 100 years in the times of the three kings *Edwards* added to 60 of our laſt years; and *extrema obruunt media*; for we have both the reverence of antiquity and the poſſeſſion of the preſent times, and they but the middle times. And beſides, in all true judgment there is a very great difference between an uſage to prove a thing lawful, and a non-uſage to prove it unlawful: for the practice plainly implieth conſent; but the diſcontinuance may be, either becauſe it was not needful, though lawful; or becauſe there was found a better means, as I think it was indeed in reſpect of the double cuſtoms by means of the ſtaple at *Calais.*

Tranſcript of part of ſir John Davis's *manuſcript argument for impoſitions by the crown, from* Carte's Hiſtory, *vol.* 4. *p.* 191.—[*From the title to the printed treatiſe by ſir* John Davis *on the ſame ſubject, it appears to have been written the latter end of the reign of* James *the firſt.*]

THE king is the fountain of all juſtice, as well commutative as diſtributive. The firſt is exerciſed chiefly in the ordering and government of trade and commerce; wherein he is to do juſtice, or procure it to be done, not only to his ſubjects who make contracts real or perſonal within the land, but to his merchants alſo, who trade with foreign nations, and to ſtrangers who traffick in his dominions. For the adminiſtration of commutative juſtice within the land, the king receives various profits, which grew firſt by way of impoſition; as fines for original proceſs to recover debts, fines for paſſing lands from one to another in his courts, and in common recoveries, and the ſilver *pro licentia concordandi*, the profits of the ſeals in his courts for all manner of writs, &c. nor is the taking of theſe and the like duties any breach of *Magna Charta*; having been impoſed by the king long before that charter was made, and taken as a recompence for the charge of the crown in maintaining the courts of juſtice. There is the ſame reaſon for his charge in doing juſtice, and procuring juſtice to be done abroad to merchants, whoſe commerce is for the moſt part out of the land, being recompenced out of the merchandizes exported and imported, not according to the will of the merchant, or the pleaſure of the people, but in proportion to the king's charge, which being beſt known to himſelf, it is fit that the recompence ſhould be fixed by himſelf. All leagues, truces, and treaties of ſtate, with foreign princes (in which the public trade and commerce of merchants is ever included) are made and concluded at his charge; he maintains a court of admiralty for deciding all marine cauſes, which generally concern merchants; his council of ſtate is applied to, in caſe of injuries contrary to the ſenſe of treaties; he is at a vaſt expence in keeping reſident embaſſadors in different courts, chiefly for procuring juſtice to be done our merchants; and in caſe of their being wronged and denied juſtice abroad, the king, by his prerogative, grants them letters of marque or repriſal, to right themſelves; and if thoſe injuries are multiplied or continued with an high hand, it is his office directly to denounce and make war on ſuch prince or ſtate, as refuſes to do juſtice to his merchants. So king *Charles* had lately done againſt *France.* It was for this cauſe (as *Appian* ſays) the *Romans* began the firſt *Punic* war; and *Cicero (a)* affirms, that they frequently waged war for the injurious treatment of their merchants. The making of war and peace is an undiſputed prerogative of the crown: he maintains a fleet, to protect merchants from ſpoil and piracy *(b)* (which the *Romans* thought a juſt reaſon for cuſtoms) at a charge too great to be defrayed by the poundage laid by *Edward* I. at the rate of three pence, though ſilver being then at twenty pence an ounce, the groat was intrinſically worth near a ſhilling, and it being levied at this laſt rate, in the time of *Edward* IV. *(c)* was found inſufficient for the maintenance of his navy. The flow of money from the *Eaſt* and *Weſt Indies* vaſtly enhanced the price of merchandize, and the charges of the crown, as well in all other articles as in that of the royal navy. Hence aroſe a neceſſity of new impoſitions, it not being fit, that the king's charges, in ſupporting the trade of merchants, ſhould be unlimited and infinite, and the duty on merchandize be ſtinted and reſtrained to ſuch a proportion only as the ſubject ſhall be pleaſed to grant him. Subjects may live as privately as they pleaſe; but a king, by reaſon of the majeſty of his eſtate, cannot well abridge his charge, and would be in a poor ſituation, if he had no power of himſelf, without their leave, to improve his revenue.

As he protects the merchants, and gives them convoys at ſea, he grants them ſafe conducts at land (no other being allowed by the law of nations, or acknowledged by *Magna Charta)* and receives their ſhips into his harbours. The king is the *cuſtos*, or guardian, of the whole realm, but he is more particularly lord of the ports, not only of the *Cinque Ports*, where he appoints a warden to exerciſe his juriſdiction, but of all the reſt in the kingdom; and our kings have ever enjoyed the prerogative of opening and ſhutting them at their pleaſure. In the reign of *Edward* III. great part whereof was ſpent in war, there are ſeveral petitions in the rolls of parliament for opening the ſea, when it was ſhut by his prerogative; yet he never opened it again, without laying an extraordinary impoſition upon merchandize. This prerogative was founded on excellent reaſon; for commerce is not to be held with all perſons. Elſe enemies might diſcover the ſecrets of the realm, and corrupt religion or the manners of the people. Nor are all things fit to be exported, particularly ſuch as the kingdom cannot ſpare, or may be of advantage to the enemy, as corn in a time of dearth, warlike ſtores in war, &c. Embargos are of the ſame nature with the ſtopping of ports, and equally appropriated to the king, being an incident annexed to his prerogative of making war and peace. When war is denounced, all trade is ſtopped between the nations engaged therein; and if a king can ſtop it, he muſt of courſe have a power to open it, and lay reaſonable impoſitions on merchants for doing ſo. It is a rule in law, he that may do more may do leſs; and he, that can forbid people to trade or paſs at all, may diſpenſe with the prohibition, and give them leave to traffick under certain conditions. Our kings have forbid *(d)* trade, ſometimes generally, ſometimes between us and particular nations, ſometimes for particular merchandizes only; of all which there are examples enough in our records and hiſtories. All companies of merchants are inſtituted by the king; and he that gives their privileges may likewiſe preſcribe the terms, on which they are to enjoy them, excluſive of others. The king is lord of the ſea about this iſland, not only as to juriſdiction and protection, but as to property *(e).* Hence all land drained from the ſea belongs, by the common law, to the crown (as *Stamford (f)* ſays) *de jure gentium*; and all ſeas belong to the next potentate, at leaſt ſo long as they are formidable: and all navigable rivers, being like arms of the ſea, ſo far as the tide floweth. Hence, antecedent to any ſtatute, the king *(g)* might reſtrain all his ſubjects, of what quality ſoever, from going beyond ſea, as *Edward* I. did in the 22d year of his reign; and the like prohibitions were *(h)* made in thoſe of his ſucceſſors. If he allows merchants to paſs to and fro, to come in and out of his ſtreams and ports, he may certainly preſcribe the conditions, and what duties they ſhall pay. Trade was carried on by the *Engliſh* many hundreds of years, before there was ſuch a thing known as an houſe of commons: it was carried on with ſo great profit, that our riches ſerved for admiration to other nations, even to the *Normans* at the time of the Conqueſt: but if our kings had not the ſame authority, as other princes, both in commerce, and in impoſitions, it could never have been carried on with advantage. They could not without it have held the balance of trade upright, or have preſerved an equality between their own ſubjects and foreigners. Our neighbours might otherwiſe drain off all our wealth, and ruin our trade at their pleaſure: and their princes, having the ſole right to lay impoſitions, might manage the market ſo, that their ſubjects ſhould ſell dear, and buy cheap, unleſs our kings had the ſame powers to prevent the ill effects of their meaſures, and the ruin of our commerce. Thus when the ſtate of *Venice* laid a ducat upon every hundred weight of currants carried out of their dominions by the *Engliſh* merchants, queen *Elizabeth*, by a ſpecial patent, in the 12th year of her reign, enabled her merchants trading to the *Levant*, to levy a noble upon every hundred weight of currants brought into *England* by any merchant ſtranger. Thus when the *Hanſe Towns* had got the emperor to baniſh all *Engliſh* merchants out of *Germany*, the ſame queen cauſed their houſe called the *Steel-yard* to be ſeized, forbade them to traffick with any of her ſubjects, and ordered their merchants to quit *England*, the ſame day that the *Engliſh* were to depart out of the empire. Nothing is more evident, than the neceſſity of our kings having the ſame power, in impoſitions as well as commerce, as other princes; they always exerciſed it well, and there was no danger of their abuſing it, whilſt the beſt part of their revenue depended thereon: and whoever will conſider, how light, eaſy, reaſonable, and calculated for the benefit of trade, the impoſitions of our kings were, muſt be allowed an uncommon meaſure of public ſpirit, if he is very fond of the change into heavier, becauſe they are parliamentary impoſitions.

(a) *Orat. pro lege Manilia.*

(b) *Pliny*'s *N. H.* lib. xix. *c.* 4.

(c) *Stat.* 12 *E.* IV. *c.* 5.

(d) See *Rot. Parl.* 2 *E.* II. *m.* 18. *Rot. Fin.* 2 *E.* III. *m.* 17. *Clauſ.* 10 *E.* III. *m.* 3. *d.* 17 *H.* VI. *in Scacc.*

(e) So *Baldus* affirms, *De jure gentium, diſtincta eſſe dominia in mari, ſicut in terra arida—mare attribuitur terræ circumſtanti.—Pedagium in mari debet ſolvi, ſicut in terra, ſi ſit impoſitum per dominum maris*; and other learned civilians aſſert, that the lordſhip of the ſea contains in it, *Jus navigandi, jus piſcandi, et jus imponendi vectigalia pro utroque.*

(f) Book of prerogative of the crown.

(g) 22 *Aſſiſ.* p. 93. *Dier.* 119. *a.* See *Writs.*

Theſe are ſome of the reaſons that may be aſſigned for the royal prerogative in point of laying impoſitions, which all monarchs enjoyed by the law of nations, and which the civil law conſidered as ſo inherent in the ſcepter, that it could not be taken away without the deſtruction of the ſcepter. In fact, it had been always exerciſed in this iſland; the *Britiſh* princes, whoſe territories were ſituated on the ſea, laid (as *Strabo* ſays) heavy duties on the native commodities, which the *Gaulic* merchants tranſported hence to their own country: and ſome pieces of the tribute money paid to *Cunobeline*, with his image and ſuperſcription, are ſtill preſerved. The *Romans* laid the like impoſitions; the power of laying them was incident to the imperial authority; and when the empire was overrun by the *Goths* and other northern nations, the princes thereof ſucceeded to, and exerciſed the ſame right, in all the countries which they conquered. The *Saxon* kings did the ſame here: and even *Magna Charta* atteſts, that there were *ancient* and *right cuſtoms* paid by merchants, before the making of that charter, and before an houſe of commons was in being. Theſe cuſtoms were indeed but ſmall; ſuch as half a mark on a ſack of wool, or 300 woolfells, a mark on a laſt of leather, thoſe on tin and lead were proportionably eaſy: and when king *John* laid 8*d.* a ton on wine; and *Edward* I. in his *Carta Mercatoria*, laid 3*d.* in the pound upon merchandize imported by ſtrangers, generally called the *petit* cuſtom, with an increaſe of all other duties on them; the one was as much a tonnage, and the other a poundage, as if higher rates had been impoſed; and the queſtion is only about the king's right in the thing itſelf, not about the *quantum* of the impoſition. Nor was the difference in point of the rate or quantity any thing conſiderable, for a poundage of 3*d.* in thoſe days was more worth to the crown, than that of a ſhilling now; and the duty of two ſhillings a tun upon all wine imported by ſtrangers (which *Edward* I. impoſed by the ſame charter) was, each ſhilling weighing then as much as three now, double the value of the preſent tonnage. Thoſe who were for ſtripping the crown of this branch of its authority, objected to *Edward*'s charter in this point, that it was ſuſpended by his ſucceſſor's writ *(i)*, in the 3d year of his reign, and in the 5th repealed *(k)* by ordinance: but this was done not by the king and parliament, but by certain rebellious barons, who aſſumed the government of the realm, and called themſelves *Ordainers*. It is well known, how turbulent a reign this was, and how weak a prince ſate upon the throne, ſcarce ever maſter of himſelf, and ſo diſtreſſed by this violence of the barons (ſeveral of whoſe ordinances were treaſonable) that he was forced to take up large ſums of money by way of loan *(l)* from the merchants, which being never repaid, the merchants received thence greater detriment, than they would have done by paying double the poundage impoſed by his father. But no ſooner did *Edward* III. get poſſeſſion of the crown, than *(m)* he revived his grandfather's charter, and ordered by his writs, the poundage and other cuſtoms therein contained to be levied to his uſe, notwithſtanding the ordinances made, not by the king his father, but *per quoſdam magnates*.

Edward III. was a great prince; and being embarked in expenſive wars during the moſt part of his reign, he put extraordinary duties, ſometimes of 4*s.* ſometimes 5*s.* upon wool, and the like upon other commodities. This gave occaſion to ſeveral petitions of the commons in parliament, upon which a greater ſtreſs hath been laid than they deſerve. It doth not appear, that theſe petitions were of right, but rather of grace and favour; they are far from inferring, either that the people had received wrong, or that the king had no right to lay impoſitions. It never behoved any prince more, than *Edward*, to be well with his people, to whom he was obliged to apply every year for the ſupport of his wars; he was infinitely careful in this reſpect: and his anſwers to their petitions were generally gracious, but wary and circumſpect. On ſome heads he was ſilent; on others, his anſwers were general or doubtful; ſometimes he granted them in part, for a certain time, and on condition he received a greater recompence; nor did he ever remit any impoſition, without receiving a ſubſidy of more conſiderable value. In his 14th year *(n)*, the *commons* prayed him not to take above the half mark on a ſack of wool, nor more than the old cuſtoms on lead, tin, and leather. In his anſwer, he granted their requeſt, not for tin or lead, but only for wool and leather; yet this grace was not to take place, till after the *Whitſontide* to come twelvemonth; it was granted but in part, to *Engliſhmen* only, not to foreign merchants: and yet though all theſe new impoſitions were to continue for above a year, he got a parliamentary grant, not only of 20,000 ſacks of wool, but of the 9th lamb, the 9th fleece of wool, and the 9th ſheaf of corn, of all perſons, both clergy and laity, throughout the kingdom. In his 29th year, *(o)* the commons wanting to get the 40*s.* duty, laid on a ſack of wool, to be taken off, it was agreed in parliament, that the king ſhould have a greater ſubſidy out of wool and leather for ſix years, *ſo as, during that time, he laid no other impoſition or charge upon the commons.* This is evidently a conditional agreement *(p)*, and the people would ſcarce have bought it ſo dear, if the king had not a right to lay them; and if he ſuſpended his power of impoſing for ſix years, it was in conſideration of a recompence of greater value. The puniſhments of lord *Latimer*, *John Pechy*, and *Richard Lions*, in the fiftieth of this king, when through age and grief at the Black Prince's death, he was become weak, ſickly, languid, melancholy, and almoſt ſtupid, made as little to the purpoſe of thoſe who urge them againſt the royal power in impoſitions. *Pechy* had got a patent, that none ſhould ſell ſweet wines in the city of *London*, but himſelf, his deputies, and aſſigns; and under colour thereof, extorted ten groats for every pipe of ſweet wines ſold by others within the city; it doth not appear that he had any warrant for it from his patent, and his being puniſhed for abuſing it, and doing things of his own head, is no argument againſt the king's right of laying the like impoſition. *Latimer* had, of his own authority, laid ſeveral impoſitions on merchandize at *Calais*, to the great decay of the ſtaple there. He had likewiſe played the ſtock-jobber in buying the debentures, tallies, and ticquets, due from the king to his ſoldiers and penſioners, at a great diſcompt, giving very little to the parties, and yet, in deceit of his majeſty, had an entire allowance for them in the *Exchequer*. He had alſo defrauded the king of the pay ſent to his forces in *Bretagne*, had ſold a large quantity of proviſions for his army there, converting the money to his own uſe; and had delivered up the towns of *S. Sauveur* in *Normandie*, and *Becherel* in *Bretagne*, to the enemy, not without the ſuſpicion of corruption and treaſon. He was cenſured for all theſe crimes in the groſs, ſo that nothing can be drawn thence againſt the right of the crown in laying impoſitions on merchandize; eſpecially ſince *Latimer* was charged with laying the impoſt at *Calais*, without any warrant, and purely of his own authority. *Lions*, a farmer of the cuſtoms, was accuſed *(q)* of ſetting on wool and other merchandize, certain new impoſitions without aſſent of parliament, converting them to his own uſe without controul, the lord treaſurer not being acquainted therewith; and of aſſuming to himſelf in divers other things, as a king. He pleaded indeed, that he laid them by the king's command, but he produced no warrant, nor could he have any without the treaſurer's knowledge: and he was juſtly puniſhed by fine, ranſome, and impriſonment. The king's right could not be any ways affected by this ſentence on a man, who had acted of his own head; eſpecially ſince his charge was, 'that being but a ſubject, he had taken 'upon him, *as a king*, in divers things, particularly in laying impoſi'tions;' which intimates ſufficiently, that a king might do it, but not a ſubject. This is ſtill more plain in the bill exhibited by the commons in this parliament *(r)*, praying, 'that thoſe who ſhould ſet new impo'ſitions by their own authority, *accroaching to themſelves royal power*, 'might have judgment of life and member;' than which there cannot be deſired a plainer acknowledgment, by parliament, that the ſetting of impoſitions belonged to the crown, and was a mark of ſovereignty and royal power.

(h) 4 *E.* III. 21 *E.* III. 16 *R.* II. 17 *H.* VI. *(i) Clauſ.* 3 *E.* II. *m.* 23. *(k) Rot. Ordinat.* 5 *E.* II. *(l) Rot. Fin.* 11 *E.* II. *m.* 12. *(m) Rot. Fin.* 2 *E.* III. *m.* 30. *(n) Rot. Parl.* 14 *E.* III. *c.* 21. *(o) Rot. Parl.* 29 *E.* III. *n.* 11. *(p)* The like conditional agreements were made in 6 *E.* III. *Rot. Parl. n.* 4. 13 *E.* III. *Rot. Parl. n.* 5. 18 *E.* III. *Rot. Parl. n.* 20. 36 *E.* III. *Rot. Parl. n.* 26. In 25 *E.* III. *Rot. Parl. n.* 25, 26, 27. the commons petition againſt an exceſſive impoſition on woolfells, and deſire that only the old cuſtom be paid: the king's anſwer was, *Ancient cuſtoms ought not to be withdrawn.* In 38 *E.* III. (*Rot. Parl. n.* 26.) they petitioned for the repeal of an impoſition of ten groats on every ſack of wool at *Calais*, and of all unreaſonable impoſitions; an anſwer was given to the laſt of theſe points, but none at all to the former. In 6 *E.* III. (*Rot. Parl. n.* 4.) on a petition for the remitting of impoſitions, the king ſaid, 'He would aſſeſs no ſuch talliages for the future, 'but ſuch as had been in the time of his anceſtors, and as it ought to be by reaſon.' In 13 *E.* III. (*Rot. Parl. n.* 13.) there was a petition againſt a maletolt of wool: but no anſwer was given. *(q) Rot. Part,* 50 *E.* III. *n.* 17, 18, 19, 20. *(r) Ibid. n.* 192.

Mr. Hakewill'*s argument in the lower houſe of parliament, in* 1610, *againſt impoſitions by the crown.* (a)

Mr. Speaker:

The queſtion now in debate amongſt us is, Whether his majeſty may, by his prerogative royall, without aſſent of parliament, at his own will and pleaſure, lay a new charge or impoſition upon merchandizes, to be brought into, or out of this kingdome of England; *and enforce merchants to pay the ſame.*

I MUST confeſſe, that when this point was firſt ſtirred mongſt us, and that wee, not contented to ſeeke redreſſe for the exceſſe of the preſent impoſitions, reſolved to proceed farther, by calling his majeſties right of impoſing into queſtion, I was very ſory: for I ſaw we were then in a faire way to have obtained a very great abatement of the impoſitions that now are; and beſides, we had his majeſties promiſe never to lay any more but in parliament time, by the advice and free conſent of his ſubjects, repayring hither from all parts of the realme. This hope of a preſent eaſe, and gracious promiſe for the time to come, gave me, I confeſſe, a full ſatisfaction; eſpecially, ſeeing I was confidently perſwaded, that his majeſties right to impoſe was very cleere and not to be diſputed; and that therefore by drawing into queſtion the right, wee might give his majeſty juſt occaſion to withdraw from us his gracious purpoſe of the preſent abatement, as alſo his promiſe for the time to come. For, ſyr, when the caſe of *Bates*, who as you know was called into queſtion for refuſing to pay the impoſition laid upon currants, was argued in the *Exchequer*, in which caſe his majeſties right to impoſe was ſolemnly diſputed, and there reſolved for his majeſty, I was then preſent at all the arguments both at the bar and at the bench; and I doe confeſſe that by the weighty and unanſwerable reaſons, as I then conceived them, of thoſe grave and reverend judges, ſitting in their ſeate of juſtice, I was much perſwaded. But by thoſe many records vouched by them, I was altogether overcome, and as it were vanquiſh't to yeeld to them; for ſyr, *ratio ſuadet, authoritas vincit.* But though I were then, and when the queſtion was firſt moved in this houſe, very confident, yet as you ſhall perceive anon, I was not very conſtant in that opinion; for being, amongſt others, imployed by this houſe to make ſearch in the *Exchequer* for records, which, by the practiſe of former ages, might guide our judgements in this weighty point, and having diligently collected the arguments made in the *Exchequer*, and not only ſo, but compared my owne collections with reports thereof made by divers other of my friends, and finding that ſome of the records urged in thoſe arguments were untruly vouched, and many miſaplyed, I then began to ſtagger in my opinion, and preſently fell to examine the weight of the reaſons which had been alledged, which in my poore cenſure, I found not of ſtrength ſufficient, without the full concurrence of cleere preſidents of former times, to maintaine the judgement given, or my opinion grounded thereupon. And therefore, ſyr, in love to the truth I did forſake my former opinion as erroneous, and do now embrace the contrary, that is, *that his majeſtie hath no right to impoſe*, and ſo am now become a convert. Thoſe reaſons that moved mee thus to change, and the weakeneſſe which I diſcovered in the reaſons alledged againſt the opinion which I now hold, I will, with your patience, open unto you, and will therein follow the commandement of *Chriſt* to *Peter, beeing converted, ſeeke to convert my brethren.*

Fleming Ch. Bar. *Clarke. Savil.*

As touching the judgement in the *Exchequer* ſtanding yet in force, ſo often caſt as a block in our way, though I much reverence the perſons of thoſe yet living, and the memory of thoſe that are with God, who gave the judgement: yet ſeeing (as I hope I ſhall bee able evidently to prove) the ſame to bee againſt the great charter of our liberties, I can eſteeme no otherwiſe of it than the ſtatute of 25. *Ed.* 1. *cap.* 10. pronounceth of all ſuch judgements; that is, that it is void and to be held for nought. Thus much I thought good to ſay by way of preamble or introduction to the matter. Now, by your favours, I will enter into the debate of the queſtion; in handling of which I will purpoſely avoid the repetition of any thing that hath been ſpoken by any man that hath argued before, as knowing in what preſence I ſpeake. That I may the better convey my ſelfe through my argument, and be the better conceived of you that are to heare me, I will divide that which I have to ſay into certain parts, which I will proſecute in order.

Firſt, I hold it neceſſary to conſider, whether cuſtom were due to the king by the common-law.

Secondly, admitting it to bee due by the common-law, whether it were a ſumme certain, not to be increaſed at the kings pleaſure or otherwiſe.

Thirdly, ſuppoſing that by the common-law the king might, by way of impoſition, have increaſed his cuſtom at his own will, by his abſolute power, without aſſent in parliament, whether or no hee bee not bound to the contrary by acts of parliament. In the handling of which part, I will conſider the ſtrength of every act of parliament hitherto vouched to this purpoſe, anſwering, as I goe, ſuch objections as have been made againſt thoſe ſtatutes by ſuch as have maintained that the king is not bound by them. I will alſo add a ſtatute or two as yet not remembered by any.

Laſtly, I will diſcover unto you the weakneſſe of ſuch reaſons as have been made in maintenance of the kings right to impoſe.

In the proſecuting of which parts I will, as occaſion is offered, give ſome anſwere to that which hath been laſt ſpoken; as knowing it to be expected at my hands.

By ſir *Robert Hitcham.*

(a) This argument was printed in 1641, with this title, 'The Libertie of the Subject: againſt the pretended Power of Impoſitions. Maintained by an argument in parlia-
' ment *an.* 7°. *Jacobi Regis.* By *William Hakewill*, of *Lincolns Inne*, Eſq.'

It was preceded with the following addreſs from Mr. *Hakewil* to the reader. ' Being very ſenſible of a great injury lately done mee, by the extreme falſe printing of a
' ſmal treatiſe of my compoſing, ſtoln out without my conſent, and hearing accidentally that ſome part of this alſo had paſſed the preſſe, I thought good for the preventing
' of the like wrong to ſtay the forwardneſſe of the printer untill I had reviewed and corrected it by mine owne notes. For my part, I ſhould have been contented altogether
' to have reſtrained it, if I might; but now ſeeing it muſt abroad, I ſhall not bee aſhamed to let it beare my name, and owne the errors of it my ſelf (thoſe of the preſſe
' excepted) though heretofore it had gayned ſo much reputation by ſome, as it was attributed to a worthier author. Some there are yet ſurviving that heard this argument
' about thirty yeeres ſince in the *commons-houſe* of *parliament*; but it hath now extended itſelfe beyond the probable proportion of a ſpeech or argument, by the inſertion
' of many records and acts of parliament more at large, which, at the delivery of it, were but meerely quoted.

' The endeavour of it is to prove, that the juſt prerogative of our kings never warranted them to raiſe monies at their pleaſure, by laying a charge on merchandize to bee
' exported or imported, without aſſent of parliament. But, on the contrary, the ſetled lawes of the land, the preſidents of former ages, the acts of our moſt neceſſitous
' and powerfull princes, and indeed every thing requiſite to make the truth apparent, doe as it were unanimouſly conſent to diſcharge us of this unjuſt and heavy burthen.

' And you ſhall ſee herein, how the policy of active princes hath by many waies attempted to undermine thoſe fortifications, which the wiſdom of our anceſtors hath
' rayſed to maintaine themſelves from this kinde of aſſault. You ſhall ſee with how great difficulty their prevailing was withſtood. And (which is the glory of truth) you
' ſhall finde thoſe deſignes, which were laid to overthrow our right, mainly to make for the evidence and confirmation of it. For, whatever unjuſt impoſitions were either
' exacted by a pretended lawfullneſſe, or ſet up by a commanding power, were by complaint in parliaments preſently following taken down, and remain on record as (wit-
' neſſes againſt themſelves) unlawfull, and againſt our libertie.

' Theſe reaſons and arguments of mine (how meane ſoever) thoſe times, wherein I urged them, accepted favorably; and ſince, in their private paſſage in manuſcripts,
' were entertained in many judicious hands, which made mee ſomewhat enlarge the conceit that before I had of them. And now ſeeing neceſſitie enforceth mee to make
' them more publique, I muſt adventure them to the cenſure of theſe nice times. Beneficiall (happily) they may be to ſome, prejudiciall I hope to none. In which confi-
' dence (having the leave of authority) they have likewiſe my leave to goe abroad.'

Vale.

W. H.'

There are alſo prefixed the following heads of the argument:
' 1. That there was ever ſome cuſtome due to the king by the common-law.
' 2. That it was a ſum certaine by the common-law.
' 3. That all the revenues which the common-law giveth to the king (out of the intereſt of the ſubject) are certaine, or reduceable to a certainty by ſome legall courſe,
' and none left to the kings pleaſure.
' 4. The reaſons why the law requireth ſuch certainty in thoſe revenues which the king hath out of the intereſt of the ſubject.
' 5. Examples of revenues given by the common-law to the king, out of the intereſt of the ſubject, and that they are all certaine.
' 6. Anſwer to an objection, that the king may lay impoſitions upon extraordinary occaſions.
' 7. Arguments drawn from the actions of our kings, that they had no power to impoſe.
' 8. Arguments drawn from the forbearance of our kings to lay impoſitions, notwithſtanding their urgent occaſions.
' 9. The difference between the preſidents urged, of impoſitions laid by the antient kings, and thoſe which are now laid.
' 10. A particular anſwer to the impoſition of 3*d.* in the pound laid upon merchant-ſtrangers by *Charta Mercatoria*, 31 *Ed.* 1.
' 11. The urgent occaſions which *Ed.* 2. had to lay impoſitions, and yet how he forbore.
' 12. The ſeverall policies uſed by *Ed.* 3. for the introducing of the power of impoſing. 1. Impoſitions taken by colour of a voluntary grant from merchants. 2. By way
' of diſpenſation with penall lawes. 3. By way of ordinance in parliament. 4. By colour of a loane by merchants. 5. By grants of merchants for liberties granted to them.
' 6. By expreſſe and direct commandement; with ſeverall anſweres to all thoſe ſeverall wayes.
' 13. In what ſtatutes impoſitions are mentioned after *Edw.* 3. time, untill Qu. *Maries*; and upon what occaſions, and how to be interpreted.
' 14. The ſignification of the words *impoſition, toll, maletolt, cuſtuma & conſuetudo magna & parva.*
' 15. No impoſition laid from *Ed.* 3. time till Qu. *Maries.*
' 16. What urgent occaſions all the kings from *Ed.* 3. till Qu. *Maries* time, had to lay impoſitions, and yet did it not. *Rich.* 2. *Hen.* 4. *Hen.* 5. *Hen.* 6. *Edw.* 4. *Hen.* 7.
' *Hen.* 8. *Edw.* 6. with a corollary of all thoſe times and occaſions.
' 17. The impoſitions laid by Qu. *Mary*, and how anſwered.
' 18. Admitting the kings had power by the common-law to lay impoſitions, yet how they are barred by ſtatutes.
' 19. *Magna Charta*, *cap.* 30. urged againſt impoſitions, and the objection made againſt it, anſwered. 1 Objection, that it extendeth onely to merchant-ſtrangers.
' 2. That it was made onely againſt taxes within the land. 3. That by the exception in the end of the ſtatute, the kings prerogative is ſalved.
' 20. The ſtatute *de Tallagio non concedendo* urged, with the anſwers to the objections made thereunto. The expoſition of the words *tallage, ayde, ſubſidie.*
' 21. The ſtatute of 25 *Ed.* 1. *cap.* 7. urged againſt impoſitions, and cleered from objections: 1. That it is againſt the exceſſe of impoſitions, and not againſt the right.
' 2. That it is onely againſt impoſitions on woolls.
' 22. The ſtatute of 14. *Ed.* 3. *cap.* 21. urged againſt impoſitions, and cleered from objections. That it extendeth onely to impoſitions within the land, and not upon
' merchandizes, anſwered, with an expoſition of the word *charge.*
' 23. Anſwers to the reaſons urged in maintenance of impoſitions: 1. That becauſe it cannot appeare that the ancient cuſtomes were ſet by parliament, therefore they
' were impoſed by the king. The antiquity of parliaments.
' 24. Anſwer to the ſecond reaſon urged for impoſitions, that the king may totally reſtraine importation and exportation, and therefore may reſtraine *ſub modo* by laying
' impoſitions.
' 25. Anſwer to the third reaſon, that the ports are the kings, and that he may open and ſhut them on what conditions he pleaſeth.
' 26. Anſwer to the fourth reaſon, that the king is bound to protect merchants, and ſafeguard the ſeas, and that therefore he may lay moderate impoſitions, for raiſing
' of money to defray his charges.
' 27. Anſwer to the fifth objection, that all forreign princes have power to impoſe; and if our king ſhould not have the like, it might be very inconvenient to this ſtate.
' 28. A ſummary concluſion of the whole argument.'

Firſt then to conſider *whether there were by the common-law any duty belonging to the king upon merchandize to be carried into or out of the kingdom, known by the name of cuſtom.* Though the mainteinance of cuſtome to be due by the common-law be a point of ſuch conſequence to them that mainteined the kings right to impoſe, as without the upholding of which their opinion, as I conceive, is not ſo much as colourably to be mainteined, and that to maintein the ſame, it be not at all neceſſary to induce my concluſion; and although to admit it, it may ſeem perhaps no good policy of argument, but rather a great diſadvantage to me to admit that, without which the contrary part cannot uphold their opinion, and which being admitted cannot make any thing for me; yet becauſe we are here not as arguers at the bar, but as judges in a high-court, and that all our ends tend to the diſcovery of the truth: I will therefore not only admit it, but will maintein it as well as I can.

That there was ever ſome cuſtome due by the common-law.

That cuſtome is due by the common-law I collect, firſt by the name thereof, for though at this day it bee (and ſo hath beene for more then 350 yeeres, as I ſhall have occaſion more fully anon to open unto you) called in our law-*Latin Cuſtuma*, yet in ancient time it had no other name here amongſt us (for I meane not to wander into forreign-learning) then *conſuetudo*, as may appeare by the ſtatute of *Magna Charta* cap. 30. *Per rectas & antiquas conſuetudines*; for I ſhall anon directly prove unto you, that *conſuetudo* in that place is not to be underſtood an uſage, as hath been ſaid, but in that ſenſe which I take it. This name *conſuetudo* in the ſame ſenſe is alſo found in many ancient records brought into this houſe upon the late ſearch. That this name then *conſuetudo*, which implies an approved continuance without a known beginning, ſhould by the common-law be given to this revenue more then to any other revenue belonging to the king; nay, that this terme, which is the common and generall name to all common and approved uſages of what nature or kinde ſoever, ſhould be applied to this dutie rather then to any other amongſt all the ancient uſages and cuſtomes which the common-law imbraceth, cannot but denote the great antiquity thereof, and, more then ſo, the allowance and approbation thereof by the common-law; for doubtleſſe, if, beſide the antiquity of this dutie, the common-law had not alſo alowed the reaſonableneſſe of it, and in a manner the neceſſity of it, it would never have denoted it unto us by this name of excellency above all other cuſtomes which require reaſonablenes as well as antiquity. Therfore doubtleſſe this duty, thus favored, is a childe of the common-law. Nay farther, it is of the very eſſence of a cuſtome to have his only beginning by allowance of the common-law; for that, which beginneth by private contract of partie, or by act of parliament, and dependeth not wholly upon the alowance of the common-law, by one of which three waies all things conſiderable in law have their commencements, cannot bee called or bee a cuſtome, in name or deede. Moreover, conſidering that this cuſtome is not limited to any one place within the realme, wee ſhall ſo little neede to be curious in affirming it to bee due by the common-law, as wee may boldly pronounce it to be part of the common-law it ſelfe. Thus you ſee, that the very name *conſuetudo* proves cuſtome to bee a dutie by common-law. To this may bee added, that *Magna Charta* cap. 30. which ſtatute was made little more then 150 yeeres after the Conqueſt, termeth this not only *conſuetudo*, which, as I have ſaid, implies antiquity beyond all remembrance of a beginning, but *antiqua conſuetudo*; not onely cuſtome, but old and ancient cuſtome. And in compariſon to this old cuſtome due at common-law, the cuſtome upon ſtaple commodities, given or increaſed by act of parliament 3 *E.* I. not printed, was called *nova conſuetudo:* before the making of which ſtatute of 3 *E.* I. you may further ſee, that cuſtome was due; for *an.* 52. *H.* 3. in the ſtatute of the *Exchequer*, printed, you may read, that the collectors of the cuſtome of wools were to yeeld their accompt twice every yeere into the *Exchequer*. But that, which moſt of all moveth me to beleeve that this duty was and is due by the common-law, is this; that in all caſes where the common-law putteth the king to ſuſtaine charge for the protection of the ſubject, it alwayes yeeldeth him out of the thing protected ſome gaine towards the maintenance of the charge: as, for the protection of wards lunatiques and ideots, the profits of their lands; for the maintenance of the courts of juſtice, it giveth him fines for purchaſe of originall writs, and fines *pro licentia concordandi*, which in ſuppoſition of law are no other then fines paid for not proceeding according to the ſurety by pledges put in upon purchaſe of the originall, and for troubling without cauſe the kings juſtices, who are maintained in their places at the kings charge. There are many the like profits of court, given by the common-law to the king for the maintenance of his charge in the adminiſtring of juſtice.

This obſervation, which might be further proved by divers other inſtances in things of other nature, maketh me to think, that becauſe the common-law expecteth that the king ſhould protect merchants in their trades, by maintaining, repairing, and fortifying the havens at home; by clearing the ſea of pirates and enemies in their paſſage; and by maintaining ambaſſadors abroad to treate with forreigne princes upon all ſuch occaſions; that it alſo giveth him out of merchandizes exported and imported, ſome profit for the ſuſtentation of this publique charge. Otherwiſe were the law very unreaſonable and unjuſt. So as to prove, that by the common-law cuſtome is due to the king, I ſhall need to ſay no more; eſpecially conſidering it hath not onely been yeelded to, but proved by thoſe, which maintain a contrary concluſion. I will therefore proceed to my ſecond conſideration: *whether that profit upon merchandizes, which the common-law for theſe reſpects gave unto the king, were a duty certaine, not to be increaſed or inhaunced at the kings will and pleaſure, without a common aſſent in parliament; or otherwiſe, whether the common-law hath left an abſolute power in the king, to demand in this caſe more or leſſe at his owne pleaſure, and to compell his ſubjects to pay it?* The reſolving of which queſtion will, as I conceive, make an end of this controverſie between us; for what are theſe impoſitions which wee complaine of, other than the enhauncing of the cuſtome by the kings abſolute pleaſure?

That cuſtome due by common law, was a ſum certain.

That this duty given by the common-law, as I have proved, unto the king, was and is a duty certain, not to be enhaunced by the king at his owne pleaſure, without aſſent in parliament, I hope I ſhall be able cleerly to prove unto you: in mainteinance of which, I will uſe ſome arguments of direct proofe, and others of great preſumption and probability. And firſt, I lay this as a ground, which will not be denyed me by any man; *that the common-law of* England, *as alſo all other wiſe lawes in the world, delight in certainty, and abandon incertainty, as the mother of all debate and confuſion, than which nothing is more odious in law:* and therfore the rule is, *quod certum eſt retinendum eſt, quod incertum eſt dimittendum*; nay further, *quod incertum eſt nihil eſt.* This is the cenſure of law upon all the acts of men, which fall under the judgment of the law. If then the law ſo judge of the acts of men, holding them for nought and voyde, that are incertaine; how much more then doth the law require certainty in her own acts, which are to binde all men? And if in any of the acts of law certainty be to be ſpecially expected, moſt of all is it requiſite that bounds of limitation and certainty be ſet between the king and his poor ſubject, between the mighty and the weak, between the lion and the lamb. And if in any caſe between the king and his ſubject more than other this certainty be required, moſt of all it is requiſite in caſes where the common-law giveth the king a perpetuall profit or revenue to be raiſed out of the intereſt and property of his poor ſubjects eſtate, either in lands or goods. If in all other things the law, as I have ſaid, and wherein I ſuppoſe you have yeelded to me, doe require certainty and limitation, and onely in this caſe where it is moſt requiſite, it hath omitted and neglected it, we muſt conclude the law to be moſt unreaſonable, improvident, and contrary to it ſelfe; which to ſay, were to conclude it to be no law. Out of theſe grounds I may then in my opinion ſafely and with ſome confidence deduce and maintain this poſition; *that the common-law of* England *giveth to the king, as to the head of the common-wealth, no perpetuall revenue or matter of profit out of the intereſt or property of the ſubject, but it either limiteth a certainty therein at the firſt; or otherwiſe hath ſo provided, that if it be uncertaine in it ſelfe, it is reduceable to a certainty onely by a legal courſe, that is to ſay, either by parliament, by judges, or jury; and not by the kings own abſolute will and pleaſure.* Though this poſition be grounded upon thoſe ſure foundations, out of which I have, as you perceive, drawn it, and needs no farther proof; yet becauſe you ſhal ſee how plentiful the truth is in reaſons to maintain it ſelfe, I will further open unto you the particular reaſons of this poſition, which are theſe.

That all the revenues which the common-law giveth to the king out of the intereſt of the ſubject, are certain, or reduceable to a certainty by a legall courſe; and none left to the kings pleaſure.

The reaſons why the law requireth ſuch certainty in thoſe revenues.

Firſt, the law requireth certainty in matter of profit, between the king and the poor ſubject; becauſe to make any man judge in his own caſe, eſpecially the mighty over the weake, and that in a point of profit to him that judgeth, were to leave a way open to oppreſſion and bondage.

Secondly, becauſe by reducing it to a certainty, the king may know what certainty to expect; that ſo he may order his charge accordingly.

Thirdly, that the ſubject may know likewiſe what he is to pay, that ſo he may know certainly what ſhall remaine to him as his own.

Finally, that the king may not depend upon the good will of his ſubject for his revenue, ſeeing the law expecteth he ſhould beare the charge, but may know in certainty what to claime as due to him, and may accordingly compell the ſubject to pay it; and that the ſubject may not be under the kings abſolute power to pay what the king pleaſeth, which may perhaps extend to the whole value of the merchandize.

You ſee in generall, how the law, by requiring certainty in matter of profit between the king and the ſubject, preventeth many miſcheifes, which would fall out if the law were otherwiſe; and therefore without more ſaying, I might here conclude, that cuſtome, being due by the common-law, was and is a ſum certain, not to be increaſed at the kings pleaſure by way of impoſition. But becauſe there are many other revenues due to the king by the common-law, as well as cuſtome; if they all, or as many as we can call to minde ſhall fall out to bee, as I have ſaid, ſummes certaine and not ſubject to bee increaſed at the kings will, this will bee a forcible argument, that cuſtome is likewiſe certain and not to be inhaunced at the kings pleaſure; for, this argument drawne *à ſimili* is of great force, and the moſt uſuall of any other in debate of things doubtfull in law. *Quæ legibus deciſa non ſunt, judex ex his quæ deciſa ſunt ſtatuet, & de ſimilibus ad ſimilia procedat.* May it pleaſe you to conſider in this reſpect other revenues, which the common-law of this land giveth the king; and according to the rule, to decide that which is in queſtion, by the ſame rule and meaſure, by which other things of the ſame nature have been decided and ordered. The common-law giveth the king a fine for the purchaſe of an original writ. Is it certaine? It is, and ever hath been. If the debt or damages demanded amount to above forty pounds, the fine is, and ever hath been, ſixe ſhillings eight pence, and no more; if to a hundred pounds, then ten ſhillings, and no more. May the king increaſe this fine at his pleaſure? There is no man that will ſay he may. There is a fine due by the common-law, *pro licentia concordandi.* Is it not certainly known, and ſo hath alwayes been, to be the tenth part of the land compriſed in the writ of covenant? And is not alſo the poſt-fine thereupon due certainly known to be once and a halfe as much more as the fine *pro licentia concordandi*, or pre-fine; as for example, when the pre-fine is ten ſhillings, the poſt-fine to be fifteen ſhillings. And can the king demand any more of the ſubject? So likewiſe, when, in a writ of right, the demandant, alleadging the ſeiſin of his anceſtor, will not be compelled to prove the ſeiſin alleadged, is he not to tender to the king a ſumme certain of a demy-mark, to have this benefit? Was it ever more or leſſe? Or can it now be more, if the king would? Theſe, amongſt many others, are duties belonging to the king by the common-law from the ſubject, for the

Examples of revenues given by the common-law to the king, out of the intereſt of the ſubject; that they are certaine.

mainteinance of his charge in the adminiſtration of juſtice, which the civilians call *vectigal judiciarium.* There are alſo in divers other caſes duties certain, belonging to the king by the common-law: as for example, the reliefe for an earldome is certainly knowne to be a hundred pounds, for a barony a hundred markes, for a knights fee a hundred ſhillings; all which in the ſtatute of *Magna Charta*, cap. 2. are called old and ancient duties. This is *vectigal patrimoniale*; of which ſort I could produce many others, all which have like certainty. Nay, there is one duty well known to us all, which the common-law giveth to the king; and is in his nature a cuſtome (our very caſe) in which the king is bound to a certainty which he cannot exceed; and that is *priſage*, a duty given by the common-law to the king, upon every ſhip-loading of wine brought into the kingdom by *Engliſh* merchants; and is one tun of wine before the maſt, and another behinde. I am unwilling to trouble you with any more particulars of this kinde. But let any man ſhew me one particular to the contrary, and I will then yeeld, that my poſition, being falſe in one, may be in more: but till my poſition hath been in this point infringed, this generall concordance of the law in all theſe particulars is argument enough for me, without having alleadged other reaſons, to conclude, that cuſtome being, as all theſe are, a revenue due to the king by the common-law, ariſing out of the property and intereſt of the ſubject, is, as all theſe are, limited and bounded by the common-law to a certainty, which the king hath not power to increaſe. *Ubi eadem ratio, eadem lex.* It may perhaps be here objected, that the ayd paid to the king upon the knighting of his eldeſt ſonne, or marriage of his eldeſt daughter, was by the common-law uncertaine; and that the king did take more or leſſe at his pleaſure, untill he was bound to the contrary by ſtatute. To this I make divers anſwers. Though it were indeed a ſumme uncertaine, yet the common-law did in ſome ſort give it a limitation; for it is by a ſpeciall name called *reaſonable ayd:* ſo, as if the ſumme demanded doe exceed reaſon, it became from a *reaſonable ayd* an unjuſt exaction. Beſides, this revenue was a thing happening very rarely, and therefore the certainty thereof not ſo much regarded by the law. And yet it is to be obſerved, how the frame of this common-wealth could not long indure incertainty even in this caſuall revenue; but it was reduced to a certainty of twenty ſhillings upon a knights fee, and twenty ſhillings upon every twenty pounds ſoccageland, by the ſtat. of *Weſt.* 1. cap. 35. 3. *Ed.* 1. If in this caſuall revenue they were ſo carefull to be at a certainty, to avoid unreaſonable exactions, as the words of the ſtatute are, how much more carefull would they have been, for the ſame cauſe, to have reduced the great and annuall revenue of the cuſtome to a certainty, if they had not thought it to have been certaine by the common-law, or limited by ſtatute-law before that time made? But, ſir, that, which I rely upon for anſwer to this objection, is this. Reaſonable ayd was and is by the common-law due as well to meane lords as to the king; but meane lords were not limited to a certainty, otherwiſe than in generall, that it muſt be reaſonable, as I have ſaid. Therefore to limit the king any further, was no reaſon: and this anſwer may be given for all uncertaine revenues belonging to the king, the like of which meane lords have of their tenants; for the incertainty of which there may alſo be given eſpeciall reaſon; becauſe theſe duties firſt began by ſpeciall contract and agreement between the lord and the tenant, and not directly by operation of the common-law, and ſo were certain and uncertain as they did at firſt agree. And therefore you may be pleaſed to remember, how in laying my poſition I was wary to ſay, *that ſuch revenues, as are due to the king as to the head of the common-wealth*, (by which I purpoſely excluded ſuch revenues as are common to him with other meane lords) *are alwayes certaine.*

I am now according to promiſe, and in maintenance of a ſecond part of my poſition, to ſhew you, *that where the common-law giveth the king a revenue not certaine at the firſt, that is alwayes reduceable to a certainty by a legal courſe, as by act of parliament, judges, or jury, and not at the kings pleaſure.* Every man, that by his tenure is bound to ſerve the king in his warres, and faileth, is to pay, according to the quantity of his tenure, a fine by the name of eſcuage. This cannot be aſſeſſed but in parliament. Upon forfeitures for treaſon, or otherwiſe, to the king, though it be a kinde of a certainty that the law giveth, in giving him all the eſtate of the party convict, both in goods and lands, or in goods onely, as the caſe is; yet for reducing it to a more expreſſe certainty, the law requireth, that it be found by office. *Wayfe*, *ſtray*, *wreck*, *treaſure-trove*, and ſuch like, are no leſſe certaine; for the king hath the things themſelves in kinde. Fines for miſdemeanors are alwayes aſſeſſed by the judges. Amercements in all caſes are to be afferred by the country, and not to be aſſeſſed by the king; though the forme of the judgement be, *et ſit in miſericordia domini regis*, in the kings mercy, *pro contemptu prediƈt.* Nay, though for puniſhment of an offence it be by ſtatute-law enacted, that an offendor ſhall make fine and ranſome at the kings pleaſure, the law even in this caſe, which is as ſtrong a caſe as may be, will not leave the aſſeſſing of the fine to the kings pleaſure, to be by him rated privately in his chamber; but it muſt be ſolemnly and legally done in an open court of juſtice by the judges, who in all other caſes are to judge between the king and his people, where the intereſt or property of the ſubject, or any charge or burden upon them doth come in queſtion, as may be proved by the booke of 2 *R.* 3. fo. 11. Inſomuch that I am of opinion, that if a ſtatute were made, that the king might raiſe the cuſtomes at his pleaſure, yet might it not be done as now it is, by the kings abſolute power, but by ſome other legall courſe, of which the common-law doth take notice; as in the caſe of the fine and ranſome. Much leſſe then will the common-law permit, that it ſhould depend upon the king's abſolute pleaſure, there being no ſuch ſtatute in the caſe.

You have heard out of what grounds I firſt deduced this my poſition, *that the law requireth certainty in matter of profit between the king and his people.* You have heard likewiſe the particular reaſons of that poſition. You have alſo heard what proofe I have made by particular caſes of like nature to this in queſtion; and how I have applyed them to the point. And ſo leaving the judgement of the whole to your wiſedomes, who can beſt diſcerne whether the argument be of weight, I proceed to my ſecond reaſon, which is drawne from *the policy and frame of this common-wealth, and the providence of the common-law: the which, as it requires at the ſubjects hands loyalty and obedience to their ſoveraigne, ſo doth it likewiſe require, at the hands of the ſoveraigne, protection and defence of the ſubject againſt all wrongs and injuries whatſoever, offered either by one ſubject to another, or by the common enemy to them all, or any of them.*

This protection, the law conſidereth, cannot be without a great charge to the king; and becauſe, as Chriſt ſaith, *no man goeth to warre upon his owne charge*, the common-law therefore hath not onely given the king great prerogatives and favours touching his own patrimony, more (I beleeve) than any other prince in the world hath; but alſo hath, for the ſuſtentation of his great and neceſſary expences in the protection of his ſubjects, given him, out of the intereſt and property of the ſubject, an ample and very honorable revenue in very many particular caſes, ſome of which I will call to your remembrance.

He receiveth out of the ſubjects purſe for wardſhips and the dependances thereupon, as we have of late accounted, about forty-five thouſand pounds by the yeare. This is a revenue which no other king of the world hath: and as it appeares by the ſtatute of 14. *E.* 3. *c.* 1. *it ought to be imployed in maintenance of the warres.* And ſo doubtleſſe was the firſt inſtitution of the common-law; for the lord hath the profit of the wards lands to no other end, than to maintain a man in the warre during the infancy of him, who otherwiſe ſhould ſerve in perſon.

He hath likewiſe all forfeitures upon treaſon and outlawry, and upon penall lawes, fines and amerciaments, profits of courts, treaſure-trove, priſage, butlerage, wreck, and ſo many more, as the very enumeration of the particulars would take up long time. To what other end hath the common-law thus provided for the maintenance of the kings charge, by all theſe wayes and meanes of raiſing profit out of the intereſt and property of the ſubjects eſtate in lands and goods, but onely to this end, that, after theſe duties paid, the poore ſubject might hold and enjoy the reſt of his eſtate to his owne uſe, free and cleare from all other burdens whatſoever? To what end hath the law given a part to the king, and left the reſt to the ſubject, if that which is left be alſo at the kings will, to make his profit thereof as he pleaſeth? To give a ſmall portion to him, that may at his pleaſure take more or all, is a vain and an idle act; which ſhall never be imputed to a wiſe law. But it may be objected that as the revenues are ordinary, ſo are they by the law provided onely for the ſuſteyning of the kings ordinary charge; and that if the law have not taken further conſideration, and limitted ſome certain courſe, how upon ſudden and extraordinary occaſions the kings charge may bee ſuſteined, there is yet no reaſon ſhewed to the contrary, why the king may not upon ſuch occaſion take ſome extraordinary courſe for the rayſing of money, as by the laying of impoſitions upon merchandizes, or by a tax within the realme, rather than the common-wealth for want thereof, ſhould periſh or be indangered.

Anſwere to an objection, that the king may lay impoſitions in times of extraordinary occaſions.

And hereupon by the knight that laſt ſpake, it was held, that *upon occaſion of a ſudden and unexpected war, the king may not only lay impoſitions, but levy a tax within the realme, without aſſent of parliament*, which poſition in my opinion is very dangerous; for to admit this were by conſequence to bring us into bondage. You ſay, that upon occaſion of ſuddaine warre the king may levy a tax. Who ſhall be judge between the king and his people of the occaſion? Can it be tryed by any legall courſe in our law? It cannot. If then the king himſelfe muſt be the ſole judge in this caſe, will it not follow, that the king may levie a taxe at his owne pleaſure, ſeeing his pleaſure cannot be bounded by law? You ſee into what a miſchiefe the admittance of one error hath drawne you. But for a full anſwer to the objection, I ſay, that the providence of the common-law is ſuch, and ſo excellent, as that for the defraying of the kings charge upon any occaſions of a ſudden warre, it hath, over and above all the ordinary revenues which it giveth the king, which in the time of warre cannot indeed but fall ſhort, made an excellent proviſion; for, ſir, *the warre muſt needs be either offenſive or defenſive. Offenſive* muſt either be upon ſome nation beyond the ſeas, or againſt the *Scots*, or *Welſh*, or other borderers within the iland. If it be an *offenſive* warre upon ſome nation beyond the ſeas, it cannot be a ſudden accident; for it is the kings own act; and he may, and 'tis fitting he ſhould take deliberation; and if it be a juſt and neceſſary warre, he may crave, and eaſily obtaine aſſiſtance of his ſubjects, by grant of ayd in parliament. *If an offenſive warre upon ſome of his neighbours within the continent of this iland*, as the *Scots*, or the *Welſh*, which alſo cannot be ſudden or unexpected to the king, being his own act; you know, how politikely the kings of this realme have provided, by reſerving tenures, by which many of their ſubjects are bound to ſerve them in thoſe warres in perſon, at their own charge. Only a *defenſive warre*, by invaſion of forreign enemies, may be ſodain: in which caſe the law hath not left the king to warre upon his owne expence, or to rely upon his ordinary revenue, but hath notably provided, that every ſubject within the land, high and low, whether he hold of the king or not, in caſe of forreign invaſion, may be compelled at his own charge to ſerve the king in perſon, as it appears by the opinion of juſtice *Thirming*, in 7 *H.* 4. The reaſon of which, in my opinion, was to no other end, than that the king might have no pretence whatſoever for the raiſing of money upon his ſubjects at his owne pleaſure, without their common aſſent in parliament. I doe then conclude this argument, that ſeeing the common-law, for maintenance of the kings ordinary charge, hath given him ſuch an ample revenue out of the intereſt and property of the ſubject, and provided alſo for ſodaine occaſions; in ſo doing it hath ſecluded and ſecured the reſt of the ſubjects eſtate from the kings power and pleaſure; and conſequently, that the king hath not power upon any occaſion at his pleaſure to charge the eſtate of his ſubjects by impoſitions, tallages,

Sir *Robert Hitcham.*

or taxes, for I hold them all in one degree, or any other burden whatſoever, without the ſubjects free and voluntary aſſent, and that in parliament. If it were otherwiſe, you ſee how it were to the utter diſſolution and deſtruction of that politike frame and conſtitution of this commonwealth, which I have opened unto you, and of that excellent wiſe providence of the common-law, for the preſerving of property, and the avoydance of oppreſſion.—Theſe two arguments uſed by me, that of *certainty*, and this of *the proviſion made by the common-law*, are in my poor opinion, arguments of direct proofe, that the king cannot impoſe.—I will now, according to my diviſion, urge an argument or two of inference and preſumption; the rather, becauſe arguments of this nature have been much enforced by thoſe, who have maintained the contrary opinion, eſpecially by Mr. Solicitor. I call them arguments of inference; and yet in my opinion, thoſe which I ſhall urge, are alſo of good proofe. Such as they are, you ſhall judge of them. *They are drawn, either from the actions or forbearances of the kings of this realme, or from the actions and forbearances of the people.*

Sir *Francis Bacon.*

Arguments drawne from the actions of the kings, that they have no power to impoſe.

Firſt, in the actions and forbearances of the kings, I obſerve, that all the kings of this realm ſince *Hen.* 3. have ſought and obteined an increaſe of cuſtome, more or leſſe, by the name of ſubſidie, of the gift of their ſubjects in parliament. Nay, ſome of them, and thoſe not the weakeſt in ſpirit, or power, but the moſt couragious and potent in that whole ranke, even that mighty and victorious prince, king *Ed.* 3. being to undertake a juſt and honourable warre, than which there could not happen a better or juſter occaſion to have made uſe of his prerogative of impoſing, did nevertheleſſe at that time ſtoope ſo low in this point, that he did, in full aſſembly of the three ſtates, pray his ſubjects to grant him a reliefe in this kinde for the maintenance of his warre, and that to endure but for a ſhort time; and further, was well content to ſuffer his prayer in that behalfe to be entred of record to the memory of all poſterity. And the ſucceeding kings have alſo ſuffered the ſame to be printed, as may appeare by the printed ſtatutes at large, *an.* 14. *Ed.* 3. *cap.* 21. Is it likely, that if any or all theſe kings had thought they had had in them any lawfull power by juſt prerogative to have laid impoſitions at their pleaſure, they would not rather have made uſe of that, than have taken this courſe by act of parliament, ſo full of delay, ſo prejudiciall to their right, ſo ſubject to the pleaſure of their people, who never undergoe burdens but with murmuring and much unwillingnes? Can there be any thing more hatefull to the high ſpirit of a king, than to ſubject himſelfe to the pleaſure of his people, eſpecially for matter of reliefe, and that by way of prayer, having lawfull power in his hands to relieve himſelfe without being beholding to them?

If perhaps the kings themſelves were ignorant of this great prerogative, which cannot be imagined; had they not alwaies about them wiſe counſellors to aſſiſt them, and ſuch as for the procuring of favor to themſelves would not have failed to have put them in minde of it? Nay, if they had known any ſuch lawfull prerogative, had they not been bound in conſcience ſo to have done? What an overſight was it of king *Ed.* 3. and all his counſell, ſo much to prejudice his right in ſo beneficiall a prerogative, as to ſuffer him upon record, and that in parliament, to pray for that, which he might have taken out of his abſolute power? Can there almoſt be a more direct diſclaiming in the right? To compare great things with leſſe, if the lord by matter of record claime any thing of his villaine, it is a diſclaimer of the villenage.

The kings of *England* have other noble and high prerogatives. I will only name two of them, the making of warre and peace, and the raiſing and abaſing of coyne at their pleaſure. Did they ever crave the aſſent of their ſubjects in parliament to make a warre? Their advice indeed they have ſometimes ſought, and their ayd for treaſure to maintaine it. The prerogative of raiſing and abaſing the value of money hath been oftentimes put in practiſe by them, and ſometimes ſtrayned to ſuch a height, that the king might well ſuppoſe the ſubjects could not but be much diſcontent therewith. And yet never any king of this realme did it by aſſent of parliament, which perhaps ſome one milde king among ſo many would have done, and it may be, would alſo have prayed his ſubjects to yield thereto, only to avoid the grudging of the people, if the ſeeking of aſſent in parliament had not been thought to have been prejudiciall to the abſolute power of their ſucceſſors: and yet, as for ſome of theſe kings, it may be ſuppoſed, they made little conſcience to prejudice a ſucceſſor in one point, that made no ſcruple totally to depoſe a predeceſſor from his throne, and all his regalities, and to uſurp it to themſelves.

Edward the 2d.

And ſo I proceed to my next argument of inference drawn from the actions of our kings. Some of the kings of *England*, as namely *Ed.* 2. in the yeere of his reigne, and *Ed.* 3. in the 1. and 24. yeere of his reigne, as may appeare by the records here amongſt us, were contented to accept an increaſe of their cuſtome *by way of loane* from the merchants, and ſolemnly binde themſelves to repay it againe. Would any wiſe man in the world, that thought he had but a colour of right, ſo much prejudice himſelf, as to borrow that which he might take without leave, and binde himſelfe to repay it? If a poore man perhaps through feare might be enforced ſo farre to yeeld to a mighty adverſary, yet that a powerfull man ſhould ſtoope ſo low to one much weaker than he; nay, that a king, in a point of ſuch conſequence, ſhould ſo farre diſcend from his greatneſſe, as to borrow of his poore ſubject that, which without being beholding to him he might obtein as his right, and binde himſelfe to repay it againe: I ſay, it cannot with any reaſon be imagined; but withall it muſt be concluded, that a king, that ſhall ſo doe, doth not thinke that he hath ſo much as colour of right to impoſe.

Edward the 3d.

I will not much preſſe or enforce the actions of *Ed.* 2. who (I confeſſe) was but a weake prince; but as for his ſonne and ſucceſſor, *Ed.* 3. there was not, as I have ſaid, a ſtouter, a wiſer, a more noble and couragious prince than he, and none more careful to preſerve the rights of his prerogative, as may evidently appeare by all his anſwers in parliament, on any complaint of the ſubject. Beſides, never had king of this realme more occaſion than he to ſtraine this prerogative of impoſing to the utmoſt. For beſides his exceſſive expence in the warres of *France* and *Scotland*, he had alſo a continuall charge of many expenſive children. His wife queene *Philippa* had alſo for her maintenance a large allowance out of his revenue. But the dowry of queen *Iſabel* his mother, who lived till about the 27. yeere of his reigne, was ſo great, as it is reported by ſome writers, that little more than the third part of the certaine revenue of the kingdome was left to him. Inſomuch, as through theſe occaſions of extraordinary expence, and the diminution of his revenue, he was driven to ſuch neceſſity, as his queen in the yeere of his reigne, was enforced to pawne her crowne and jewels to procure money for him, as may appeare by the record of that yeere in the office of the clerke of the pels. Nay, the king himſelfe, in theſe extremities, was oftentimes driven to lay his jewels to pawne for money: and in *an.* 17. did alſo pledge his crown for 4000. pound, to certaine merchants of *Florence*, as by the records of that yeere, in the office of the lord treaſurers remembrancer in the *Exchequer*, is manifeſt. By this you may ſee, that this powerfull king wanted not urgent and juſt occaſion, if any occaſion may be juſt, to have put in practiſe his abſolute power of impoſing; and yet, as you ſee, it appears of record, that in the midſt of his great wants he tooke an increaſe of cuſtome *by way of loane*, and bound himſelfe to repay it.

It may be here objected, that he did lay impoſitions.

What impoſitions they were, and how to be compared with the impoſitions now in queſtion, I purpoſe to tell you, when I come to anſwer objections, which I have referred to the end of my ſpeech. In the meane time I will goe on with my courſe, and urge one argument more, drawne from the actions of our kings, touching the increaſe of cuſtome.

A man would thinke, that the taking of the increaſe of cuſtome by all the kings, both one and other, with the aſſent of their ſubjects in parliament, and ſometimes by way of prayer and intreaty, for a ſhort time; nay, the taking of it by way of loane, and binding themſelves to repay it; and that to have been done by the moſt powerfull kings, in their greateſt neceſſities; were argument enough, that they did not beleeve they might juſtly claime it as their right by their abſolute power.

Edward the 1ſt.

And yet is not this all; for, ſome of them, by name, *Ed.* 1. did not onely take it by aſſent in parliament, or *by way of loane*, but (as one that buyes for his money in the market) did give for it a reall and valuable conſideration, and that to merchant-ſtrangers, of whom there was more colour to demand it as a duty, than of his naturall ſubjects. In proofe of which I produce *charta mercatoria*, made *anno* 31. *Ed.* 1. whereby it is recited, that, in lieu of certaine liberties and immunities granted by the king to the merchant-ſtrangers, as alſo for the releaſe of priſage, they granted to the king an increaſe of cuſtome. What were all the ſpecial liberties that were granted them, I know not, nor whether they continue. But ſure I am, that by vertue of that grant they are at this day free of priſage, paying onely 2 s. upon a tun of wine, by the name of butlerage, which they granted by the ſame charter; whereas *Engliſh-men* pay priſage *in ſpecie*, *viz.* one tun before the maſt, and one tun behinde.

And it is very worthy the obſervation, how the ſame king, *E.* 1. in the ſame yeer of his reign did command his cuſtomers throughout *England*, that, whereas certain *Engliſh* merchants were, as he was informed, of their own accords willing to pay him the like increaſe of cuſtome which the merchant ſtrangers had granted unto him, ſo as they might enjoy the like liberties and benefits; nevertheleſſe they ſhould not compell ſuch *Engliſh* merchants, againſt their wils, to pay it. The words are worth the hearing. *Cum quidam mercatores de regno & poteſtate noſtri, ut ipſi dictis libertat.* (having before recited *charta mercatoria*) *uti & gaudere, & de priſis noſtris quieti eſſe poſſint, præſtationes & cuſtumas hujuſmodi, de bonis & mercandizis ſuis, nobis dare & ſolvere velint, ut accepimus; aſſignavimus vos ad præſtationes & cuſtumas prædictas, de his, qui præſtationes & cuſtumas illas gratanter & abſque cohercione ſolvere voluerint, colligendum, & ad opus noſtrum recipiendum; ita tamen quod aliquem mercatorem de dicto regno noſtro ad hujuſmodi præſtationes & cuſtumas nobis invite ſolvendum nullatenus diſtringatis.* What ſtronger inference can there almoſt poſſibly be againſt the kings abſolute power of impoſing, than this: that he was contented, and ſo ſpecified to all his officers of the ports, that if the merchants did of their own accords pay more than their ancient cuſtomes, they ſhould have conſideration for it; but if they themſelves were not willing to pay more, then they ſhould not be compelled thereunto?

One other obſervation I draw from the actions of the kings touching the increaſe of their cuſtome, which is this, that thoſe kings, which did lay impoſitions (which as I will ſhew you by and by, was very rarely) though it were never but in time of great neceſſity, and but to indure for a ſhort time; yet they alwayes did it, not with the advice alone of the merchants, as at this day, but *the merchants did alwaies ſolemnly grant an increaſe of cuſtome*; and the kings were alwayes wary, for the better juſtification of their actions to the people, in their commiſſions for collecting of cuſtome, to recite not onely the great neceſſity which moved them to take an increaſe of cuſtome, but alſo *the grant of the merchants*, as may appeare by the records, of which we have the copies amongſt us. I dare confidently ſay, there is not above one or two at the moſt that are otherwiſe, if the impoſitions be of that nature, which theſe are of which we complaine; and yet theſe impoſitions alſo, by the *grant of merchants*, though raiſed upon never ſo great a neceſſitie of ſtate, and to indure but for a ſhort time, were always complained of by the commons, when they met in parliament, as may appeare amongſt other records, by the parliament roll of 27. *Ed.* 3. *No.* 27. where in a petition of the commons, exhibited to the king in parliament, are theſe words. *Les commons monſtrent, coment que les marchants ayent grant per eux, ſans aſſent de parliament, un ſubſidie de* XLs. *de ſacc. de layn, outre le droiturel maletout de demy marke; et prion que ſoit amend a ceſt parliament; car eſt encounter reaſon, que le cominaltie de lour biens ſoient per marchants charges.* Which I Engliſh thus. *The commons ſhew, how the merchants have granted by themſelves, without aſſent* *of parliament, a ſubſidie of* 40s. *upon a ſack of wooll, over and above the rightfull cuſtome of halfe a marke; and pray that it may be redreſſed at this parliament; for it is againſt reaſon that the commonalty ſhould be charged in their goods by merchants.* With this agreeth the printed ſtatute of 36. *Ed.* 3. *cap.* 11. in the Statutes at large, where you ſhall finde an expreſſe proviſion againſt the rayſing of impoſitions upon woolls, *by grant of merchants*; in which petition I doe obſerve, that the parliament in thoſe dayes did diſtinguiſh, even as we now doe, between impoſitions laid by act of parliament, and impoſitions laid only by the grant of merchants, acknowledging that impoſitions laid by parliament only are lawfull, and condemning all other as unlawfull; for otherwiſe why ſhould they tearme the demy-marke, which was laid by act of parliament, 3. *Ed.* 1. *(Droiturel maletout)* a lawful impoſition, but with relation to the unlawfulneſſe of theſe impoſitions granted by merchants, which they then did complaine of? Beſides, I obſerve that they ſay, that it is againſt reaſon, that merchants ſhould by their grant, *without aſſent in parliament*, charge the whole commonaltie; by which it plainly appears, that they complained not ſo much of the exceſſe or greatneſſe of the impoſitions, as of the unlawfull manner of the raiſing of it by grant of merchants, *without aſſent in parliament.*

Hitherto I have, according to my diviſion, drawn arguments from that which our kings have done, and put in practiſe for the increaſe of their cuſtome.

I will now make ſome obſervations of their forbearance to put this pretended power in practiſe, conſidering the ſeverall occaſions of the times, which I will proſecute in order.

Arguments drawn from the forbearance of our kings to lay impoſitions, notwithſtanding their great occaſions.

Firſt therefore in generall, I obſerve, that from the Conqueſt, untill the reign of queen *Mary*, being no leſſe then 480. yeeres ſpace, whatſoever the occaſions were, whatſoever the diſpoſition of the kings were, yet in the practiſe of this pretended prerogative of impoſing the kings have been ſo ſparing, as, notwithſtanding this curious ſearch that hath been made, wherein I ſuppoſe nothing that might make for the cleering of the queſtion hath eſcaped us, it cannot be found or proved by matter of record, that ſix impoſitions, ſuch as we now complaine of, were laid by all thoſe kings, who were in number 22. And thoſe ſixe, if they were ſo many, though they were unlawfull, yet were they in ſome ſort to be born withall. Firſt, by reaſon they were very moderate. Secondly, that they were laid in the times of great and apparent neceſſitie, and that they were to endure but for a yeer or two; for none of them, except onely that upon wine, laid 16. *E.* 1. laſted longer. They were, I ſay, notwithſtanding their unlawfulneſſe, yet in theſe other reſpects ſo farre to be borne withall, as, if the impoſitions which are now laid had been ſo qualified, we ſhould, I ſuppoſe, never have complained of them. And yet not one of theſe few impoſitions laid in former times, but was complained of, and upon complaint taken away, as may appear by the records here amongſt us. How much more reaſon is there then, that we ſhould expect the like juſtice now; conſidering that not one merchandiſe alone, as then, but very neere all the ſorts and ſeverall kindes of merchandiſes that are, are charged; that not a moderate and eaſy charge is laid upon them, but ſuch, as though we ſhould confeſſe his majeſties abſolute power to lay what he liſt, yet we had juſt cauſe to complain of the exceſſiveneſſe of the burden? For firſt, the rates of merchandiſes, for the ſubſidies of poundage and tonnage, are extreamly rayſed, a thing alſo though lawfull, yet hath been rarely put in practiſe. Then comes the impoſt upon the back of that, and is as much as the ſubſidie it ſelfe is. In ſome few merchandiſes, 'tis true, the impoſt is perhaps leſſe then the ſubſidy; but 'tis as true, that in divers others the impoſt is farre more. Beſides, theſe impoſitions were not laid in the time of warre, but even then when we were at peace with all the world, except perhaps there were ſome ſparks of rebellion in *Ireland*, then not fully quenched. Laſtly, theſe impoſitions are not, as thoſe in former times were, limited to endure for a yeere or two, but are to come to his majeſtie his heirs and ſucceſſors for ever, as may appeare by his majeſties letters patents in print, prefixed before the new book of rates. So as if thoſe few impoſitions laid in former times had been lawfull, yet can they not by any means be a warrant or preſident for our preſent impoſitions, differing ſo far from them in all theſe points of conſequence. But if even thoſe few, ſo quallified as they were, were complained of and taken away, what ſhall we then ſay of ours, ſo farre exceeding them in all the degrees of irregularitie? Beſides, if ſo few preſidents, as five or ſix in ſo many yeeres ſpace, and thoſe in times of ſo great neceſſitie, without any expreſſe judgment in law, or good authoritie in approbation of them, but accompanied with as many complaints againſt them, be argument enough to prove the lawfulneſſe of the act, I dare undertake, that as well taxes within the land, as impoſitions upon merchandizes, may be proved to be lawfull. But to alledge the acts of kings, in rayſing a profit to themſelves upon their ſubjects, to prove thereby their right, is of all other arguments, that are, the weakeſt. And ſo I leave it, and call to minde, that when I told you, it could not be proved by the records amongſt us, that from the Conqueſt to queen *Maries* time, there had been any more than ſixe impoſitions laid; I did in that number limit my ſelfe to ſuch impoſitions as thoſe are which we now complain of; for I muſt confeſſe, that in that ſpace, many more impoſitions were laid, but they were of a farre differing nature from ours; differing, I ſay, not only in thoſe circumſtances by which I did even now compare the impoſitions of theſe times to thoſe five or ſix of former ages, but in very eſſence and propertie, inſomuch as they may not properly be called impoſitions. And yet the frequent practiſe of them hath been objected and relyed upon, as ſo many preſidents, to prove the lawfulneſſe of the impoſitions now complayned of. It behoveth me therefore, that in maintenance of my aſſertion, that ſo few impoſitions have been laid, as I have affirmed, that I open unto you the difference betweene the one and the other, which being done, your ſelves will eaſily judge, that the greater part make nothing towards the defence of theſe preſent impoſitions. For theſe impoſitions, which now are in queſtion, are no other then an increaſe of cuſtome at the kings pleaſure, and commanded by him to be taken, the paſſage being free and open to all men. Thoſe other, which make ſuch a great ſhew in number, and are produced as ſo many preſidents in maintenance of theſe, are no other then ſo many diſpenſations or licences for money, to paſſe with merchandizes prohibited by act of parliament to be exported; as will evidently appeare by comparing the times, and examining the ſtatutes. I will therefore in this place, as ſhortly as I can, runne over thoſe preſidents, that have been, or may be alledged by the contrary part, out of thoſe records which are here amongſt us, and leave it to your judgement, whether I maintaine my aſſertion, or be not rather better then my word for the number.

Urged by *Flem. Clark. Doderidge.*

The firſt impoſition by them alledged, is that of 16. *Ed.* 1. which, as it appears by the record, was 4. ſhillings upon a tun of wine. This indeed, for aught I know to the contrary, was a meere impoſition, ſuch as are now in queſtion. And yet if I did deny it, and ſay that it was layd by aſſent of parliament, I know not how the contrary could be proved; for though indeed the words of the record are, *cum rex precepiſſet, ut de ſingulis doliis vini caperentur* 4. *ſolidi*, it follows not that it was laid therefore only by the kings commandment; for we ſee that even ſome acts of parliament, in thoſe auncient times, though they were made by the full aſſent of all the three eſtates, yet they have theſe words in their preambles, *rex precepit, rex vult.* But as for recitalls of acts of parliament by the king, in his commiſſions, and otherwiſe, it was in thoſe times uſuall to ſay, *cum nuper ordinaverimus*; and therefore notwithſtanding the recitall be, *cum nuper rex precepiſſet*, it is no cleere proof, that therefore it was done onely by the kings commandment. Nevertheleſſe I will, I ſay, admit this to be a meere impoſition, and to be one of the number; and indeed, as this is the firſt they produce, ſo is it their beſt. Only this, (amongſt all the reſt) is not limited to indure for a time certain. But give me leave, I beſeech you, to open unto you, with what circumſtances this impoſition was accompanied, and what followed of it; and then I will leave you to judge, who beſt are able, how far the preſent impoſitions may be juſtifyed by this.

The firſt circumſtance to be obſerved in this impoſition is, that it was laid immediately after the warre againſt *Wales* was ended, and at the time, when for the ſelling of the eſtate of *Gaſcoigne*, the king himſelf was in perſon enforced to undertake a voyage thither, as may appeare by our hiſtories of thoſe times, which alſo may bee collected by the very words of the record, which are theſe, *cum rex ante ultimum receſſum ſuum ab Anglia precepiſſet, &c.* That as theſe times were troubleſome, they were alſo very chargeable to the king, and did put him to try all means for the levying of money, I ſhall not need to urge it: it cannot be otherwiſe.

One other circumſtance is this, that this impoſition laid in this time of great neceſſity was not, as now, upon all merchandizes, nor ſo much as in generall upon one kind of merchandize, comming from all the parts of the world, but onely upon ſuch wines as were brought hither from two towns in *Gaſcoigne*, *Bergerac* and *St. Emilians*, as may appear by the records; and it is probable that theſe towns were then in revolt, and that the ſooner to reduce them to obedience, the king laid this burden upon their commodities, thereby to hinder the vent of them.

16. *E.* 1.
22. *E.* 1 in *Scaccario.*

Another circumſtance is this, that though that this impoſition were indeed laid without limitation of any time, as touching the continuance thereof, yet within ſix years following, *viz.* 5. *Decemb. a.* 22. upon complaint of the merchants the king releaſed two ſhillings of the foure ſhillings, as may appear by the records of 22 *E.* 1. with which the merchants not holding themſelves contented, the very ſame yeare within eight or nine months following, *viz.* 23. *Julii an.* 22. the whole impoſition was releaſed, as may appeare by a recitall in the accompt of one *William Randall* receiver of the impoſt money, entred *an.* 26 *E.* 1. And within three years after the releaſe, *viz. an.* 25. there followed an act of parliament againſt all impoſitions in generall, as when I come to ſhew you what ſtatutes there are, in the point, I ſhall I hope cleerly prove unto you. In the meane time I will proceed to examine the reſt.

The next preſident urged is an impoſition of 40. ſhillings upon a ſack of wooll laid by *E.* 1. *an.* 21. For the proofe of which, a record of the *Exchequer* of that year hath been vouched. I muſt confeſſe I have not ſeen that record. But by another record of the ſame court, *an.* 26. *E.* 1. it is evident, that the ſaid impoſition was not raiſed by the kings abſolute power, but by grant, and that alſo the ſame was in the time of warre, and to endure but two or three yeare, if the warre ſhould ſo long continue, as will beſt appear by the words of the record. *Cum cuſtuma* 40s. *nobis, in ſubſidium guærræ noſtræ contra regem Franciæ, de quolibet ſacco lanæ exeunte regnum noſtrum, percipiendum per biennium vel triennium ſi tantum duraſſet guerra illa, nuper conceſſ. fuit, &c.*

By this you perceive, by what means, upon what occaſion, and with what limitation this impoſition was laid. If you will further know, what followed of it, may it pleaſe you to read the printed ſtatute of *an.* 21. *E.* 1. *c* 7. where it is ſaid, that the more part of the commonalty found themſelves ſore agreeved therewithall; and by the ſame ſtatute, not only that impoſition of 40. ſhillings upon a ſack of wooll, which was the occaſion of the great grief and complaint, was taken away; but upon occaſion thereof, there was at the ſame time proviſion alſo made againſt all other impoſitions whatſoever, as, I ſay, I hope I ſhall anon cleerly prove unto you. Inſomuch as this impoſition of 40. ſhillings upon a ſack of wooll ought to be ſo farre from being urged as a preſident for the preſent impoſition, and conſequently of the grievance of the commonwealth which followes thereupon, as that rather on the contrary part it may be thought to be the happieſt accident in the conſequence thereof, that ever befell the common-wealth in this kinde. For it was the occaſion of the making of the firſt law that ever was made againſt impoſitions, and other charges and burdens of that nature to be impoſed by the kings abſolute power without aſſent of parliament.

Vouched by Fleming, Clark, Dodderidge, Bacon, Attorney Hobart.

And ſo I leave their ſecond preſident, and come to the third, which in time was 31. of the ſame king *E.* 1. It is no other then that increaſe of cuſtome, which by the merchant ſtrangers was granted to king *Ed.* 1. by that charter now familiarly known unto us by the name of *charta mercatoria*, which, by all that have maintained his majeſties right to impoſe, hath been ſtood upon and urged, as an impoſition by the kings abſolute power; but more eſpecially by maſter Solicitor hath been ſtrongly inforced with all the advantage poſſible for the mainteinance of his opinion. Nevertheleſſe I doubt not but I ſhall give it a very full anſwer, ſuch as yet this objection hath not received, though divers, that have ſpoken before, and ſome this day, have undertaken to cleere it; wherein I will arrogate nothing to my ſelfe, but leave it wholly to your cenſure. It hath been ſaid by maſter Solicitor, that though this increaſe of cuſtome may ſeem to ſome, to proceed from the grant of merchants, yet that this grant of theirs was to no other purpoſe, nor had other effect, then only thereby to declare their aſſent; for that, thoſe which did grant were no corporation or body in the eſtimation of law, and ſo could not binde any but themſelves alone, and not ſuch as ſhould ſucceed them; and that it was only the authority of the kings pleaſure to accept and take this increaſe of cuſtome, that gave it life at the firſt, and ſtrength to continue as an impoſition till this very day. For *even at this day, ſaith he, the* 3. *pence upon the pound, granted by the ſaid charter, is paid by the merchants ſtrangers, and they likewiſe enjoy ſome priviledges granted by the ſaid charter.* And it was further by him obſerved; that notwithſtanding all the ſtatutes that have been urged againſt impoſitions, yet this impoſition hath continually ſtood and hath never been denyed to be paid by any man; and that therefore it is likely that no man till now ever conceived, that theſe ſtatutes were made againſt impoſitions upon merchandizes, but were rather to be underſtood to extend onely to impoſitions within the realme.

27 *E.* 3. No. 27. 36 *E.* 3. c. 11.

To this objection I make this anſwer, that it is indeed true, that the grant of merchants in this caſe, cannot binde the whole common wealth; as I have heretofore proved by the petition exhibited in parliament by the commons 27 *Ed.* 3. *No.* 27. and by a ſtatute of 36 *E.* 3. *c.* 11. And therefore I cannot but confeſſe, that this increaſe of cuſtome may very truely be called an impoſition; for that indeed it did at firſt take ſtrength, onely by the kings pleaſure to accept it, as hath been ſaid, and not by the grant of the merchants. Admitting it therefore to be a meer impoſition; let us conſider with what extraordinary circumſtances it is accompanied.

Firſt, as you may perceive by the record it ſelf, and as it hath partly been ſaid already, the king took it not without yeelding recompence for it; for the merchants ſtrangers, by ſubmitting themſelves unto this charge, obtained divers liberties and immunities from the king, by the ſame charter, amongſt which freedome from priſage is one which at this day they enjoy, in which reſpect this impoſition is in ſome ſort tollerable, though not at all lawfull.

Another conſiderable circumſtance, and difference from our preſent impoſitions, is this, that it was a compoſition made by the king with merchant ſtrangers, which, though it be by ſtrictneſſe of our common law, not of force to binde in perpetuitie; yet how farre by the civil law this doth binde ſtrangers, which are governed by theſe lawes, is not ſo eaſily decided; and this may be a good colour to uphold it.

Theſe ſpeciall reaſons, though they may well ſerve the turne, to make an evident difference betwixt this and our preſent impoſitions, and ſo conſequently to avoid the concluſion drawn from the preſident, and may alſo ſeem colourable, and particular reaſons to uphold the impoſition it ſelf; yet is not this that, which I mean to relie upon for anſwer. For even this impoſition, in recompence of which the king parted with ſo large priviledges and benefits, and which, becauſe it concerned only merchant ſtrangers, did neither in the burden thereof, nor in the preſident, ſo directly touch the *Engliſh*; yet in the deteſtation, as it ſeems, of all impoſitions, of what nature or kinde ſoever, and upon what pretext or colour ſoever they were grounded, I ſay, even this impoſition alſo was complained of in parliament within few yeeres following; and upon complaint, taken away, as may appeare by the cloſe roll of 3. *Ed.* 2. *membran.* 23. where you ſhall finde inrolled a *ſuperſedeas*, commanding, that the new cuſtome, granted by the merchant ſtrangers, reciting the particulars as they are contained in *charta mercatoria*, ſhall ceaſe at the kings pleaſure; and this is there ſaid to be yeelded to at the requeſt of the commons, which cannot be but in parliament. But becauſe the renewing of it again reſted at the kings pleaſure, therefore, within two yeeres after, by a publicke ordinance made by the principall prelates earles and barons and other great men of the kingdome, authoriſed by the kings commiſſion, dated the 16. of *May*, the ſame third yeere of his reigne, the charter it ſelfe was declared to be utterly void; for that it was hurtfull to the commonwealth, againſt *magna charta*, and made *without aſſent in parliament.* And not only that charter, but all other new cuſtomes or impoſitions whatſoever, impoſed ſince the coronation of *Ed.* 1. till that time, were alſo taken away, ſaving onely the old cuſtome upon wooll woollfels and leather. And further it was ordained, that if any man ſhould preſume *to take* any more then the auncient cuſtom rightfully due, and ſhould be thereof convict, he ſhould anſwere to the partie greeved his coſts and dammages, be impriſoned according to the quantitie of his offence, and be further puniſhed as an offender againſt *magna charta*, according to the diſcretion of the juſtices. *Ro. ordinationum* 5. *Ed.* 2. *in the Tower.*

37. *E.* 3. 20.

Though the force and authoritie of this ordinance may perhaps be doubted and blemiſhed; becauſe it was made by the barons, at the time when they had the better hand of the king, as hath been in part objected; yet you ſee, that they deliver not their cenſures, without alledging alſo their reaſons; and this their ordinance is no more in effect, then that which was thought fit by all the commons in the parliament of 5. *Ed.* 2. before mentioned.

But it hath been yet further ſaid, that, notwithſtanding this ordinance, the impoſition doth nevertheleſſe continue in force, and is at this day paid by the merchant ſtrangers, and that therefore in likely hood the ordinance prevailed not againſt it. 'Tis true, that at this day the merchant ſtranger doth pay three pence more in the pound for ſubſidie of poundage, then the *Engliſh* doth, and that by vertue of *charta mercatoria.* But let me tell you, that *charta mercatoria* in it ſelfe had not ſtrength and vertue ſufficient to ſubſiſt for ſo long a time. It was, as I have ſaid, ſuſpended by the king himſelf *an.* 3. condemned by the ordinance of 5. *E.* 2. and had at this day been of no more force, then it was all the time of *Ed.* 2. after 3°. that is, of none at all, had it not been confirmed by act of parliament *an.* 36 *Ed.* 3. *cap.*—. This was onely that which protected *charta mercatoria* againſt all thoſe ſtatutes made againſt impoſitions, and that hath kept it in life till this day; and this indeed, I mean an act of parliament, is the only means, that our law acknowledgeth, for the laying or eſtabliſhing of impoſitions, and without which they cannot long laſt.

You have now heard opened three of thoſe ſix preſidents, which are moſt relied upon for maintenance of theſe preſent impoſitions, which are all that have been urged, or can be found to have been practiſed from the Conqueſt till the reigne of *Ed.* 3. during which time there are, as you ſee, as many publique acts in oppoſition of them, which are of ſo much the more force, in that they are the legall regular acts of great counſells; whereas, on the contrary part, thoſe three impoſitions were the acts of powerfull kings wills, in the times of extream neceſſity. As for *Ed.* 2. his ſucceſſor, there hath not been one impoſition alledged to have been laid by him of one kinde or other. Nay, all the records touching this buſineſſe found in his time, being onely foure, make directly againſt them.

Edw. 2.

The firſt is *anno* 3. which was (as you have heard) a releaſe at the kings will, upon complaint of the commons, of the impoſitions raiſed by *charta mercatoria.*

The ſecond was the ordinance made *an.* 5. declaring *charta mercatoria* and all other impoſitions to be void, and inflicting puniſhment upon ſuch as ſhould demand any.

The third was *an.* 11. which is a *ſuperſedeas* to diſcharge certain commodities from yeelding an increaſe of cuſtome granted by merchants by way of loane, which in great probability the king would never have releaſed, but upon complaint. The rather I think ſo, becauſe, as the record recites, it was granted in a time of great neceſſity.

The fourth is *an.* 12. and is much of the ſame nature, the recitall of which contains ſome very obſervable things, which I will open unto you. It ſhewes firſt in very effectuall words the greatneſſe of the kings wants, and the cauſes thereof. The words are, *Cum pro expeditione guerræ noſtræ Scotiæ, & aliis arduis neceſſitatibus nobis multipliciter incumbentibus, pro quarum exoneratione quaſi infinitam pecuniam profundere oportebit, pecunia plurimùm indigeamus in preſenti; ac inſuper, pro eo quod exitus regni & terræ noſtræ, ſimul cum pecunia nobis in ſubventionem præmiſſorum tam per clerum quam per communitatem regni noſtri conceſſa ad ſumptus predictos cum feſtinatione, qua expediret, faciend. non ſufficiunt.* Here was cauſe, if any cauſe may poſſibly be juſt, for the king preſently to put in practiſe his prerogative of impoſitions. His expence by reaſon of a neceſſary warre in *Scotland* was ſo great, as the whole revenue of the kingdome, together with an ayd which had been lately granted him, could not with that expedition that was requiſite ſupply his preſent want. Doth hee for all this make uſe of his prerogative of impoſing? Or doth hee haſtily, for want of adviſed proceedings, take ſome other courſe prejudiciall to his right? No. The record further ſayes, that he enquired by all wayes and meanes, how he might moſt commodiouſly and fitly levy money for theſe occaſions. After which adviſed deliberation, the courſe at laſt reſolved upon was, not by abſolute power to lay impoſitions, which of all other courſes, if it had been lawfull, had been the moſt ſpeedy and beneficiall, but a courſe more juſtifiable; which was, that merchants ſhould be called together, and that they ſhould be intreated to lend the king upon every ſack of wooll 10. ſhillings, and upon every laſt of lether 5. ſhillings, above the ancient cuſtome; and that for their ſecurity of true repayment, *without fiction or delay*, which are the words of the record, whereby it ſeems that onely a pretence of a loane and repayment had been before that time uſed to colour impoſitions, commandment ſhould be given to the cuſtomers to certifie into the *Exchequer* the names of every particular merchant that ſhould ſo lend unto the king, that they might accordingly receive full ſatisfaction. And 'tis worth the obſerving, that this loane was for no longer time, then from *April*, till *October* following. Thus much is warranted by the record. So as you ſee, that in all this time of this king *Ed.* 2. impoſitions were not only altogether forborn even in the times of his greateſt neceſſity, but they were alſo condemned as unjuſt and utterly unlawfull.

Ed. 3.

We come now to the reigne of king *Ed.* 3. in whoſe time there was no practiſe or meanes, that by the policy of man could be thought on to bring the people under this yoke of impoſitions without aſſent of parliament, but it was by him attempted: inſomuch, as I have in my obſervation out of the records collected no leſſe then five or ſix ſeverall waies, all of them very colourable, which in his time were put in practiſe for the raiſing of impoſitions; and yet none of them but was reſiſted by parliament and condemned.

Impoſitions by way of grant of merchants.

That which was moſt uſuall with him was, that merchants ſhould grant to pay him ſo much upon every commodity exported or imported by way of increaſe of cuſtome. This ſeems not unreaſonable, for that every man might grant of his own what he liſted; and this alſo, to make it more colourable, was never attempted but in the time of warre. And yet, as it hath been partly ſaid already, this was alwayes held unlawfull, as may appeare by the record of 17 *E.* 3. where the commons in parliament ſay, that it is a great miſchiefe, and againſt reaſon, that they ſhould be enforced to pay the deerer for commodities, by reaſon of a charge upon merchandizes, by the grant of merchants, the which is a charge to the people, though none to the merchant. *Anno* 25. *Edw.* 3. the commons reciting, that whereas merchants have granted a new increaſe of cuſ-

17 *E.* 3 No. 27. Ro. Parl.

25 *E.* 3. No. 22. Ro. Parl.

tome to the king, pray, that commiſſions to collect ſuch new increaſe of cuſtome by ſingular grant of merchants be not awarded. *Anno* 36 *Ed.* 3. *cap.* 11. amongſt the printed ſtatutes, grants of ſubſidies upon woolls by merchants without aſſent of parliament are declared to be void, which act was made upon a petition of the commons in *anno* 36 *Ed.* 3. deſiring a law to be made to the ſame effect. If impoſitions raiſed by the grant of merchants, which I ſuppoſe to have been by ſome publicke and ſolemne inſtrument, under the hands and ſeals of the principall merchants of all the great towns of *England*, being called together for that purpoſe, were not of force in this behalf, much leſſe was their bare aſſent without any ſuch ſolemnity, which alſo was a courſe in practiſe in the days of *Ed.* 3. and was alſo uſed in the laying of theſe preſent impoſitions, which wee now complaine of.

36 *E.* 3. No. 26. Ro. Parl.

Another meanes of raiſing impoſitions uſed by *Ed.* 3. was by way of diſpenſation for money with ſome ſtatute in force, which reſtrained the paſſage of merchants. Moſt of his impoſitions of one kinde or other, laid after 11 *E.* 3. were of this nature. For *anno* 11. *cap.* 1. amongſt the printed ſtatutes, you ſhall find it enacted, that *no man upon paine of death, loſſe of lands and goods, ſhould export wools.* Immediately after the making of this ſtatute, impoſitions by way of diſpenſations for money came to be ſo frequent and burdenſome, that the very yeere following the king, being in perſon to undertake a warre in *Scotland*, and for the raiſing of treaſure having laid heavy impoſitions in this kinde, which he perceived to be very burdenſome to the people, he wrote to the arch-biſhop of *Canterbury*. His letter is extant upon record, to this effect; that whereas the *people were much burdened with divers charges, tallages, and impoſitions, which he could not mention but with much grief, but being enforced by inevitable neceſſity could not as yet eaſe the people of them, he required the arch-biſhop to exhort the people patiently and humbly to bear the burden for a while, and to excuſe him towards the people, hoping he ſhould ere long recompence his ſaid people, and give them comfort in due time.* His neceſſities were nevertheleſſe ſo great, and this means of raiſing money was ſo colourable, ſeeing no man was compelled to pay, that did not himſelf deſire to be diſpenſed with, for the breach of a penal law, by which his life goods and lands were forfeited, as he ſpared not to lay on load in this kinde; inſomuch as you ſhall finde, that in *an.* 13. he took for diſpenſations to paſſe onely to *Antwerp* of *Engliſhmen* 40. ſhillings upon a ſack of wool, 40. ſhillings upon 300. woollfells, and 4. pound upon a laſt of leather; of ſtrangers 3. pound upon a ſack of wooll, 3. pound upon 300. woollfells, and 6. pound for a laſt of leather; whereas the ancient and due cuſtome was no more then 6. ſhillings upon a ſack of wooll, the like upon 300. woollfells, and 13. ſhillings 4 pence upon a laſt of leather. Immediately hereupon, even this very yeere, was this complained of in parliament, and a petition exhibited by the lords and commons, that it might be enacted, that this *maletolt* or impoſition, becauſe it was taken without aſſent of parliament, might be taken away, and that a law might be made, that no ſuch charge might be laid, but by aſſent of parliament. And they further prayed, that they might have a charter under the great ſeal, confirmed and enrolled in parliament, to the ſame effect, which was performed the next parliament, as may appeare by the ſtatutes printed, where, *an.* 14. *Ed.* 3. *cap.* 21. you ſhall ſee an act of parliament to this effect, and that a moſt effectuall one. And immediately after, follows the charter to the ſame effect, of both which I ſhall have more occaſion to ſpeak hereafter. But ſuch were the kings wants, that, even in the mean time between the petition and the making of the act, he could not forbeare to raiſe money by this meanes; for in *an.* 14. the eleventh day of *March*, in the end of which month the next parliament began, as may appeare by the preamble to the ſtatutes of that parliament, he tooke by way of diſpenſation 40. ſhillings upon a ſack of wool, when it ſhould be ſafely landed at *Bruxells*, and 40. ſhillings at the port within *England*, which was indeed an intollerable charge. But the better to colour it, the king, in his commiſſions for collection thereof, pretended, that the merchants had been humble ſuiters to him, that the paſſage for woolls might be open till *Whitſontide* following; and that to obtaine the ſame, they had of their free wills offered to give him the ſaid ſummes, as may appear by the recitall in the beginning of the ſaid record.

Impoſitions by way of diſpenſation with a penal law.

Stat. 11. *Ed.* 3. *cap.* 1.

12 *E.* 3. No. 22. Ro. *Aleman.*

13 *Ed.* 3. Orig. de Scac. Ro. 3. & 12.

13 *Ed.* 3. No. 5. Ro. Parliam.

14 *Ed.* 3. cap. 21.

14 *Ed.* 3. Ro. 3. Orig. de Scac.

In further prevention of this miſchiefe, in an act of parliament printed, made *an.* 27. *Ed.* 3. *cap.* 2. there was a ſpeciall proviſion made againſt all licenſes to tranſport. Nevertheleſſe, as it may be collected by a record of the ſame yeere, the king raiſed 40. ſhillings upon a ſack of wooll, 40. ſhillings upon 300. woollfells, and 4. pound upon a laſt of leather, by the ſame means, I meane by way of diſpenſation. For though indeed it be recited to be granted by merchants, yet was it no otherwiſe granted by them, then for licenſes to tranſport; for at that time the ſtaple of wooll was in *England*, as may appeare by the printed ſtatute of 27. *Ed.* 3. *cap.* 1. and 2.

Stat. 27. *E.* 3. cap. 2.

Orig. de Scac. 27. *E.* 3. Ro. 7.

27 *Ed.* 3. cap. 1 and 2.

And here I thinke it fit to make this obſervation in generall, that, whereas in ſome other of the records of *Ed.* 3. there is mention made of impoſitions upon woolls granted by merchants, becauſe the paſſage of woolls was in thoſe daies ſo often reſtrained by ſtatute, as may appeare by very many printed ſtatutes of that time, it is very likely, that theſe grants of merchants were alſo for diſpenſations to tranſport, as appears that this of 27. was; and it may well be, that ſome of the ſtatutes, being but temporary, were not committed to the preſſe. This kinde of impoſition, by way of diſpenſation, I finde not to have been at all practiſed from 27. till 39. where without any colouring of the matter, with pretence of the grant or gift of merchants, or any recitall of ſuite made by merchants to have the paſſage open, as uſually in former times, but plainly and aptly, the king recites, *that whereas* Engliſh *merchants were by act of parliament reſtrained to tranſport woolls, nevertheleſſe, upon advice with his counſell, he thought fit to give leave, that ſuch as would might tranſport woolls, paying* 46. *ſhillings* 8. *pence upon a ſacke, which the king commandeth to be levied.* This impoſition laſted a very little while; for the next parliament following, the ſubjects granted to the king a ſubſidie upon woolls woollfells and leather, to endure for a very ſhort time. And yet, as it appears by the words of the record, the king doth thank his people for it, *with all his heart.* At which time, for the maintenance of his warres in *Scotland*, he obtaineth the continuance thereof *for two yeeres*, at the end of which *two yeeres* he further obtaineth in parliament a continuance of the ſame from *Michaelmas* following, *for three yeeres*, for the ſupplie of treaſure for the warre. Two yeeres following, *viz.* in *an.* 45. the commons doubting, as it ſeemeth, that the king had ſecretly concluded to increaſe, by way of impoſition, this ſubſidie, which was yeelded to in parliament, and granted for three yeeres, made a conditionall petition, that if any impoſition be laid upon woolls wooll-fells or leather more then the ſubſidie granted in parliament, that it may be taken away. The king anſwereth, that if any be laid ſince the ſtatute, it ſhall be taken away; and then follows the printed ſtatute, *an.* 45. *Ed.* 3. *cap.* 4. *that no impoſitions be laid upon woolls, wooll-fells, or leather*; which is the firſt place where I finde *impoſitions* named in our printed books. I finde them firſt named upon my *Latine* record, 12. *Ed.* 3. in the kings letter to the archbiſhop; and firſt upon my record in *French*, not printed, *an.* 21. *Ed.* 3. *Num.* 16. *Ro. Parliament.*

Yet you ſhall finde an act of parliament for free paſſage *an.* 15. *Ed.* 3.

39 *Ed* 3. Ro. 2. Orig. Scac.

43. *Ed.* 3. 9. & 10. Ro. Parl.

Num. 42. Rol. Parliam.

But to proceed. About a yeere following this parliament of 45. neere which time the ſubſidie granted *an.* 43. for three yeeres was expired, there was another ſubſidie of forty three ſhillings foure pence upon a ſack of wooll, as much upon twelve ſcore wooll-fells, and five pounds upon a laſt of leather, above the ancient cuſtomes, granted in parliament, for the maintainance of the warre in *Guyen*, to endure for two yeeres; for which, the king likewiſe gave thanks.

46. *Ed.* 3. No. 10. Ro. Parl.

The next yeere following, the ſubſidie granted the laſt parliament, was continued from *Michaelmas* for a yeere without any condition, and for the next yeere upon condition, amongſt other things, that no impoſition be laid during the two yeeres, and that the money levied be imployed upon the warres. In the next yeere following, the king took, as by the grant of merchants, upon a ſack of wool, of denizens fifty ſhillings, and of ſtrangers foure marks; upon 240. wooll-fells, of denizens fifty ſhillings, and of ſtrangers foure marks; and upon every laſt of leather, of denizens five pounds, and of ſtrangers eight marks. Though this record pretendeth nothing but the grant of merchants, yet it is upon the matter no other than a diſpenſation for ſo much money; for, at this time, the paſſage was not open, other than to *Calliſe*, where the ſtaple then was, as may appeare by the two records of 38. *Ed.* 3. *Ro. Parl.* & 50. *Ed.* 3. *Num.* 24. And yet you may ſee, how hatefull even theſe impoſitions by way of diſpenſation, which are farre more tollerable then our preſent impoſitions, were in thoſe dayes. For within two yeeres following, one *Richard Lions*, farmer of the cuſtomes, among other things laid to his charge, was accuſed in parliament for ſetting or procuring to be ſet new impoſitions, not ſhewing of what nature, without aſſent of parliament, and was adjudged to forfeit his goods and lands. But more particularly the lord *Latymer*, lord chamberlain of *England*, was expreſsly accuſed, that he combined with *Richard Lions* and others, who for their own profit had procured and counſelled the king to grant many licences for the tranſporting of great quantities of wooll beyond the ſeas, other then to the ſtaple at *Calliſe*, againſt divers ordinances and commandements to the contrary, and had put upon woolls and wool-fells new impoſitions. Here you ſee, that the device of diſpenſations for money had the name of an impoſition in thoſe dayes, though indeed it be not in its nature a meere impoſition, or at leaſt not ſuch a one as thoſe are which we complain of: but ſuch as it was, you ſee how from time to time it hath beene condemned, and how it is reckoned up amongſt the moſt hainous faults of thoſe two great offenders, who, though perhaps they were condemned alſo for other offences, yet the laying of theſe to their charge did ſhew the great hate generally conceived againſt impoſitions of this kinde. I might here further adde in proofe of the invalidity of theſe diſpenſations, that certain merchants, having obtained ſome of theſe, and having alſo the advantage of the kings proclamation to diſpenſe with the ſtatute which reſtrained their paſſage, yet they never thought themſelves ſecure from this puniſhment of the ſtatute, till they were provided for by act of parliament, as may appeare by a ſtatute printed *anno* 35 *Ed.* 3. *cap.* 21. To alledge therefore any of this kind, thereby to prove the lawfulnes of ours, cannot but argue a weak cauſe.

47. *Ed.* 3. No. 12. Ro. Parl.

48 *E.* 3. Ro. 2. *Orig. de Scac.*

50 *Ed.* 3. No. 17, 18, 19, Ro. Parl.

50 *E.* 3. No. Ro. Parl.

For firſt, as I have ſaid, there is farre more reaſon and colour for theſe, then for ours; for in this caſe no man was compelled to pay, that did it not to avoide a greater miſcheife; for by paying the impoſition, he was free from a grieveous puniſhment for breach of a penall law which reſtrained his paſſage; whereas in our caſe a charge is laid upon him for exerciſing his lawfull trade, where no ſtatute law or common law is to the contrary, but rather both the one and the other make for him.

But it may bee here objected, that the king may lawfully reſtraine, the breach of which reſtraint is a contempt and againſt law, and that to impoſe doth imply a reſtraint upon a penalty. Suppoſe it were ſo, yet, if in caſe where the reſtraint is not onely by the king, but the whole eſtate aſſembled in parliament, for ſome urgent cauſe, it be unlawful to give licenſe for money, as you perceive it is, how much more is it ſo, where the reſtraint is for no other purpoſe then to raiſe an impoſition, as in our caſe? But of this more largely hereafter.

Another device of raiſing impoſitions without aſſent of the commons in parliament, practiſed by *Ed.* 3. was *by way of ordinance*, which indeed is in the next degree of ſtrength unto a ſtatute. For it is a conſtitution made by the king himſelfe,

Impoſitions raiſed by way of ordinance inparliament.

and all the prelates, earls, and barons, not at the counſell table, or in the kings chamber, but ſitting ſolemnly in parliament, and hath alſo the like ſolemnity of inrolement that a ſtatute hath, onely it is enrolled in a roll by it ſelfe, which hath the name of the roll of the ordinances. But the only eſſentiall difference between this and an act of parliament is, that this hath not the aſſent of the commons.

Some ordinances have had that eſtimation amongſt us, that they have at this day the force of ſtatutes; as the ordinance of *Merton*, made 20 *Hen.* 3. which, though it were no other then an ordinance made by the king the prelates earls and barons, without aſſent of the commons, yet hath it by continuance of time gotten not onely the ſtrength, but the name alſo of a ſtatute. There be ſome others of this nature, and we finde it uſuall, that the names of ſtatutes and ordinances have been indifferently and confuſedly uſed to expreſſe the one or the other. So as there was not any other more probable deviſe or invention to have brought the people under the yoake of impoſition, without their own aſſent, then was this, by the way of ordinance. Nay, to adde yet a further ſtrength to this high authority of an ordinance in parliament, the aſſent alſo of merchants was uſually joyned therewithall, to make it have the cleerer paſſage with the ſubject; and further it was never, but in the time of warre.

7 *Ed.* 3. R. 9. Orig. de Scac.

The firſt impoſition of this kinde by way of ordinance, which I finde amongſt the records, was 7 *E.* 3. amongſt the originals of the *Exchequer*, where it is ſaid by way of recitall, that the king conſidering how merchants, which make great gaine by trading, ought as well as others to aſſiſt him with treaſure for his warre, eſpecially conſidering how at their intreaty he had placed the ſtaple in *England*; therefore at his parliament held at *Yorke*, by the prelates earls and barons it was ordained, that the merchants ſhould yeeld unto the king a ſubſidie upon merchandizes. This ſubſidie or rather impoſition, thus ſolemnly ordained, and in the times of ſo great neceſſity, was no ſooner eſtabliſhed then revoked, as may appear by the words immediately following in the ſame record, whereupon the merchants of their own accords yeelded, and freely gave ten ſhillings upon a ſack of wooll, as much upon three hundred woolfells, and twenty ſhillings upon a laſt of leather, for a ſhort time, by way of diſpenſation or licence, towards the maintenance of the warre.

20 *Ed* 3. Nu. 78. Ro. Parl.

The like is found *anno* 20 *E.* 3. where the commons complaining of an impoſition of this kinde, laid by the prelates earls and barons in parliament, and by the agreement alſo of merchants, it was not denyed unto them, but that their ſuit was juſt. Onely it was anſwered them, that as yet it was not convenient to take it away; for that the king had taken up great ſummes of money of divers merchants, for his preſent neceſſity, to be repayed out of the ſaid ſubſidie, and therefore it could not be as yet diſcharged without great damage to the king and the merchants. But the moſt materiall record, againſt impoſitions by way of ordinance, is the yeere following, where the king, in excuſe of impoſitions complained of, anſwereth, that they were laid in times of great neceſſity, *and by the aſſent of the prelates, earles, and barons, and other great men, and ſome of the commons then preſent*; *neverthleſſe his pleaſure is, that ſuch impoſitions*, not duly laid, *be not drawn into conſequence, but taken away*, 21 *E.* 3. *No.* 17.

There are ſome others of this kinde, but never any that did abide the triall, though they have alwayes been accompanied with all ſuch circumſtances, as were moſt likely to give them paſſage without controllment; as to be laid in the time of warre, to be limited to a ſhort time, with conſent of merchants. If the authoritie of an ordinance in parliament, joyned with the aſſent of merchants, were in thoſe dayes not of force ſufficient to uphold impoſitions, much leſſe will an order of the king and his counſell out of parliament uphold them at this day, eſpecially after ſo many yeeres diſcontinuance.

Impoſitions rayſed by way of loane by merchants.

Another invention to raiſe impoſitions, practiſed by *Ed.* 3. and in former times, was by way of a pretended or feigned loane from the merchants, of ſo much above the old cuſtome upon merchandiſe exported or imported, which loane was never repaid to the merchant. That this was an old practiſe, may be collected by the preſident, 12 of *Ed.* 2. already cited, where the king promiſeth, that *without fiction* or delay he would repay them their money; implying thereby, that ſometimes fiction had been uſed: and doubtleſſe that loane which was 11 *Ed.* 2. the very yeere before, was ſuch a fained loane as I ſpeake of; for otherwiſe, without queſtion, the king would not have releaſed part of it, as may appeare by that record that he did. For if the money be, *bona fide*, borrowed, and truly intended to be repaid, then doubtleſſe the courſe is lawfull; if otherwiſe, I hold this kinde alſo as unlawfull as any of the reſt.

Edward the third did once or twice borrow in this kinde, as may appeare by records already cited to another purpoſe, with which I will not againe trouble you.

Impoſitions raiſed by grant of merchants, for liberties granted to them.

There was yet another device for raiſing of impoſitions, begun indeed by *Ed.* 1. and condemned in the time of *Ed.* 2. but revived, and much practiſed by *Ed.* 3. which was alſo by way of grant of merchants, and yet not altogether the ſame that I firſt obſerved to have been ſo much practiſed by *Ed.* 2. but is much more colourable and tollerable. For whereas that was a grant, or rather a meere guiſt, without any thing granted back againe in lieu thereof; this, I now ſpeake of, is a ſolemne grant indeed, made by merchants, of an increaſe of cuſtome, for liberties and freedoms, and other valuable priviledges and exemptions, granted unto them by the king. That former was *date nihil expectantes.* This is, *date & dabitur vobis.* And indeed the recompence that the merchants had by this charter granted unto them, made their grant to the king leſſe ſubject to controll, then otherwiſe without ſuch recompence it would have been. I mean the grant of merchant ſtrangers, ſo often remembered amongſt us by the name of *charta mercatoria*, which though it were damned all the time of *Ed.* 2. from the third yeere of his reign, yet was it revived by *E.* 3. *even that very yeere, when he likewiſe depoſed the king his father*, and uſurped to himſelf his crown. For it appeares by the records, that he commanded the ſame to be levied the very firſt yeere of his reigne. What hath been ſaid againſt this kind of impoſition, I ſhall not need here againe to repeate, only let me call to your remembrance, how this charter, as needing a better prop then his owne ſtrength, and validity in law, was in the ſame kings reigne confirmed by parliament, and onely by that ſtrength continueth in force at this day.

1. *Ed.* 3. Ro. Fin.

You have heard five or ſixe ſeverall politique inventions and devices for the eaſie drawing on and ſweetning of this yoak of impoſitions, all practiſed by this prudent and potent king, *Ed.* 3. whoſe times were indeed ſo troubleſom, and his charge every way ſo exceſſive, as it is no marvell, that he left not any way unattempted to raiſe money, without the aſſent of the commons, whom he always found unwillingly and hardly drawne to matters of charge.

Impoſitions laid by expreſſe and direct commandment.

One other way of impoſitions he uſed, not coloured or maſked under any ſuch pretence, or politick invention, as you have heard, but plain and direct, only his owne expreſſe commandment to his officers, to collect of every merchant ſo much for ſuch a commoditie, exported or imported, and to anſwere it into his *Exchequer*, without any recitall in his commiſſions, of grant, aſſent, guift, loane of merchants, diſpenſation, or ordinance in parliament, or any other ſuch colourable pretext whatſoever.

Theſe indeed, and only theſe, are meer impoſitions, and may be aptly compared with theſe of our times. Of this kind, amongſt all the records of *Edward* the third's time, I find only two, which I will truly open unto you. The firſt is in the twenty-one of his reigne, where it appears, that *Lionell*, afterwards *duke of Clarence*, named upon the record *Lionell of Antwerp*, becauſe I ſuppoſe he was there borne, the kings ſecond ſonne being then guardian of *England*, whileſt the king his father was at the ſiege of *Calliſe*, at a counſell by him held the ſame yeere, which I take to be no other then the privie counſell, aſſeſſed without aſſent of parliament, upon every ſack of wooll two ſhillings, upon every tun of wine two ſhillings, upon every pound of aver de poys of merchandizes imported ſix-pence. This impoſition was, I muſt confeſſe, for ought I know to the contrary, ſuch as our preſent impoſitions are; I mean, in that it was impoſed onely and ſimply by the kings abſolute power, and may in that reſpect be the fourth, of that number of ſixe, which I told you were all that could be found in any degree like to ours, ever to have been practiſed in this commonwealth, from the Conqueſt till queene *Maries* time. But though in the authoritie of impoſing it be like, yet in circumſtances very materiall you ſhall find an apparent difference between them.

21 *Ed* 3. No. 11. Ro. Par.

Poundage impoſed.

Firſt, this impoſition is very moderate in the ſum, as you may perceive; for it was but two ſhillings upon a ſack; whereas in 13. *Ed.* 3. forty ſhillings upon a ſack of wooll was uſuall, and ſometimes fifty ſhillings.

Secondly, it was to continue no longer then till *Michaelmas* following.

Thirdly, it was laid in the time of a moſt chargeable warre, and ordained to be imployed for the maintenance of ſhips of warre at ſea, for the ſafeguard of merchants in their paſſage, of which it is apparent there was at this inſtant very great neceſſitie; for it was, as I have ſaid, impoſed then, when king *Ed.* 3. lay at the ſiege of *Calliſe.*

Beſides, ſuch as it was, and ſo qualified as you perceive, it was neverthleſſe complained of in parliament, by a petition from the commons, as may appeare by the records of the ſame of 21. *Edward* the third. To which petition or complaint this anſwere was given, *that all the ſaid impoſitions were already taken away, ſave only the two ſhillings upon a ſack of wooll, which ſhould laſt no longer then* Eaſter; *and ſeeing the ſame was ordained for the ſafeguard of merchants, in which there had been greater ſums of money expended by the king, then could be collected between that and* Michaelmas, *therefore to continue the ſame till* Eaſter; *he hoped it would not ſeem over-burdenſome or grieveous unto them.* In the parliament following, *viz. anno* 22. the commons pray, that writs may bee directed to the cuſtomers to forbeare at *Eaſter* next to take the two ſhillings upon a ſack, according as it was granted at the firſt parliament, and that it be not any longer continued by the procurement of any merchant. The king anſwereth, *let it ceaſe at* Eaſter, *as it was agreed the laſt parliament.*

22 *E* 3. N. 16. Ro. Parl.

Here you ſee it was abſolutely taken away; and therefore though it had wanted theſe qualifications and circumſtances which I have obſerved it had, yet, it being a thing ſo publiquely condemned, it ought to be of little force with you to juſtifie theſe preſent impoſitions. But that which I obſerve out of this laſt record, maketh me rather to incline, that this impoſition was onely by way of diſpenſation, then that it was an abſolute impoſition, ſuch as ours are. For to what end, I pray you, ſhould the commons pray that it might not be any longer continued by the procurement of any merchant, except it were likely that merchants for their benefit ſhould pray the longer continuance thereof; and what benefit can any impoſition whatſoever bee to a merchant, except it bee by way of diſpenſation to give him leave to trade, where before ſuch diſpenſation given he ſtood altogether reſtrained? If then it be an impoſition by way of diſpenſation with a penall ſtatute of reſtraint, then is it no preſident for our preſent impoſitions. But whether or no it be a diſpenſation or abſolute impoſition, I leave t to your judgements. You have heard my obſervation.

And ſo I come to the next preſident in the times of *Ed.* 3. produced for maintenance of our impoſitions, which was in the 24 yeere of his reigne, the record of which and that which followed thereupon, I will, without any inforcement at all, open unto you, and ſo leave it to your cenſures. The king reciting, that whereas the *Spanyard* and *French* had joyned in league to make warre againſt him, and that for the withſtanding of his ſaid adverſaries, as alſo for the ſafeguard of merchants againſt pirates, he had ordained, that certaine ſhips ſhould be ſet forth, and that for maintenance of the ſaid ſhips there ſhould be paid by merchants two ſhillings for every ſack

24 *E.* 3. N. 12. *Orig. de Scac.*

Poundage impoſed.

of wooll, two ſhillings for three hundred woolfells, foure ſhillings for a laſt of leather, a ſcute of gold, or foure ſhillings for a tunne of wine, and ſixpence of the pound upon all other merchandizes for one yeere following; he commandeth his cuſtomers to levy the ſame accordingly.

25 *E.* 3. N. 12. Rot. Par.

The very next yeere and parliament following, the commons exhibite a petition in parliament againſt impoſitions and other like charges, without aſſent of parliament: to which anſwer is given, that *it is* not *the kings intention they ſhould be charged.*

I have now gone through all the materiall records here amongſt us, of the times of *Ed.* 3. in which, though his reigne were very long, and by reaſon of his warres, and other exceſſive charge, more occaſion was given him to try the ſtrength of this point of the prerogative, then ever any king before or ſince; though oftentimes, and by many politicke inventions, as you have heard, he attempted to eſtabliſh this prerogative, of laying impoſitions without aſſent in parliament; yet can there not be produced in all his time, any more then two preſidents of impoſitions like to theſe of ours; that is, *impoſed by the kings abſolute authority.* And yet theſe two were alſo, as you perceive, qualified with ſuch circumſtances, as, if ours were ſuch, we ſhould have held them tolerable, though perhaps not lawfull. Yet they, ſuch as they were, eſcaped not without being complained of, and condemned alſo in parliament, as you have heard.

It may perhaps be, that ſome one or two of theſe impoſitions, which were by aſſent or grant of merchants in this time of *Ed.* 3. were in times when the paſſage was open, and not reſtrained by act of parliament, and ſo to be compared to our impoſitions. But whoſoever ſhall, by looking over the ſtatutes and records with never ſo much heed, conſider the times of opening and ſhutting of the ſea by ſtatutes, ſhall finde it ſo intricate, as hee ſhall bee very hardly able directly to ſay, that, at the time when any of theſe impoſitions were granted, the paſſage was open.

If in my obſervation I had found any ſuch, I ſhould have admitted it for an abſolute impoſition, as I have done *charta mercatoria*, which was by grant of merchants; for certainly, as I have yeelded, the grant of merchants is in this caſe of no other effect, then the declaration only of their aſſent; and the impoſition reſteth meerly upon the king's authority. But I finde none ſuch. If any ſuch could be produced, you have heard, how they have beene from time to time controlled in parliament.

And ſo I paſſe from *E.* 3. to the times following. From the end of the reign of *E.* 3. till the reign of queen *Mary*, who was the eleventh prince of this realme after *Ed.* 3. (as *Ed.* 3. was the eleventh after the Conqueſt) being the ſpace of 170. yeeres or thereabouts, it hath been confeſſed by all thoſe that have argued in maintenance of his majeſties right to impoſe, that there hath not been found one record that proves any one impoſition to have been laid. There are indeed in our printed bookes ſome three or foure ſtatutes during that time, in which mention is made of impoſitions. But they are, as I ſhall prove, impoſitions of another nature then thoſe are which we complaine of; and ſo make nothing at all to the proofe of his majeſties right: or if they were ſuch as ours are, yet are they no where found mentioned but with diſgrace, and to the end to be taken away; which may be the reaſon, that notwithſtanding the great uſe that might have been made of three or foure preſidents of impoſitions in theſe times, for the patching up of a continuance of the practiſe, which otherwiſe by this long diſcontinuance receives a great blemiſh; thoſe which argued for impoſitions did not take hold of theſe, but choſe rather to confeſſe, that no impoſitions at all were laid during all this time, and labored to ſeek out the reaſons of the diſcontinuance.

11 *R.* 2. cap. 9. Statutes in which there is mention made of impoſitions after the end of *Ed* the thirds raigne untill Qu. *Maries.*

I will briefely ſhew you what ſtatutes they are, during that time, which mention impoſitions. The firſt is 11 *R.* 2. *cap.* 9. No impoſition nor charge ſhall be put upon woolls, leather, or woollfells, other than the cuſtome and ſubſidie granted to the king this preſent parliament; and if any be, the ſame ſhall be repealed and annulled, as it was another time ordained by ſtatute, ſaving alway to the king his ancient right. If by this ſaving the pretended right of impoſing ſhould be excepted, as was ſaid in the *Exchequer*, the ſaving ſhould then be contrary to the body of the act; and therefore it muſt needs have ſome other interpretation, that it may ſtand with the reſt of the act, and not condemn the law makers of ſo much want of diſcretion. Therefore doubtleſſe this (ſaving) is no other then an exception of the ancient rightfull cuſtomes, due upon thoſe ſtaple commodities. And for my part I am of opinion, that the ſtatute was made, not ſo much to take away any impoſition laid by this king *R.* 2. as out of a provident and prudent care in the law makers, proceeding from the freſh memory of the practiſe of *Ed.* 3. in this kinde; for all thoſe that were of this parliament, did live and were at mans age in *Ed.* 3. time, and could not but well remember the grievouſnes of his impoſitions. Beſides, I obſerve, that they deſire, that no impoſition be laid by way of addition to the ſubſidie upon woolls and leather then granted. It was never heard till of late, that an impoſition upon any merchandize was charged at the ſame time with a ſubſidie; and therefore without queſtion, this was no other then an aboundant proviſion by them, wherein they were no more carefull then any wiſe man would be in the like caſe. When they had of their own free wills given the king a liberall gift, they were carefull not to be further charged by him.

23 *H.* 6. cap. 18.

The next ſtatute in theſe times, where impoſitions are found mentioned, is, 23 *H.* 6. *cap.* 18. By which it appeares, that *Engliſh* merchants, being reſtrained from repayring to *Gaſcoigne* and *Guien*, to buy the wines of that country, they were neverthleſſe ſuffered to repaire thither paying certaine *new impoſitions*, which were demanded of them. Upon complaint hereof, it was enacted, that all *Engliſh* merchants might freely paſſe into thoſe parts, and buy wines there at their pleaſure, without any *new impoſition* or charge to be put upon them; for that *ſuch impoſitions were to the damage of merchants, and to the hinderance of all the kings people: if any were demanded by the kings officers, the officers ſo demanding them ſhould forfeit twenty pound, beſides treble damages, to the party grieved.*

27 *E.* 3. c. 6. 38 *Ed.* 3 c. 10. and 38 *Ed* 3. cap. 42 *E.* 3 c. 8. 43 *E.* 3 c. 12.

That theſe impoſitions were by way of diſpenſation with a ſtatute, which reſtrained the repaire of *Engliſh* merchants into thoſe parts, and not by the kings abſolute power, thereupon to ground an impoſition, is evident by the ſtatutes in print. For from 27 *Ed.* 3. till this, 23 *H.* 6. there are five or ſix ſtatutes in print to this purpoſe, ſome more ſtrict then other, which continued in force till 23 *H.* 6. The reaſon of the reſtraint by *Ed.* 3. I ſuppoſe to have been; becauſe *Gaſcoigne* and *Guien* were then in his poſſeſſion, and he was deſirous his ſubjects, the merchants of thoſe countries, ſhould have the ſole profit of their own commodities; and that they onely ſhould import them into *England*, and not the merchants of *England.* Whatſoever the cauſe of the reſtraint was, it is very cleer *the reſtraint was by ſtatute*, and that this impoſition raiſed by way of diſpenſation was condemned; which neverthleſſe, ſuppoſe it had not been controled, yet, as I have ſaid oftentimes, it is in nature ſo farre differing from ours, as the practiſe thereof will not ſo much as help to ſalve this long diſcontinuance.

1 *R.* 3. cap. 12.

The next mention of impoſitions is found 1 *R.* 3. *cap.* 12. The words are, *the ſubjects and cominality of this realme ſhall not from henceforth be charged by any ſuch charge or impoſition called a benevolence, nor by ſuch like charge.* You perceive by the words of the ſtatute, what impoſitions are intended within that ſtatute.

7 *H.* 7. cap. 7.

The next mention of impoſitions in theſe times, I finde to be, 7 *H.* 7. where a charge of eighteen ſhillings, laid upon a butt of malmeſie by parliament, is called an impoſition.

12 *H.* 7. cap. 6.

Another mention of impoſitions, I finde to be, 12 *H.* 7. *cap.* 6. In the preamble of the ſtatute the words are, *that every perſon ought to uſe himſelfe to his moſt advantage, without exaction, fine, impoſition or contribution to be had, or taken of him, to, or by any* Engliſh *perſon, or perſons.*

Though ſome, that have argued before me againſt impoſitions, have urged this ſtatute, as making againſt our preſent impoſitions, yet for my part, I am not of that opinion, but upon peruſing the ſtatute, doe rather thinke, that it extendeth only to impoſitions laid by the merchants of *London*, upon the merchants of other cities and townes not incorporate into their companies, as will evidently appeare by the ſtatute: ſo as notwithſtanding this ſtatute, that which I have averred, and hath been yeelded to by the kings counſell, that no impoſition was laid from *Ed.* 3. to queene *Maries* reigne, is not yet impeached.

14 *H.* 8. cap. 4.

There is yet one other ſtatute of later time, in which mention is made of impoſitions, and that is 14. *H.* 8. *cap.* 4. The words are, *every ſubject borne in* England, *and ſworne to be ſubjects of other princes, as long as they ſhall ſo abide ſubjects to the other princes, ſhall pay ſuch cuſtoms, ſubſidies, tolls, and other impoſitions, within this realme, as ſtrangers doe.* I hold that this word *impoſitions*, in this place, is uſed as a generall to all the particulars before mentioned, and no otherwiſe, and is no more in effect then *charges*; a thing uſuall in ſtatutes of this nature, to adde generall words for the more ſecuritie, which I collect by the word *(other)* going next before it: for to what end ſhould it be ſaid, *no (other) impoſitions*, if thoſe particulars firſt named, were not contained within that generall word of *impoſitions?* This word *(other)* is a relative, and muſt needs be anſwered with words going before, when there are no other words following.

7 *H.* 7. c. 7.

The ſignification of the words *maltolt*, and *impoſition*, or *impoſt.*

Beſides, it is common in the ſtatutes and records of *Ed.* 3. *No impoſition upon wools ſhall be laid, but in parliament*; by which it appears, that a charge laid by parliament may be called an impoſition; which is very evident by a ſtatute made not above 28 yeeres before this, I meane the ſtatute of 7. *H.* 7. *cap.* 7. which I ſpake of even now, where a charge of eighteen ſhillings upon a butt of malmſey, laid by that act of parliament, is called an *impoſition*; and as I have ſhewed you, the word *impoſition* hath been applyed to all theſe ſeverall inventions, uſed by *Ed.* 3. for the charging of merchandizes. Nay, the word *maltolt*, which is *Engliſhed* by *Raſtall an evill toll*, as indeed it ſignifies, and in that reſpect is of a farre harder ſenſe then the word *impoſition*, is uſed indifferently for a *charge* ſet by parliament, or a charge ſet by the kings abſolute power upon merchandizes.

No impoſition laid, from *Ed.* the thirds time, till Q. *Maries.*

What great occaſions all the kings from *Ed.* 3. till Q. *Marie* had to lay impoſitions, and yet did it not.

Impoſitio, derived from the verbe *imponere*, is no other then the act of laying on, or impoſing; and therefore in my opinion, impoſitions are more properly by the merchants called *impoſts*, which ſignifieth the things impoſed. But I ſhall not need any further to enforce this, conſidering it hath ſo liberally been confeſſed by the kings counſell, that there is no record or ſtatute from *Ed.* 3. till queen *Maries* reigne, that giveth any aſſurance that *impoſitions*, or ſo much as any one *impoſition* was laid, during all that ſpace of above 170. yeers. Only it behoves me for further opening the truth, to teſtifie, that, being one of thoſe that were by you imployed to make ſearch in the ancient cuſtome books of thoſe times remaining in the *Exchequer*, together with ſome of the beſt experienced merchants of this houſe, ſome of which had ſate at the receipt of cuſtome, wee had many meetings, and ſpent many whole dayes in turning over the old cuſtome books, and as carefully as we could did ſurvey ſome books of every age and time; but after all our ſearch ended, could not finde any one impoſition from the time of *Ed.* 3. till queen *Maries* reigne, to have been received by any cuſtomer or collector. And if you pleaſe to give me leave to remember to you the paſſages of thoſe times, you cannot but marvell, that none of all thoſe princes ſhould ſo much as attempt to trie the ſtrength of this ſo beneficiall a prerogative, ſo much practiſed by *Ed.* 3. and when you have heard their occaſions, and compared their other actions with their forbearance in this kinde, you will, I think, conclude, and ſay in your hearts, that ſurely none of all thoſe kings had ſo much as any imagination, that any ſuch prerogative belonged unto them, as to raiſe money at their pleaſure, by laying a charge upon merchandizes to be exported or imported, without aſſent in parliament.

Richard 2.

Richard the ſecond, being the grand-childe and next ſucceſſor of *Ed.* 3. in whoſe times impoſitions of all ſorts did ſo much rage, had little leſſe occaſion then his predeceſſor had. For firſt, he had little treaſure left him, and he was no ſooner in his throne, but news was brought that the *French* had invaded the realme. They had burned *Rye* and *Haſtings* in *Suſſex*, they had taken and poſſeſſed the *Ile of Wight*, they had beſieged *Winchelſey*. From the northern parts, the *Scots* had burned *Roxborough*, and were ready to overrunne all the north parts of *England*. Being thus beſet with warre on all ſides, doth his counſell, which in all likelyhood had moſt of them been of counſell to his grandfather, adviſe him to raiſe money by impoſitions, as his grandfather had done (for this courſe of raiſing money by way of impoſitions, was yet freſh in all their memories)? They do not, but he taketh the ordinary courſe, by calling a parliament, which for mainteinance of his charge in the war, the ſecond yeere of his reign, granteth him a fifteenth. He calleth another parliament, and hath another fifteenth granted, the fourth yeere of his reigne. The warres increaſing, his neceſſities were ſuch, and ſo conceived by the parliament, as they granted him a moſt unuſuall taxe throughout the whole kingdome, upon every eccleſiaſticall perſon, one and other, ſixe ſhillings eight pence; upon every other man or woman within the realm, four pence; which when it came to be levied, cauſed (though cauſeleſly, becauſe it was legally granted) that notorious rebellion, of which *Wat Tyler* was the captaine. This taxe, as it was levied not without that great rebellion, ſo queſtionleſſe was it unwillingly yeelded to in parliament; and yet becauſe there was no other courſe thought lawfull for the raiſing of treaſure upon the ſubjects goods, then by their own aſſent in parliament, onely that courſe was thought fit to be practiſed, which was ſuch as ought to be obeyed.

From the 5. to the 18. yeere of his reigne, he obtained every other yeere one aide or other in parliament; ſometimes a taxe, ſometimes a fifteenth, ſometimes a ſubſidie of tonnage and poundage. In the eighteenth yeere, he was inforced to go in perſon into *Ireland*, to ſettle the ſtate of that country, then in rebellion. All theſe troubles he had from abroade, beſides thoſe famous rebellions here at home, which afterwards caſt him out of his ſeat; yet did he never for all this attempt to lay impoſitions, though he wanted not about him to put him in minde of his abſolute power. For *Edward Strafford*, biſhop of *Exeter*, lord chancellor of *England*, in a ſermon made to the parliament held *anno* 21. as our chronicles report, did publiquely maintain, that the king was not bound by any law, but was of himſelf abſolute and above law, and that to controle any of his actions was an offence worthy of death; at which parliament all that were preſent came armed, for fear of the king; and the parliament houſe it ſelfe was beſet with 4000. archers by his appointment. I will ſpeak no more of him then this. Though he were a king of a weak ſpirit, yet did he not ſpare to practiſe upon his people the moſt grievous things that were; inſomuch that he ſo farre diſcontented them that they depoſed him by common conſent in parliament, the onely deſperate example of that kinde that our hiſtories doe afford, or I hope ever ſhall.

Henry 4.

His ſucceſſor *Henry* the fourth, in reſpect he held the crown by ſo weak a title, had cauſe to give the people all the content he could poſſible. And yet he was ſo oppreſſed with warres on all ſides, from *France* and *Scotland*, but eſpecially by continuall and dangerous invaſions made by the *Welſh*, as without the aide of his people for the ſupply of his treaſure, it had not been poſſible for him to have held his crown on his head. And therefore he preſſed his people ſo farre, that in a parliament held the fifth yeere of his reigne, they yeelded to him ſo great and ſo unaccuſtomed a tax, as that the grantors thereof, as our chroniclers ſay, tooke ſpeciall order, that no memory thereof ſhould remaine of record onely to avoide the preſident; and yet the very next yeere following, his wants were againe grown ſo great, as his ſubjects, being aſſembled in parliament to give him further ayde, did reſolve, that there was no other way to ſupply his want, then to take from the clergie their temporall lands and goods, and to give them all to the king; which being withſtood by the clergie, a reſumption of all the gifts of *Ed.* 3. and *Ric.* 2. was propounded. At laſt, after they had ſate a whole yeere, they gave him two fifteenths. At this time, moſt of his counſell and the great officers of the kingdome were ſpirituall men. Had they not now, if ever, a juſt occaſion given them to have put the king in minde of his prerogative of laying impoſitions, not onely to the intent to have diverted him from the harkning to that deſperate motion, that had been made againſt them to all their utter undoings; but were they not alſo bound in duty and conſcience, in this time of ſo great neceſſitie, ſeeing the parliament knew not otherwiſe how to ſupplie the kings wants, to have adviſed him to have made uſe of his lawfull right of impoſing; by which means, he might, without troubling the parliament, quickly have raiſed great ſummes of money? Certainly it was not, becauſe they were ignorant of any ſuch practiſe in former times; for none of them that were then of the counſell to *Henry* the fourth, but they lived in *Ed.* 3. time; and moſt of them, doubtleſſe, were in *Ed.* 3. time men of age and diſcretion. But in all likelyhood as they knew that *Edward* the third did lay impoſitions, ſo likewiſe they knew, that impoſitions had been from time to time, in thoſe daies, condemned as unlawfull, and were become hatefull to the people; and onely for that reaſon they did forbeare to adviſe the king to take that courſe, though the neceſſitie were never ſo great.

Another prerogative, as much concerning the intereſt of the ſubject as this of impoſitions, namely the abaſing of coyne, this king made no ſcruple at all to put in practiſe, becauſe he held it to be lawfull.

Hen. 5.

His ſonne, and next ſucceſſor, *Hen.* 5. who, by his many victories over the *French*, and his noble diſpoſition and behaviour towards his people, was ſo farre beloved of them, as never was king of this realme more, though the kingdome were now, by one degree of diſcent, more firmely ſetled upon him then it was on his father, who uſurped it; though alſo his expence of treaſure, by reaſon of that great warre in *France*, were as much, as any king's of *England* ever were; though he had troubles alſo from his neighbours the *Scots*, and within his owne realme by rebellions; and laſtly, though he ſpared not, for ſupplie of treaſure, to ſuppreſſe above a 100. priories of aliens; yet neither out of the ſtrength of his love with the people, nor in his extreame neceſſity, by reaſon of theſe honorable warres in *France*, for the maintenance of which the people would willingly have undergone any burden which he would have laid upon them, eſpecially after the victory at *Agencourt*, did he ever ſo much as attempt the laying of impoſitions.

Hen. 6.

His ſucceſſor *Hen.* 6. though indeed of a meek ſpirit, yet he was ſo followed with troubles within the realme, and from abroad, that he was inforced to crave ſuch an extraordinary aide of his ſubjects in parliament, as the levying thereof was the cauſe of that famous rebellion of *Jack Cade* in his time. Beſides, in the 18 yeere of his reigne, for the eaſe of his charge and ſupply of his wants, all grants by him made, of any lands, rents, annuities, or fees whatſoever, ſince the firſt day of his reigne, were reſumed: and this is never yeelded to, but in caſes of extreame neceſſity. As for impoſitions, notwithſtanding his great wants, he thought not of them.

Edw. 4.

Edw. 4. that ſucceeded him, was no leſſe free from troubles; for he was, as you know, driven to forſake his kingdome, and to live for a while like a baniſhed man with the duke of *Burgundy*. He was alſo inforced in the 5 yeere of his reigne to make a reſumption; and the ſame yeere to abaſe his coyne. And *Comines* obſerveth of him, that he obtained a ſubſidie of his ſubjects in parliament, upon condition that he ſhould himſelfe in perſon undertake the war in *France*; and that only to get the ſubſidie, he paſſed the ſeas into *France*, but preſently returned without doing any thing. What ſhould ſuch ſhifts as theſe have needed, if he might, without being beholding to his ſubjects, lawfully and without controll have raiſed treaſure by laying of impoſitions? It is well worth the remembring, that which the ſame *Comines*, ſpeaking in commendation of the frame of this common-wealth, ſaith, *that this ſtate is happy, in that the people cannot be compelled by the king to ſuſtein any publique charge, except it be by their own conſent in parliament.*

Hen. 7.

H. 7. had a ſubſidy of tunnage and poundage granted to him for his life, as may appear by the Parl. Roll 1 *H.* 7. which appeares no where in our printed books.

I proceed from *Ed.* 4. to *Hen.* 7. omitting *Ed.* 5. and *Ric.* 3. becauſe of the ſhortnes of their reignes. *Hen.* 7. had indeed a more peaceable time than any of his predeceſſors; and yet he was not altogether free from troubles, both within the realme and from abroad. But his naturall inclination was rather to embrace peace. He was ſo provident and politique in the gathering and ſtoring up of treaſure, as never any prince of this realme was therein to be compared to him. He did himſelfe take the accounts of his revenues, which I have ſeen under his own hand. He had for his aſſiſtants about him *Empſon* and *Dudley*, men learned in the lawes, and by all probability very cunning in all the profitable points of the prerogative; men that intended or ſtudied little elſe than the advancing of their maſters profit; men even till this day infamous for their wicked counſell, in perſwading that good king to lay ſuch heavy exactions and burdens upon his people as he did. If theſe men, who in all likelihood ſhould have beſt knowne the kings right, eſpecially in ſo high a point of profit, had but had the leaſt notice of ſo profitable a prerogative as this, would they not have been at ſtrife which of them ſhould firſt have put the king in minde thereof? Or if they had held it queſtionable, would they not have put it to ſome triall? Certainly there can be no cauſe imagined, that ſhould make them thus to forbeare, but either they were utterly ignorant of any ſuch prerogative; or, that knowing ſuch a thing to be claimed by ſome of the ancient kings, eſpecially by *Ed.* 3. they knew likewiſe, that it was in the ſame times continually complained of in parliament, and alwayes condemned; and that there were acts of parliament directly againſt it. And this is more probably to bee conceived of them, being men of ſuch ſearching ſpirits, and ſo well ſtudied in point of prerogative, then that they were ignorant of the practiſe of *Ed.* 3. conſidering alſo that they were neerer to thoſe times by 120 yeeres then wee are.

But that which moſt of all moves me herein is, that there was in *H.* 7. time ſuch an occaſion offered of making uſe of this prerogative, as there could not poſſibly happen any other that might better have juſtified the laying of impoſitions, which was this. The *Venetians*, to the intent to drive our merchants from fetching ſweet wines at *Candy*, that they might the better imploy their owne ſhips and merchants, did impoſe upon every butt of malmeſey brought thence by *Engliſh* merchants foure duccats; by which means the *Engliſh* wholly loſt that trade, and the *Venetians* made the whole profit thereof. This miſchiefe was no other way better to be remedied, than by impoſing the like, or a greater charge upon merchants of *Candy* bringing malmeſey into *England*; that ſo they of *Candy* not being able to afford them better cheape than the *Engliſh*, the *Engliſh* might ſtill fetch them from *Candy*, as they had wont to doe. I ſay, there could not poſſibly be a more juſtifiable occaſion of laying impoſitions, than this was. And did this king, ſo carefull in other things of preſerving his prerogative, and moſt of all in matters that concerned his profit, take hold of this occaſion to lay an impoſition by his abſolute power? Nay rather, though he ſaw it convenient, and in a manner neceſſary, yet he conceived it to be unlawfull ſo to do; and therefore did it not by his abſolute power, but by aſſent of parliament, as may appeare by the ſtatute of 7 *Hen.* 7. *cap.* 7. printed; where, in the preamble of the act, you ſhall ſee the occaſion of the making of the act to be as I have opened it unto you: and you may perceive by the body of the act, that for the counterpoyſing of the impoſition of foure duccats laid by the *Venetians* upon our merchants, there was impoſed 18s. for a butt of malmeſey, upon their merchants bringing it hither, to laſt as long as the impoſition of foure duccats, which, as appeares by the act, came but to 18s. of our money, ſhould endure. It is not probable, that this king, conſidering his other actions, would have ſuffered this to have been done by parliament, if he had thought he might have lawfully done it by his abſolute power; and therefore it cannot almoſt be gaine-ſaid, that in theſe times this pretended prerogative of laying impoſitions without aſſent of parliament was held to be againſt law.

Henry 8. *Hen.* 8. had a ſubſidie of tunnage and poundage granted to him for his life, the firſt yeare of his reign, as appeares by the Parl. Roll.

Hen. 8. his ſonne and ſucceſſor, was ſo farre from the diſpoſition of his father, in this point of thrift and providence, as there was not in the whole ranke of our kings any one like to him, for exceſſive prodigality. The great riches ſtored up by his father with ſo much care, and left unto him, hee ſo ſodainly conſumed in triumphs, maſkes, mummeries, banquets, pompous and braving warres, as was that of *Turwin* and *Turney*, and in the ſatisfying of his luſt, as he was out of very neceſſity enforced to crave moſt unreaſonable aids of his ſubjects in parliament, ſuch as never before had been granted, which through very dread and feare were yeelded to him. Yet not ſo ſatisfied, that no meanes for the rayſing of money might bee neglected or unattempted, in the 15 yeere of his reigne, by the councell of that proud prelate cardinall *Woolſey*, he ſpared not to ſend out commiſſions into every ſhire throughout the whole realme, with privy inſtructions to the commiſſioners, how they ſhould with moſt advantage behave themſelves, in perſwading the people to contribute to the king the ſixt part of their whole eſtates, to bee paid preſently, either in money or plate; whereupon followed extreme curſing, weeping and exclamation againſt the king and his councell, and the people were in point to rebell, had not the king ſtayed the proceedings of the commiſſioners by his letters. Finding that this way would not ſerve his turne, hee demanded a benevolence; which not anſwering his expectation, he did the ſame yeere raiſe unto himſelfe a great deale of treaſure by abaſing his gold.

Such things as theſe, princes never put in practiſe, but when all other meanes faile them; and yet hee went many degrees beyond this. For, in the 27. yeere of his reigne he ſuppreſſed above 370 religious houſes, the yeerly value of whoſe revenues I have read to be no leſſe than 32000*l.* *per annum* in thoſe days: and that of their goods, ſold at very low priſes, he made above 100000*l.* in preſent money. About 4. yeares after he diſſolved all the monaſteries, abbeies, priories, nunneries, and all other religious houſes of what kinde ſoever throughout *England.* By which meanes, and by the ſale of their goods, he gathered ſuch a maſſe of treaſure, as it might have been imagined that never any king of this realme ſhould have needed to have ſought reliefe at his ſubjects hands. Yet he himſelfe, no longer than within 3. yeeres after following, craved and obteined, as may appeare by the ſtatutes of that time, an exceſſive great ayde by parliament; and yet the yeere following hee did alſo abaſe his coyne more then halfe in halfe, ſuch an abaſement as never before or ſince was heard of, and could not but bee very grievous to the people; but becauſe perhaps they held it lawfull ſo to doe, they made no publique complaint thereof. And it is worth the obſerving, that though this prerogative of abaſing coyne be a thing which trencheth as deepely into the private intereſt of the ſubject as the laying of impoſitions; for by this meanes a man, that this day is worth in revenues a hundred pounds *per an.* ſhall to-morrow, if the king be ſo pleaſed, be worth but fifty or forty, or leſſe, in reall value; and though alſo the practiſe of this prerogative hath not been forborne by any of the kings of this realme, and that ſome of them have uſed it very immoderately; yet cannot there be found any one publique complaint, that ever I have met withall, upon record againſt it, as from time to time there have beene many againſt impoſitions; which argues that the ſubject did make a difference between theſe two prerogatives; this, of laying impoſitions; and that, of abaſing coyne; thinking the one lawfull and the other not. But to conclude my obſervations upon the actions of *Hen.* 8. The next yeere after this unconſcionable abaſement of his money, hee craved a benevolence. The yeere following he tooke the profits of all the chantries, colledges and free chappels, &c. during his life, which ended the next yeere. Can any man imagine, that during this kings reigne it was held lawfull, or any ſuch thing ſo much as dreamed of, to rayſe treaſure by laying impoſitions? I will enforce it no farther, but leave it to the judgement of any reaſonable man, that ſhall conſider theſe things which I have remembred, whether or no it bee likely.

Edward 6.

Out of the time of his ſonne and ſucceſſor *Ed.* 6. I can obſerve little, becauſe of the ſhortneſſe of his reigne. But methinkes, if his governors had imagined that any ſuch prerogative had been due unto him, they ſhould not in honor have forborne the practiſe thereof for the ſupplying of the kings great neceſſities, and inſtead thereof have craved of the ſubjects that unaccuſtomed and unreaſonable ſubſidy, granted *an.* 2. of a certain ſum of money upon every ſheep and every cloth within the realme, for 3. yeeres; which afterwards for the unreaſonablenes thereof was releaſed.

A corolary or connexion of all the times before mentioned.

I have now gone through in ſuch ſort as you have heard, the times of all the kings from Ed. 3. *till* Q. Maries *reigne*; *during which time what can there be more imagined, that might poſſibly have happened to have awakened impoſitions, if they had not been more than aſleepe? Neither the neceſſity of juſt and honorable warre, nor the ſubtleties and curioſitie of peace, nor the prodigality of ſome of theſe kings for the better ſatisfying of their pleaſures, nor the covetouſneſſe of others, nor the ſoftneſſe of ſome of their diſpoſitions, nor the nonage of others apt to be abuſed by evill counſellors, nor the dreadfull and fearefull awe in which ſome of them held their ſubjects, nor the aſſurance of the peoples extraordinary affection, which might have emboldened ſome others, nor the evil conſcience of uſurpers, nor any other motive whatſoever, which happened during this long time, could revive them*; *untill* Q. Mary *did at laſt raiſe them out of the grave, after they had been ſo many yeeres dead and rotten.*

Qu. *Mary*.

The firſt impoſition, that ſhe layd, was that upon cloth, continued till this day, which grew upon a ſpeciall reaſon; as may appeare by the printed booke of the rates of her cuſtomes and ſubſidies; in the end whereof you ſhall finde a declaration expreſſing the loſſe ſuſteined by reaſon of the difference between the cuſtomes and ſubſidies of wool and cloth. By which it appeares, that a ſack of wool yeelded in cuſtome ſix ſhillings eight-pence, and in ſubſidie thirty-three ſhillings four-pence; that the cuſtome upon a ſhort cloth was fourteene-pence, and that a ſack of wool did commonly make foure ſhort clothes, the cuſtome of which was foure ſhillings eight-pence; ſo that the cuſtome of wool made into cloth was leſſe, then the cuſtome and ſubſidie of ſo much wool not cloathed, in every ſack in ſhort clothes thirty-five ſhillings foure-pence; which difference was reduced to an equality by rating upon every ſhort cloth ten ſhillings. After this declaration made of the difference, and of the rate which reduced both to an equality, follow theſe words; 'Which difference conſidered, and the 'great loſſe ſuſteined by us in the ſame, by reaſon that cloathing is 'much increaſed, it is thought convenient by us, with the advice of 'our councell, towards the reliefe of the loſſe, for to aſſeſſe, upon the 'clothes carried out by way of merchandize, ſome larger rate then 'heretofore hath been uſed; and though it were reaſon to appoint ſuch 'a rate as might recompence the full of the loſſe ſuſteined, yet up'on divers conſiderations, at this time, us and our councell moving, we 'are pleaſed only to aſſeſſe upon every ſhort cloth, by the name of cuſ'tome, ſix ſhillings eight-pence, &c.'

I thought good to open this at large unto you, that you might ſee, upon what ſpeciall reaſon of equity this impoſition was grounded, and how it differeth from ours. And it is worthy the obſerving, how the queene commandeth this increaſe of cuſtome to be yeelded unto her, not as an impoſition, or by the name of impoſt, but by the name of cuſtome; becauſe it cometh in lieu of the ancient cuſtome upon wool; which is the reaſon, that at this day it is demanded and paid by that name; whereas no other new raiſed duty hath that priviledge, but they are either called ſubſidie of tonnage or poundage, if they be raiſed by act of parliament; or impoſt, if by the kings abſolute power.

The name of cuſtome was anciently given to none but to wools, woolfells, and leather; and upon this occaſion, to cloth alſo.

This impoſition, though grounded upon ſuch equity as you have heard, yet in *Dyer*, 1 *Eliz. fo.* 165. *a.* and *b.* it was, as appeares by my L. *Dyer*, complayned of by the merchants of *London with great exclamation*, (which are his words,) and ſuit to the queen to be unburdened of it, becauſe it was not granted in parliament, but aſſeſſed by queen *Mary* of her abſolute power: whereupon there were divers aſſemblies and conferences of the juſtices and others, but their reſolution is no where to be found, at leaſt by us. It is very probable, that, if they had given judgment for the queen, it would not have beene kept cloſe. But howſoever the profit was too great to be taken from the crowne, and therefore it continues till this day.

Plowdens argument againſt it, in Mr. *Tates* hand.

Howſoever the reaſon in equity in the laying this impoſition upon cloth may ſeeme to bee found unto ſome men, and ſo to allow of this impoſition as differing from ours, yet for my part I hold it not ſo, when I conſider what courſe was taken by *Ed.* 3. upon the ſame occaſion. *An.* 11. *E.* 3. *cap.* 1. and 2. it was enacted, that no wool ſhould be carried out of *England*, but by the kings licence; and that no man ſhould weare cloth, other than ſuch as ſhould be made in *England.* This law tooke ſuch effect, as within ten yeeres the greateſt part of the wool in *England* was made into cloth; and it became to be tranſported in ſuch abundance, by reaſon that there was no cuſtome at all due upon cloth, and the cuſtome and ſubſidie upon wools was very high, that in the 21 yeere, the king, finding his cuſtome of wools ſo much decreaſed, doth ſeeke to remedy it, not by impoſing a new charge upon cloth by his abſolute power, as queen *Mary* did, but did it by aſſent of his ſubjects in full parliament, as I collect partly by my L. *Dyer* in the place laſt mentioned, but more fully by a recitall in a record amongſt us, of 24 *E.* 3. *ro.* 13. *Orig. de Scaccar.* to this effect: *that whereas the cuſtomes and ſubſidies due and granted upon wools are much decreaſed, becauſe a great part of the wool of* England *is made into cloth, for which no cuſtome is due*; *and whereas in conſideration thereof, at our council held the* 21 *yeere of our reigne, by the common aſſent of the prelates earles and barons and others, it was ordeined and accorded, that* 14d. *by denizens, and* 20d. *by ſtrangers, ſhould be paid for every cloth of aſſiſe,* &c. *made of* Engliſh *wool, and tranſported*; *upon paine of forfeiture of the clothes.* And ſo followeth an authority given to collect the ſame.

The next impoſition laid by queen *Mary* was forty ſhillings upon a tun of *French* wines, impoſed in the 5 yeere of her reigne: at which time there was firſt a proclamation made, that no wines at all ſhould be brought from *France*, being then in enmity with *England*, upon paine of forfeiture of the wines; which, by the way, is a ſtrange clauſe in a proclamation. Immediately after this reſtraint there was an order made by the queen and her privy counſell, that ſuch as would might bring in *French* wines, notwithſtanding the proclamation, paying forty ſhillings upon every tun by the name of impoſt, as doth appeare by record in the rolls of *Eaſter* terme, 1 *Eliz.* in the office of the kings remembrancer of the *Exchequer*, in the caſe of one *Germane Ciol*, againſt whom an information was exhibited for not paying the ſaid impoſition. Whereunto, taking it by way of traverſe, that there is any law of the land by which he may be charged with impoſt, he pleads a licence made unto him, *an.* 1. and 2. *Ph.* & *Mar.* to import a certaine number of tunnes of wine within a certaine time, any reſtraint then made, or afterwards to be made to the contrary, notwithſtanding; provided alwayes, that the cuſtome, ſubſidie, and other duties due and accuſtomed to be paid to the king and queen, were duly ſatisfied: and he ſhewes, that, for all wines brought in by him during the life of queen *Mary*, he paid the ſubſidie of tonnage, *viz.* three ſhillings for every tun, which was all that was due and accuſtomed to be paid. Upon this plea a demurrer was joyned, and judgement given thereupon againſt the queen. This judgement hath been enforced in the maintenance of impoſitions. Whether or no it make not rather againſt them, I leave to your cenſures.

Germane Ciol's caſe.

Neere about the ſame time there were impoſitions laid alſo by queen *Mary* upon all *French* commodities whatſoever to be imported, as may appear by the port-bookes of thoſe times in the *Exchequer*; which impoſitions were received to the uſe of queene *Eliz.* in the beginning of the 1 yeere of her reign. But ere the yeer ended they were all taken away, as may appear by the ſame port-bookes; which in my opinion is a great argument, that they were not then held lawfull. For princes doe not ſo eaſily give over their hold in matters of profit, if they be any way able to maintain it. What hath hitherto upheld the impoſition upon wines, I know not, except it be the great profit that comes by it to the crown, and becauſe there was never any late judgement given directly againſt impoſitions.

Admitting the king had power by the common-law to lay impoſitions, yet hee is barred by ſtatutes.

You have hitherto heard what reaſon and direct proofe I have uſed to maintaine, that by the common-law the king cannot at his will increaſe his cuſtome by way of impoſition. You have, ſecondly, heard what the practiſe of former ages hath been in this kinde, till this day; from which I have alſo drawn reaſons of inference, that prove the common-law ſo to be. But now, admitting that by the common-law it had been cleere and without queſtion that the king might at his will have laid impoſitions, and that alſo the ſame could have been cleerly proved by the practiſe of the ancient kings; yet I affirme, that ſo ſtands the law of *England* at this day, by reaſon of ſtatutes directly in the point, as the kings power, if ever he had any to impoſe, is not onely limited, but utterly taken away; as I hope I ſhall be able evidently to prove, notwithſtanding any objection that hath been made againſt the interpretation of the ſtatutes to this ſenſe.

MagnaCharta cap. 30. enforced, and the objections made againſt it, anſwered.

The firſt ſtatute is in *Magna Charta*, *cap.* 30. The words are, *All merchants, if they were not openly prohibited before, ſhall have their ſafe and ſure conducts, to enter and depart, to goe and tarrie in the realme as well by land as by water, to buy and ſell without any evill tolls, by the old and rightfull cuſtomes, except in the time of warre. And if they be of the land making warre againſt us, and be found in our realme at the beginning of the warre, they ſhall be attached without harme of body, or goods, untill it be knowne to us, or our juſtices, how our merchants be intreated there in the land making war againſt us, &c.*

25. *E.* 1. *cap.* 1. 2. 3. 4.

The ſtatute, of which this is a branch, is the moſt ancient ſtatute-law we have, wonne and ſealed with the blood of our anceſtors; ſo reverenced in former times, that it hath been by parliament provided, that tranſcripts thereof ſhould be ſent to all the cathedrall churches of *England*, there to remaine; that it ſhould be twice every yeere publikely read before the people; that likewiſe twice every yeere there ſhould be excommunication ſolemnly denounced to the breakers thereof; that all ſtatutes and all judgements given againſt it ſhall be held as void; that it ſhould be received and allowed as the common-law, by all ſuch as have the adminiſtration of juſtice; and it hath been no leſſe than 29 times ſolemnly confirmed in parliament. I will, therefore, with ſo much the more care, endeavor to free this law from all the objections, that have been made againſt it.

The firſt objection, that it extendeth only to merchant-ſtrangers, anſwered.

The firſt objection doth tend to the diminiſhing of the extent of this ſtatute, as touching the perſons whom it may concerne; for it hath been collected out of the latter words of the ſtatute, that it ſhould extend onely to merchants-aliens, and not to denizens.

Firſt, it is improbable, that the makers of the law ſhould be more carefull to provide for the indempnity of merchant-ſtrangers than of *Engliſh*; except perhaps they might imagine, that *Engliſh* merchants were already ſufficiently provided for by the common-law. If that were their reaſon, as there could be no other that I can imagine, it doth as much maintaine my opinion, as if they had been conteined within the ſtatute.

Again, the words are generall, *all merchants*; and, *qui omnes dixerit, nullos excipit.*

Beſides, the ſtatute is a beneficiall law; in which caſe particular and ſpeciall words doe alwayes admit a generall extent: and therefore, to reſtraine generall words, as the objectors would, is againſt all reaſon, and rule of law. As for the latter words, 'tis true, they doe indeed extend onely to merchant-ſtrangers; but the ſenſe of the firſt ſentence is perfect without this: and as long as no abſurdity nor contradiction doth follow by interpreting the firſt words to extend to all merchants in generall, and the latter onely to merchant-ſtrangers, the moſt ample and beneficiall conſtruction is ever the beſt, as in all other ſtatutes of this nature.

But this objection is, in my opinion, cleerly removed by two ſtatutes made by *Ed.* 3. in declaration of this very clauſe. The firſt is, 2 *Ed.* 3. *c.* 8. the words are, *All merchants, ſtrangers and privies, may goe and come with their merchandizes into* England, *after the tenure of the Great Charter.* I take it, that *privies* in this place, being the very word that is found in the originall, which is in *French*, ought to be underſtood denizens; for, otherwiſe I ſuppoſe it would have been joyned to the word *ſtrangers* by a conjunction disjunctive, which is uſuall where the words are of one ſenſe; and not by a copulative, as here it is. Beſides, I take the word *privy* to be derived from the *Latine*, *privatus*, which ſignifieth a particular property; as *res privata*, a mans owne private eſtate; ſo, *mercatores privati*, our own merchants. That merchant-ſtrangers ſhould be firſt named, is common in ſtatutes and records.

The next ſtatute explaining this of *Magna Charta*, is, 14 *Ed.* 3. *c.* 2. The words are, *Whereas it is conteined in the Great Charter, that* all merchants *ſhall have ſafe conduct, &c. We grant that* all merchants, *denizens and forreins, may freely paſſe, &c.* which I take to be no other than a meere declaration of *Magna Charta*.

The ſecond objection, that *Magna Charta cap.* 30. was made only againſt taxes within the land, anſwered.

The ſecond objection made againſt this branch of *Magna Charta*, is, that the meaning thereof was to ſecure the merchants, not from a new increaſe of cuſtome to be impoſed by the king, to be paid at their entrance or going out of the ports, ſuch as our impoſitions are; but from certaine petty exactions, as tolls and ſuch like, which were then uſually demanded of them within the land, by the townes through which they were to paſſe, and where they ſold their merchandize; for the farther remedy of which there were afterwards divers ſtatutes made, which doe evidently manifeſt that ſuch was the miſchief. And they doe the rather make this collection becauſe of the words, *buy and ſell without evill tolls*; for, ſay they, impoſitions are not paid upon the buying and ſelling of merchandize, but when they are to ſhip or unſhip. They take hold of the word *toll*, which properly is an exaction for paſſage within the land, or for ſale in markets or faires. Theſe objections notwithſtanding, I hold it ſomewhat cleere, that the meaning of this ſtatute was principally to ſecure merchants touching impoſitions. My firſt argument is drawn *ab authoritate*, from the authority of the wiſeſt and moſt ſage men in greateſt places and offices within this kingdom, in the times wherein they lived, and who alſo could ſo much the better judge of the true meaning of this ſtatute, in that they lived ſo neere the time of the making thereof, even in the beginning of the reigne of the next king (ſave one) to him that made this ſtatute. I meane thoſe, who made the ordinance in 5 *Ed.* 2. heretofore divers times mentioned by me, who, in alledging their reaſon againſt *charta mercatoria*, doe amongſt other things ſay, that the ſame was made againſt *Magna Charta*. What was the cauſe of the griefe conceived againſt *charta mercatoria*, other than the impoſitions by colour thereof laid upon forraine commodities? It appears by the ordinance, that was the onely cauſe. If then *charta mercatoria* were by them adjudged to be againſt *Magna Charta*, only becauſe by colour thereof new impoſitions were raiſed without aſſent of parliament, it is evident, that they interpreted the ſtatute of *Magna Charta* to be made againſt impoſitions. If they had thought it to have extended onely to petty tolls and exactions within the land, as is objected, then could it not have extended to *charta mercatoria*. As for the words, *buy and ſell, without any manner of evill tolls*, I denie not but the words may perhaps have that ſenſe which hath been collected out of them, *viz.* that in buying and ſelling, they ſhould be free alſo from unjuſt exactions within the land. But I ſay further, that theſe words, *without any manner of evill toll, by the old and rightfull cuſtomes*, do extend not onely to the next precedent words, *buy and ſell*, but alſo to the former words, *enter and returne*, and more principally to them then to any other; for to have provided, that they ſhould be free from thoſe petty exactions of tolls in markets, and for paſſing through cities and townes, and to leave them ſubject to impoſitions to be laid on at the kings pleaſure, had been but a ſlender ſecuritie. This expoſition of mine is confirmed by a record here amongſt us, of 16 *Hen.* 3. no longer than ſeven yeeres after the making of this ſtatute; by which it appears, that the king commanded his officers at the *ports*, *to ſignifie to all merchants, that they might with ſafetie enter into his kingdom, paying the rightfull and ancient cuſtomes,* '*Nec timeant ſibi de maletoltis quas faciet rex.*'

Derivation of the word *toll.*

As touching the word *toll*, which they ſay is to be underſtood of tolls for paſſages, and for buying and ſelling in faires and markets, it behoves me to ſay ſomething of the derivation thereof; the rather, becauſe it is very often uſed in our ancient ſtatutes and records in the ſame ſenſe as it is in this place; and by the derivation thereof the naturall and true meaning of the word ſhall be beſt underſtood. I hold it therefore to be derived from the *Latine* word *teolonium*, which ſignifies cuſtome, by cutting off the latter part of the word, and retaining onely the firſt part *teol*, by contraction *toll*; of which manner of derivation there are infinite examples in our language. The *Latine teolonium*, as ſaith *Calvin* in his *Lexicon Juris Civilis*, is derived from the *Greek telos*, which ſignifies as well *cuſtom* as it doth *finis*. Hence it is, that the cuſtomers are called in *Latine telonarii*.

Thus you ſee, that the genuine and primitive ſignification of our word *toll* is no other than cuſtome upon merchandizes. From the word *toll*, are come thoſe two barbarous *Latine* words found in our ſtatutes and records; *toltum*, which is the word uſed in the record of 16 *H.* 6. but even now vouched by me; and *tolnetum*, the originall word in the ſtatute now in queſtion, which I muſt confeſſe is alſo in our law *Latine* uſed by us for *toll* in the market and *toll* for paſſage, as may appear by the regiſter and the book of entries. But in this place, *malum tolnetum* properly ſignifies, not a toll in the common ſence, but an unlawfull charge laid by the king upon merchandizes, as an increaſe of cuſtome, according to the primitive ſignification; which is evidently proved, in that it is here oppoſed to old and rightfull cuſtomes, *ſine omnibus malis tolnetis per certas & antiquas conſuetudines.* Wherefore it ought ſo to have been tranſlated, for ſo it ſignifies, *without impoſitions, by the old and rightfull cuſtome.* This expoſition and tranſlation is further warranted by the uſe of the word *maletolt*, ſo often found in our ancient ſtatutes and records, which without ſcruple is derived from the *Latine*, *malum tolnetum*, the very word of our ſtatute. I find it diverſly written, *maletout*, *maletolt*, *maletot*, and ſometimes *maletent*; but I never find it any where uſed in any other ſence then for an impoſition by way of increaſe of cuſtome upon merchandizes. Sometimes indeed, but that very rarely, it is taken in the beſt ſence, for lawfull and rightfull cuſtome, as the word impoſition ſometimes is; but then commonly it is accompanied with another word to free it from the worſt ſence, as *droiturel maletout, &c.* That *malis tolnetis* in this place ought to be tranſlated *impoſitions*, may be farther proved by that which I find in a writer of the *French* hiſtory, one *Jean Serres*, who ſaies, that in the time of *Philip le Beau*, king of *France*, which was about the time of *Ed.* 3. king of *England*, there were rebellions in *France* becauſe of impoſitions laid by the king, which in thoſe days they did, ſaith he, call *maletouts*, the very word then anciently uſed in *Engl.* for impoſitions, as may plentifully appeare by the ſtatutes and records of *H.* 3. *Ed.* 1. *Ed.* 2. & *Ed.* 3. for the word *impoſition* was not uſed in any *French* record, ſtatute, or other, for ought I have ſeene, till *Ed.* 3. I find it once uſed in *Latine*, 12. *Ed.* 3. in the letter which king *Edward* the third writ to the archbiſhop, to excuſe him to the people for laying impoſitions; and as all that letter throughout is of an eloquent ſtile, ſo as it ſeemeth he was carefull to avoid alſo that barbarous word, *malum tolnetum*, though common and familiar, and inſtead thereof to uſe the pure *Latine* word *impoſitio*. *Sylvius*, writing upon *Tullies* oration for *Marcus Fonteius*, where theſe words are uſed by *Tully*, *impoſuit vectigal*, ſaith, *Ita uſitatum vulgo eſt ut* vectigalia *nova appellent impoſitiones.* The word *vectigal*, in this place, though in a generall ſence it may be applyed to any revenew whatſoever, yet, with the civill lawyers, it is by way of excellence commonly uſed for cuſtom, as may appear by *Calvin* in his *Lexicon*. Vectigal, *quod fiſco vel reipubl. portorii nomine penditur, id eſt, pro mercibus, quæ invehuntur vel evehuntur.* Sometimes they uſe to joyne with it, for a more cleere diſtinction, the word *portorium*; as a man would ſay, the revenue of the

The word impoſition.

ports; agreeable with which, upon ſome records of *Henry* the third's time, I have found it to be called *exitus portuum*. By this it is evident, that *impoſitio* in pure *Latine*, and *impoſition* in *Engliſh*, is the ſame with *maletolt* in *French* and *malum tolnetum* in our law *Latine*; and they doe all ſignifie a new increaſe of cuſtome, and not any thing elſe. Wherefore I conclude, that theſe words, *ſine malis tolnetis*, in our preſent ſtatute, are naturally and properly to be expounded, and underſtood of *impoſitions*, and ſo ought to have been tranſlated, and not as they are. And although the word *impoſition* itſelf, as alſo the word *maletout*, and *malum tolnetum* may be, as I have confeſſed, taken as well for a new increaſe of cuſtome by a lawfull means, *viz.* by aſſent in parliament, as for an increaſe of cuſtome by the kings abſolute power, which is unlawfull; yet by the words that immediately follow it is evident, that this ſtatute doth onely intend unlawfull impoſitions, that is, impoſitions laid by the kings abſolute power, without aſſent in parliament. Otherwiſe would they not have been oppoſed to due and rightfull cuſtomes, as by the words of the ſtatute they are.

The word cuſtom, *cuſtuma*, and *conſuetudo* expounded.

But becauſe there hath been ſome exception alſo taken to the expoſition of the word *cuſtom* in that ſenſe in which I take it, that is, for cuſtome upon merchandize, for that the word in the originall is *conſuetudo*, which ſignifies an uſage, and not *cuſtuma*, which is the *Latine* word we now uſe for cuſtome upon merchandize; it behoves me therefore to ſay ſomething touching theſe words, *conſuetudo* and *cuſtuma*, for the cleering of this ſcruple. This word *conſuetudo*, in his firſt and proper ſignification, doth, I confeſſe, ſignifie an uſage, or practiſe of a thing time out of minde. But it is evident by the records in the time of *H.* 3. and *Ed.* 1. this word in a more ſpeciall manner was applied to all, or moſt of the duties belonging to the crowne by reaſon of trade; as, *conſuetudo aquæ* Thameſis, *conſuetudo piſcis venientis ad vicum pontis* London. *conſuetudo quæ vocatur ſcavagium*, *conſuetudo quæ vocatur gauge*. But yet more ſpecially it was applyed to that dutie, which we, following the ſame rule, becauſe of the greatneſſe of the revenue, doe likewiſe *per excellentiam* call cuſtom. This may appeare by the pipe roll of 52 *Hen.* 3. with this title *Conſuetudo mercandizorum*, and by divers other records of *Hen.* 3. times. The rolls and records of the beginning of *Ed.* 1. doe likewiſe prove the ſame very evidently, inſomuch that not onely that, which in this kinde belongs to the king by the common-law and by ancient preſcription, was called *conſuetudo*; but in later time, if any increaſe were of that dutie, though it came not by preſcription, but by grant in parliament, or otherwiſe, yet it ſtill retained the name *conſuetudo*, which by continuance of time came to be the proper name to that kinde of dutie howſoever it began. And therefore in 3. *Ed.* 1. you ſhall finde, that after the old cuſtome of woolls was increaſed to a demy-marke by act of parliament, yet the word *conſuetudo* was nevertheleſſe ſtill retained, but with an addition; for it was then called *nova conſuetudo*. Nay, though the increaſe were by the kings abſolute authoritie, and upon the matter a meere impoſition, yet the king in his commiſſion did alwayes call it *conſuetudo*; as in 16. *Ed.* 1. the impoſition of foure ſhillings upon a tun of wine is, in the kings commiſſion to collect it, called *conſuetudo*. Nevertheleſſe, I aſſure myſelf, the people called it by ſome worſe name, as *maletolt* or the like.

The ſeverall applications of this word *conſuetudo* to all duties whatſoever belonging to the crowne by reaſon of trade, is the reaſon, as I conceive, that the word is uſed in the plurall number in the ſtatute of *Magna Charta, per antiquas & certas conſuetudines*; that ſo they might bee ſecure againſt all unjuſt exactions upon merchandizes whatſoever. But, as I have ſaid, the principall ſcope was to provide againſt impoſitions; and by reaſon alſo that the word *conſuetudo* was taken as well for impoſitions as for rightfull cuſtomes, therefore, to make all ſure, they inſert the words *antiquas & rectas*. This word *conſuetudo* in this ſenſe continued till about the twentieth yeere of *Ed.* 1. after which time I cannot call to minde that I have ſeene it upon any record. In ſtead and place thereof came in the word *cuſtuma*, which I find firſt in *charta mercatoria an.* 31. *Ed.* 1. where the increaſe of cuſtome by the grant of merchant-ſtrangers is called *parva cuſtuma*; and that which before was called *nova conſuetudo*, doth now begin to loſe that name, and to bee called *magna cuſtuma*; which termes of *magna cuſtuma*, intending thereby that increaſe made by parliament, *anno* 3. *Ed.* 1. upon the three ſtaple commodities, wools, woollfells, and leather; and *parva cuſtuma*, intending thereby the increaſe granted by the merchants-ſtrangers, *an.* 31 *Ed.* 1. are the termes uſed at this day by the cuſtomers, and by which they diſtinguiſh their entries. This word *cuſtuma* I finde to have been alſo promiſcuouſly uſed by *E.* 1. *E.* 2. and *E.* 3. in their commiſſions, and applyed, as well to increaſe of cuſtome by way of impoſition or by acts of parliament of thoſe times, as to ancient cuſtome upon the ſtaple commodities. But regularly none ought to be called *cuſtuma*, but that which is due upon the ſtaple commodities; and ſo is it uſed at this day, except only cloth; for if it bee laid by act of parliament, it is called a *ſubſidie*; if without aſſent of parliament, *impoſt*. You ſee in what ſenſe the words *malum tolnetum* and the word *conſuetudo* have been uſed in former times, and are thereby able to judge how they ought to be underſtood in this preſent ſtatute, which, as I have ſaid, ought to have the moſt benign interpretation that the words may beare.

Cuſtuma.

The third objection againſt *Magna Chart. cap.* 30. that by the exception the kings prerogative to lay impoſitions is ſalved, anſwered.

But it hath beene likewiſe objected, that in this ſtatute there is a ſpeciall clauſe of exception, which leaveth the king at his liberty to lay what impoſitions he pleaſeth, this ſtatute notwithſtanding. And that is the words in the beginning of the ſtatute, *All merchants, if they were not openly prohibited before, ſhall have their paſſage, &c.* which implies, ſay they, that if they be prohibited, which reſts wholly in the kings power, then they are not to have benefit of this ſtatute touching the freedome from impoſitions; and they ſay farther, that the very laying of impoſitions doth imply a reſtraint *ſub modo*. Though I purpoſe to ſpeake more fully in anſwere of this objection, when I come to ſhew you the weakneſſe of the reaſons alledged for impoſitions, yet I cannot forbeare in this place to ſpeake a worde or two in anſwere thereof, having the ſtatute now before us. *Except they be prohibited, they ſhall have free paſſage* (ſaith the ſtatute) *without paying evill-toll.* This doth imply, ſay they, that if they be prohibited, they may be compelled to pay impoſitions. But that cannot be neceſſarily concluded. It implies indeede ſomewhat ſtrongly, that they may bee prohibited. The ſtatute of 1 *R.* 2. *cap.* 12. inhibiteth the warden of the *Fleete* to deliver any priſoner out of execution, unleſſe it bee by writ or other commandment of the king. It may be as ſtrongly implied out of this ſtatute, that the king may, by his commandment without writ, deliver a priſoner out of execution; but the contrary hath alwaies been held. The ſame objection is made, and the ſame anſwere may be given to another exception in the latter end of this branch, *except in the time of war.*

4 & 5 *P. & M. fo.* 162. *b. Dyer.*

The ſecond ſtatute againſt impoſitions, the ſtatute *de Tallagio non concedendo*, expounded and cleered.

I come to the ſecond ſtatute againſt impoſitions, which is the ſtatute *de Tallagio non concedendo*, touching the time of the making of which there is great variety of opinion; for it is not, for ought I could ever learne, found any where upon record. Juſtice *Raſtall* accounts it to have been made 51 of *H.* 3. and with him agrees an old manuſcript which I have ſeen. It may well bee; for in one of the ſtatutes you ſhall finde a pardon to *Humfrey* earle of *Boham* earle of *Hertford* and *Eſſex* conſtable of *England*, and to *Roger Bygott* earle of *Norfolke* and *Suffolk* marſhal of *England*, who both lived in that time. *Thomas* of *Walſingham* in his Hiſtory of *England* ſaith it was made in the 25 yeere of *Ed.* 1. Hee reciteth the ſtatute *de verbo in verbum* as it is in our printed bookes; otherwiſe I ſhould have thought he had meant another ſtatute againſt impoſitions made indeede 25 *Ed.* 1. and found upon the records of that yeere. In our printed ſtatutes at large, it is placed laſt of all the ſtatutes of *E.* 1. Though there be ſome diſagreement about the time of the making of this ſtatute, yet they all agree the occaſion to be the laying of a great impoſition upon wool. The words of *Thomas Walſingham*; *Auxit rex tributum lanæ ad* 40s. *cum prius ultra dimidiam mercam non daretur. Tota autem communitas ſentit ſe gravatam de vectigali*; *lana enim Angliæ fere extendit ad medietatem valoris terræ & vectigal ad quintam partem terræ.* The cuſtome of wools, as you perceive, was in thoſe dayes eſteemed to bee the fift part of the value of the whole land. It followeth in him, that upon complaint the ſubject at laſt obteined the ſtatute I nowe ſpeake of, the words of which are, *No tallage or ayde ſhall bee rayſed or ſet by us or our heires in our realm, without the aſſent and good will of arch-biſhops, earles, barons, knights, burgeſſes, and other freemen of the land.* After theſe generall words, by way of proviſion againſt all manner of burthens whatſoever to bee laid in time to come without aſſent of parliament, followeth in the next branch (ſave one) eſpeciall proviſion for the taking away of the impoſition then in demand upon wools; which latter clauſe, as it doth cleerely ſhew the cauſe of their preſent griefe to bee the ſame which our chronicles ſay it was, ſo doth it likewiſe make it evident, what it was which they ſought to be ſecured of for the times to come. Neither are the words themſelves ſo obſcure, by reaſon of the generality of them, but that they alſo without knowing the occaſion of the making of the law doe directly point at impoſitions; for, though indeede the word *tallage* be, as I conceive, to be underſtood only of charges within the land, yet the word *ayde* extendeth to all charges of what nature ſoever. Nay, that even impoſitions themſelves have beene called *aydes* or *ſubſidies*, which is all one, is evident by almoſt all the records of the *Exchequer* here amongſt us, eſpecially by thoſe of *Ed.* 3. time; in which, whereſoever you finde any mention made by the king, in his commiſſions, of an impoſition raiſed by him, hee ever calls it *ſubſidium* or *auxilium*. So likewiſe in the printed ſtatute of 36 *Ed.* 3. *cap.* 11. you ſhall finde, that the impoſition by grant of merchants there mentioned is called a *ſubſidie or ayde*. This expoſition of the word *ayde*, concurring with the occaſion of the making of the ſtatute, doth in my opinion ſtrongly enforce this ſtatute againſt impoſitions. And 'tis to bee obſerved, that in this ſtatute there is *no ſaving or exception of the kings antient right*, which, as our chronicles ſay, was a point principally inſiſted upon at the making of this law, earneſtly preſſed by the ſubject to bee without that clauſe, and for a long while ſtood upon by the king, but at laſt yeelded unto in ſuch ſort as you have heard.

Tallage.

Aydes.

Subſidies.

The third ſtatute againſt impoſitions, 25 *E.* 1. *cap.* 7. cleered from objections.

The next ſtatute againſt impoſitions is 25 *Ed.* 1. *cap.* 7. The words are, *Foraſmuch as the more part of the cominalty hath found themſelves ſore agrieved with the maletolt of wools,* viz. *a toll of* 40s. *for every ſack of wool, and have made petition to bee releaſed of the ſame, wee at their requeſts have cleerely releaſed it, and have granted for us and our heires, that wee ſhall take no ſuch things, without their common aſſent and good will, ſaving to us and our heires the cuſtome of wools, ſkins and leather granted before by the cominalty aforeſaid.* I might, in enforcing this ſtatute, rely upon a rule of law for the expoſition of ſtatutes of this nature, *Omnis impoſitio eſt odioſa, ideo ſtricta contra impoſitiones, & large ad favorem gravatorum interpretanda eſt lex contra impoſitiones data.* But there ſhall not need any ſuch favourable conſtruction; for the words are in themſelves very cleere. The law conſiſteth of three parts. The firſt is the kings grant of a petition made by the commons for the releaſing of an impoſition of 40s. upon a ſack of wool, then in demand. When the preſent grief was ended, the next care was to prevent the like miſchiefe in all times to come. It therefore followes, *And wee have granted for us and our heires, that we ſhall take no ſuch thing without their common aſſent*, which is the ſecond part of the law. The ſaving in the end is the third part.

Againſt this generall proviſion two objections have beene made.

The firſt objection, that this ſtatute is only againſt the exceſſe of the impoſitions then laid, and not againſt the right of impoſing, anſwered.

Firſt, that the words *no ſuch things* are to be underſtood only of the burthenſomneſſe and exceſſe of impoſitions, and not otherwiſe. *No ſuch things*, that is, ſay they, no *ſuch grievous* impoſitions as this preſent impoſition is. It had beene a poore ſecurity for times to come, to have left it to interpretation, whether or no impoſitions, which might happen to be laid in after ages, be as grievous as the impoſition complained of in this time, by comparing one with the other. 'Tis ſo uncertain a computation, as no man, when hee thinks thoroughly of it, can imagine, that men, worthy to ſit at the making of laws, ſhould ſuffer ſuch a thing to paſſe them. Who can certainly ſay, whether our impoſitions bee more or leſſe grievous then the rate of 40s. upon a ſack of wool? Beſide, how eaſily had this lawe beene to have beene eluded by abating only 12d. or but 1d. in the next impoſition? For, if it be but a penny leſſe, it is *no ſuch* impoſition, for the burden. Therefore it muſt needes bee expounded of the quality and very nature of the thing complained of, and not of the quantity. *No ſuch thing*, that is, *no ſuch thing as this is*, that is to ſay, *an impoſition*. But that, which will cleere this objection, is a proclamation made the very next yeer after the making of this act, in which the king reciting this act, inſtead of theſe words, wee will take *no ſuch thing*, uſeth theſe words, *nullam aliam cuſtumam ſine communi conſenſu capiemus*, not only *no ſuch*, but *no other*. By which you may ſee, that the words were then interpreted in that ſence, in which I doe now interpret them.

26 E. 1. *Inter brevia retorn. de term. Mich. in Scac in offic. rem thesaurar. ibidem.*

The ſecond objection, that it is only againſt impoſitions upon wool, anſwered.

But admitting, ſay they, that it bee ſo to bee expounded that the king will lay *no other impoſition* without aſſent in parliament, that is to be underſtood, ſay they, *no other impoſition upon wools*, and not otherwiſe; which is their ſecond objection. It were a very ſtrict conſtruction for a ſtatute of ſo beneficiall an intent as this is ſo to reſtraine it; if there were no other words in the ſtatute that did inlarge the expoſition. But by the words following it is moſt evident, that the ſcope of this law is more liberall then ſo; and that the kings intent was for ever to ſecure his ſubjects, againſt all charges of this nature, I meane impoſitions, not upon wools only, but upon any other merchandiſe whatſoever, which I collect from laying all the parts of the law together.—The petition for preſent eaſe is to be releaſed onely of the *maletolt* of foure ſhillings upon a ſack of wool, which is yeelded to. The ſecurity for the time to come is, *we will take no ſuch thing*. The ſaving, which followeth that, is, *ſaving the cuſtome of woolls, woolfells, and leather*. I obſerve, the ſaving extends not to *woolls* alone, as the petition doth, but alſo to woolfells and leather, by expreſſe name; by which it is evident, that the ſecuritie for the time to come is of a larger extent than to ſtretch onely to wools, as hath been objected. For elſe, to what end ſhould woolfells and leather be excepted in the ſaving, if they had not been contained in the generall words, *no ſuch thing?* An exception cannot be but of a thing contained in former words. If therefore the grant would have extended to woolfells, if they had not been ſpecially excepted, then do I conclude by the ſame reaſon, that it doth extend to all other merchandizes not excepted; for the words are generall.

And ſo I leave this law cleered of all objections, and very full againſt impoſitions.

The fourth ſtatute urged againſt impoſitions 14 *E.* 3. *cap.* 21. cleered from objections.

The next ſtatute made againſt them is 14 *Ed.* 3. *cap.* 21. By the firſt part of which law you may perceive, that, whereas the commons had prayed the king not to take of woolls, woolfells, leather, tyn, or lead, any more than the ancient cuſtome, the king prayed them to grant him forty ſhillings upon a ſack of wooll for a yeer and a halfe, which they granted. Whereupon the king, by way of retribution, and in anſwere of their petition, as touching the wooll cauſeth it to be enacted for their ſecurity in time to come, *that neither he nor his heires would demand, aſſeſſe, nor take more cuſtome of a ſack of wooll than ſixe ſhillings eight pence: and ſo likewiſe upon woolls and leather, no more than the ancient cuſtome, without aſſent of parliament*. All this while there is no anſwere given touching the tyn and lead mentioned in the petition; upon which, as it appeares, the king had alſo laid impoſitions. But there doe follow certain generall words, by which, not onely tyn and lead, but all other commodities whatſoever are freed from impoſitions. The words are, *the king promiſed in the preſence of his earles, barons, and others of his parliament, no more to charge, ſet, or aſſeſſe upon the cuſtome, but in manner aforeſaid*. Except theſe words doe extend to lead and tyn, to free them from impoſitions for times to come, as well as woolls woolfells and leather are freed by the former ſpeciall words, their petition touching tyn and lead is no way anſwered. And if they doe extend to tyn and lead, by reaſon of the generality of the words, they doe by the ſame reaſon extend to all commodities; for what more liberall words can there be than theſe; *that the king will not charge, ſet, or aſſeſſe upon the cuſtome?* Theſe words, *the cuſtome*, being words indefinite, are, you know, equivalent to an univerſall, according to the rule, *indefinitum æquipollet univerſali*. And although the king doe but promiſe, yet I doubt not but in this caſe his promiſe is a law. And it is worth the obſerving, that the lords doe in very extraordinary and unuſuall manner ſolemnly undertake, as much as in them lyeth, that they ſhall procure the king to hold the ſame, and *that they ſhall in no wiſe aſſent to the contrary, if it be not by the aſſent of the prelates, earles, barons, and commons, and that in full parliament*; and for the greater ſurety, and to give cauſe to eſchew all counſell to the contrary of this ordinance, *the prelates have promiſed to give ſentence upon them that counſell againſt the ſame in any point*; which are the very words of the ſtatute in print.

14 *Ed.* 3. no. 5. Ro. Par.

The ſtatute of 14 *Ed.* 3. *cap.* 21. was yielded unto by the king, upon a petition exhibited the parliament before, both by the lords and the commons, praying that a law might be made againſt impoſitions, as may appeare by the records of the 13 yeere of *Ed.* 3. at which time they likewiſe prayed, that the king would be pleaſed to grant them a charter to the ſame effect, to be inrolled in parliament. The ſtatute you have heard. The charter followeth in our printed bookes immediately after the ſtatute, where the king, in the preamble thereof, reciting the great gift that he had given him at the ſame parliament, that is to ſay, the 9th *fleece*, 9th *ſheep*, and 9th *lamb* throughout the kingdom, which indeed, was a very extraordinary great gift, (and therefore his grant, in regard thereof, is to be intended ſo much more beneficially) doth in lieu thereof, for him and his heires, grant to his ſubjects in theſe words: *From henceforth they ſhall not be charged, nor grieved, to make any ayde, or to ſuſteine charge, if it be not by the common aſſent of the prelates, earles, barons and other great men, and the commons of our ſaid realme of* England, *and that in parliament*. It hath been objectedo, that theſe words, *aide* and *charge*, are to be underſtood of charges within the land, ſuch as are taxes and tallages, and not of impoſitions upon merchandizes. And this is the only objection made, or indeed can be made againſt this ſtatute; for the cleering of which, I can ſay no more then already I have proved by matter of record for the opening of the ſence of this ſtatute, *viz.* that this charter and the laſt ſtatute were made upon a petition exhibited in parliament, for a law and charter to be made againſt impoſitions upon merchandizes. And therefore that conjecture of theirs, that it ſhould extend only to taxes, and not to impoſitions, cannot but fall to the ground; eſpecially ſince there is not in the petition, any mention at all of taxes or tallages, or of any other charge or aide but impoſitions onely, then which there cannot allmoſt be a cleerer proof, then that this law being made upon this petition, is to be expounded againſt impoſitions. Which, if this petition had not been extant, would with no leſſe cleerneſſe have been proved, by conſidering the miſchiefe at the time of the making of this law, which was not tallage or taxes, but thoſe heavie impoſitions of foure pound and five pound upon a ſack of wool, by way of diſpenſation with the ſtatute of 11 *E.* 3. *cap.* 1. of which I have formerly made mention. So as this ſtatute, being made in the firſt intention againſt diſpenſations for money with a penall law, though the occaſion were particular, yet, the words being generall, *I hold, that with reaſon it may be extended againſt all diſpenſations, with penall lawes for money*. In particular, I hold, that the raiſing of money, by *diſpenſations* with the ſtatutes againſt ale-houſes, is, if not by the common law, yet by the force of this law, unlawfull; for certainly, *quod prohibitum eſt una via, non debet alia permitti*.

An objection that the ſtat. of 14 *Ed.* 3. *cap.* 21, extendeth only to impoſitions within the land and not to impoſition upon merchandizes is anſwered.

The word Charge.

As for the words *ayde* and *charge*, I have already proved, that it was a terme by which impoſitions were commonly called in thoſe times. That they were alſo called *charges* is evident by very many records of thoſe times, where complaint is made againſt them, as 21 *Ed.* 3. *numb.* 11. *Les commons priont que la charge de* 21s. *ſur ſack de lane ſoit ouſte*, 21 *Ed.* 3. *numb.* 16. ‘The commons ‘pray that no *charge* be ſet upon them without aſſent of parliament.’ The kings anſwere is, if any *impoſition* be levyed unduely it ſhall bee taken away. Of this kinde there are very many preſidents, ſo as if the precedent petition had not aſſured us of the ſcope of this lawe as it doth, the very words themſelves, rightly underſtood, would have made it cleere.

In the ſame charter there is another clauſe as beneficiall as this, to this effect, *all merchants denizens and forreins, except thoſe which be of our enmitie, may without let ſafely come into the relm of* England *with their goods and merchandizes, and ſafely tarry, and ſafely returne, paying the cuſtomes, ſubſidies and other profits* reaſonably thereof due. The objection to this clauſe is very obvious, for what, ſay they, can theſe words, *other profits reaſonably due*, ſignifie other than *impoſitions*; for, by the words going before, cuſtome and ſubſidies are expreſly named, and there is, ſay they, no other third profit upon merchandize but impoſitions, and indeed this ſtatute they themſelves have vouched in maintenance of impoſitions. To this objection it might ſerve for a full anſweer, that there are other duties then cuſtomes and ſubſidies due upon the landing of wares; for example *wharfage*, *cranage*, *ſcavage*, and ſuch like, the which with more probability I may conjecture to be intended by theſe words, *other duties*, then they can conjecture it to bee meant of *impoſitions*. *Sed in planis non opus eſt conjecturis.* The beſt expoſitors of this act are thoſe that lived in the ſame times, and they doe cleerely expound this clauſe to be made againſt impoſitions, as may appeare by the record of 21 *E.* 3. *no.* 29. for you ſhall there find a petition exhibited in parliament by the commons to bee relieved touching an impoſition upon wools, alledging for a reaſon of their petition, that every *man ought freely to paſſe, paying the ancient cuſtome as it was ordained by the kings charter*. This petition againſt impoſitions was exhibited by the whole parliament, within ſix yeeres after the making of the charter, as may appeare by comparing the times; and if they had not then thought, that *impoſitions* had been meant to have beene provided againſt by this charter, they would not certainly have made ſuch a ſpeciall reference thereunto.

Anſwers to the reaſons urged in maintenance of impoſitions.

In diſcovering the weakeneſſe of the reaſons alledged in maintenance of impoſitions, I ſhall not greatly neede to ſay any thing more then hath been ſaid; becauſe the ſtate of the queſtion hath beene already ſo thoroughly opened unto you, that whatſoever can, with any colour of reaſon, be ſaid for impoſitions, may receive an anſwer out of that which hath beene ſpoken againſt them. Nevertheleſs, I will in a few words recall to your memories their reaſons; and in as few apply the anſwers to them, with ſome additions of mine owne, that, by laying both together in your view at one time, the weakeneſſe of the one and ſtrength of the other may the better appeare unto you.

The firſt argument, that becauſe it cannot appear that the ancient cuſtomes were ſet by parliament, therefore they were impoſed by the king, anſwered.

It hath beene ſaid, that the old cuſtome of a demi-marke upon a ſack of wool muſt have his beginning, either by the kings abſolute power, or by a legall aſſent of the people, which can bee no where but in parliament, and cannot but appeare of record; but becauſe no ſuch aſſent can be ſhowne, therefore they conclude, that it began by the kings abſolute power, and inferre that the ſame power remains ſtill. The ſubſtance of this argument is found in my lord *Dyer* in the place cyted by me. It was much inforced in the *Exchequer*. But as touching the particular of the old cuſtome of a demi-marke upon a ſack, and the other old cuſtome upon fels and leather, it is now no longer urged; becauſe it appears expreſly by divers records of 3 *E.* 1. in the *Tower*, that it was granted *per les grandes et al prier des comons et de les merchants de tout* Engleterre, and by a record of

Ro. Pat. 3 *E.* 3. M. 1. ſtat. 25. *E.* 1. *c.* 7. *Ro. fin. intus* 3 *E.* 1. M. 24.

3 *E.* 1. M. 1. Ro. Par.

25 *E.* 1. *cap.* 7. ſtat. printed, *per communitatem regni noſtri Angliæ*, which concurres alſo with the ſtatute of 25 *E.* 1. *cap.* 7. in print; ‘ ſaving to us and our heires the cuſtomes of ‘ wools, ſkins and leather *granted heretofore* by the commi- ‘ nalty aforeſaid.’ The pattent roll of 3 *E.* 1. which hath theſe words, *cum prelati magnates ac tota comunitas mercatorum regni noſtri nuper nobis conceſſerunt quandam novam conſuetudinem*, viz. *de quolibet ſacco lanæ* 6s. 8d. *&c.* being ſomething obſcure, are by the concurrence of all thoſe other records ſo cleerely expounded, as there cannot be, neither now is there, any queſtion made, but that the cuſtome of a demy-marke, and the other old cuſtomes, which by my lord *Dyer*, and by all thoſe who argued for or againſt impoſitions in the *Exchequer*, was held to be due by the common-lawe, was by grant in parliament. Neverthelеſſe the ſtrength of the argument they ſtill retaine. Though the demy-mark and thoſe old cuſtomes upon the ſtaple commodities were by act of parliament; yet, ſay they, before that increaſe by parliament the king had cuſtome, and no doubt a ſome certaine. Otherwiſe could not this increaſe be called *nova conſuetudo*. Beſides, ſay they, the cuſtome reduced to a certainty by 3 *E.* 1. is only upon three commodities, wool, ſkins, and leather. There are many other commodities, which did likewiſe pay cuſtome. How began that cuſtome, ſay they, if not by the kings abſolute power? And when was that power taken away? I anſwer, admit it were by the kings abſolute power, yet that the king hath cleerely diſcharged himſelf of that power by act of parliament, I hope I have cleerely proved. But this queſtion, how began the firſt cuſtoms, is beſt anſwered by another queſtion, how began the fine for purchaſe of originall writs, the fine *pro licentia concordandi*, the certainty of priſage? Nay, who reduced it firſt to certaintie, that the tryall of iſſues ſhould be by twelve jurors, no more nor no leſſe; that the full age of a man ſhould be accounted twenty-one yeeres; of a woman fourteene, twelve yeeres her age of conſent, and nine yeeres capable to bee endowed; a yeere and a day given to ſue an appeale; the like limitation of a yeere and day in very many other caſes? In effect, who reduced all the known grounds of the common-law to that certainty that now they are? Becauſe wee cannot tell how or when they began, ſhall wee therefore conclude, that they began by the kings abſolute power, and inferre, that by the ſame reaſon, they may bee changed at his pleaſure? If the king may increaſe his fines upon the purchaſe of originall writts (which by the ſame reaſon hee may doe, that he may doe his cuſtome, nay, hee hath more colour for this then for that, becauſe there is no ſtatute againſt this) hee might eaſily raiſe that revenue to the value of his cuſtomes. But no man can, nor will I hope offer to mainteine it to bee lawfull. You ſee the weakeneſſe and the dangerous conſequence of this argument, by comparing it to other caſes of like nature. To ſay the truth, all theſe things began no man can ſay certainly when or how, but by a tacit conſent of king and people, and the long approbation of time beyond the memory of any man, and yet no man can directly affirm but that moſt of them might begin by act of parliament, though now there bee no records extant of ſuch antient parliaments. The firſt parliament was not kept 9 *H.* 3. though it be the firſt in our bookes. If we will give credit to other records, and to our beſt chroniclers, we ſhall heare and reade of divers parliaments in the reigne of king *John*, and of his predeceſſor *Rich.* 1. and in the reign of *H.* 2. of two famous parliaments, one at *Claringdon* in *Wiltſhire*, the other at *Gedington* in *Northamptonſhire*. And although our chronicles ſay, that the firſt parliament kept in this realm was held 19 *Aprilis*, 16 *H.* 1. yet I am of opinion, that *William* the Conqueror held parliaments; for what can be elſe underſtood by theſe words, *per commune conſilium totius regni noſtri ſtabilitum fuit*, which I finde in Mr. *Lamberts* collection of the ancient lawes of *England*, in the beginning of the lawes of *William* the Conqueror? Many of the ſtatutes of *E.* 1. have no other words. Nay, long before him, in the yeere of our Lord 712. in the time of *Inas* king of the *Weſt-Saxons*, I aſſure my ſelf there were parliaments held, and that of the three eſtates, as at this day; as may appeare by theſe words in the beginning of the lawes of king *Inas*, in Mr. *Lambert*, *Suaſu & inſtituto epiſcoporum noſtrorum omnium, ſenatorum noſtrorum, & natu majorum populi noſtri in frequentia magna:* and more plainly in the concluſion of ſome other of his lawes; *hoc factum fuit per commune conſilium & aſſenſum procerum, comitum, & omnium ſapientium ſeniorum, & populorum totius regni, & per præceptum regis Inæ*, which are the ſame in *Latine* which ours is in *Engliſh*, *by the king, the lords ſpirituall and temporall, and the commons.* Why might not the cuſtome upon woolls be firſt granted at one of theſe parliaments, as well as to have it firſt begun by the kings abſolute power? There is no more probability of the one than the other. Becauſe moſt of the ancient records were burnt in *H.* 2. time, when the *Exchequer* was burnt, ſhall we conclude therefore that there were never any ſuch? You ſee the weaknes of this argument in all the points thereof. I leave it, and paſſe to another.

The anti-quity of Parliaments.

The ſecond argument, that the king may totally reſtrain the importing and exporting of merchandizes, therefore he may do it *ſub modo* by laying of an impoſition, anſwered.

The king may, ſay they, reſtrain the paſſage of merchants at his pleaſure, which they prove by divers records; 2. *E.* 1. *m.* 18. *Ro. Par.* 2. *E.* 1. *m.* 17. *Ro. fin.* 31. *E.* 1. *n* 44. *Ro. Pat.* 17 *H.* 6. *Ro. Cla. in dorſo.* Upon which they inferre, that if he may reſtraine a merchant that he ſhall not paſſe at all, he may much more ſo reſtraine him that he ſhall not paſſe except he pay a certaine ſum of money: for this, ſay they, is leſſe than totally to reſtraine him; and *cui licet quod majus, licet etiam quod minus.* Of this argument my lord *Dyer* gave light in his caſe of impoſitions, 1 *Eliz.* and this hath been diverſly inforced by all that have argued for impoſitions. In anſwer of which, I will conſider, how farre the king may reſtrain the paſſage of merchants; and then will examine the conſequence of the argument.

For my part, I think the king cannot reſtrain the paſſage of merchants, but for ſome ſpeciall cauſe; wherein to define certainly and reſolutely, to ſay for what cauſes he may, and for what not, I will not undertake. Onely let me inform you, that there is not one of theſe preſidents vouched by them to prove the kings power to reſtraine, but they are upon ſpeciall reaſons; as by reaſon of enmity with ſuch a nation from whence they are reſtrained, *or becauſe ſuch a commodity may not be ſpared within the kingdome.* Beſides, they are not reſtraints from all places, and of all manner of merchandizes, but from certain places onely, and for certain ſorts of merchandizes. And for my part I thinke that reſtraints in all theſe caſes, and of like nature, are by the common-law left to the kings abſolute power; for if it were otherwiſe, it ſhould be in the power of a merchant for a little private lucre to enrich the kings enemies, or to furniſh them with munition to be imployed againſt the ſtate, or utterly to ruine the common-wealth, by carrying out a commodity which may not be ſpared, or by bringing in of ſome that may be hurtfull. Nay, which is more, ſuch may be the occaſion, that the king may, I doubt not, ſtop the paſſages of all merchants from all places for a ſhort time, as upon the death of the late queen it was put in practiſe, to prevent intelligence. There may likewiſe be ſuch neceſſary uſe of their ſhips, as the want of them upon ſome ſodaine attempts may be a cauſe of the overthrow of the whole ſtate. In ſuch caſes as theſe, if the common-law did not give the king leave to reſtraine their paſſage by his abſolute power, it were very improvident in the higheſt points, which cannot be imagined of ſo wiſe a law. And yet the kings of this realme have alwayes been ſparing in the practiſe of their abſolute power in this point; for there are little leſſe then 30. acts of parliament, touching the opening and ſhutting up of the paſſage of merchants, moſt of which, as I conceive, were made rather for the increaſe of puniſhment, then for want of power in the king; for the breach of a reſtraint by abſolute commandment is puniſhable, as all other contempts, onely by fine and impriſonment, and not by forfeiture of the merchandizes, as in the preſident of the wines, *an.* 5. of queene *Mary*, vouched by me, and is in ſome of thoſe old preſidents. If it be otherwiſe, I muſt confeſſe I know not the reaſon of the difference of this from other contempts. You ſee, that I have yeelded to their propoſition, *that the king may by his abſolute power reſtraine the paſſage of merchants*, and have therein granted more then their preſidents prove. But is the conſequence good, that becauſe the king may reſtrain, therefore he may impoſe upon ſuch as paſſe? Firſt I denie, that in our caſe there is any reſtraint at all, as there was in the caſe of the *French* wines, by queen *Mary*, by her proclamation going before the impoſition. For proofe of which, I referre you to the kings letters patents prefixed before the laſt book of rates; by which inſtrument, the impoſitions now complained of were altogether raiſed. You ſhall finde it no other then a declaration of the kings pleaſure ſo to have it, and a courſe preſcribed for levying of it. But admitting, that the very laying of an impoſition did implie a reſtraint, yet I denie the conſequence, becauſe the king may reſtrain totally, that therefore he may reſtraine for a time, or from certaine places, or certaine commodities, or certaine merchants; this indeed is a good argument, *à majori ad minus.* But becauſe he may reſtraine totally, therefore, that he may give paſſage for money, is no good conſequence; for in our caſe, there is no reſtraint at all, but it is rather a paſſage for money. If there be juſt occaſion of reſtraint, the law giveth the king power to reſtraine. But when merchants may without hurt to the ſtate have paſſage, as in our caſe, to enforce them to pay for that paſſage is in my opinion as unlawfull, as to enforce any man whatſoever to pay for doing that which he may lawfully doe. Merchants have, as I may ſo ſay, as good inheritance in their trade, as any man in his lands; and when it may ſtand with the good of the ſtate, that they may paſſe, they ought to paſſe as freely without charge impoſed on them, as any man ought to hold his inheritance, or any artificer or other tradeſman ought to exerciſe their lawfull trades and means of living, free from burdens to be laid on by the kings abſolute power. If all others ſhould be free, and onely merchants, who adventure their perſons and eſtates in ſo many dangers, to bring us from farre places ſuch things, as without which we cannot ſubſiſt, and to return us profit for our ſuperfluities, ſhould be ſubject to involuntarie burthens, their eſtate were of all other mens moſt unhappy and ſlaviſh, which, of all other trades, is indeed the nobleſt, and moſt worthy to be cheriſhed.

And here by the way I note, that, in all other nations of the world, where the merchant is ſubject to impoſitions at the kings pleaſure, the landlord, the farmer, the artificer, the very plowman, and all others, are in like ſort ſubject to taxes and burdens, when the king pleaſeth. The merchant is not the man alone that is ſubject to taxes, and all other men free. If, in the frame of our common-wealth, it were thought fit to free all other trades and profeſſions from taxes, much more ought it to be thought reaſonable, that our merchants ſhould be free, and by all means poſſible incouraged in their trade; for our caſe is not as it is with other nations of the Continent. We are iſlanders, and divided by the ſea from all the world, and in that reſpect have ſuch uſe of merchants, as we cannot live without them. If therefore any ſhould be free amongſt us, it ſhould be the merchant; and not the quite contrary, onely the merchant charged, and all others free. *Plato* in his 8. book *de Rep.* is of opinion, that the merchant, for his incouragement to trade, ſhould be free from all cuſtome whatſoever. We ſeek only to be free of involuntary impoſitions. But to return to the argument of reſtraint, from whence I am a little digreſſed. If it be a good argument, that becauſe the king may reſtraine in *toto*, he may reſtrain in *tanto*; it will not be denied unto me, for it followeth neceſſarily, that in caſes where he cannot reſtraine in *toto*, he cannot reſtraine in *tanto*. But there is no man that will ſay, that he may reſtraine the entrance and paſſage of all merchants, to and from all the parts of the world whatſoever, without any limitation of time, but the reſtraint to endure for ever, and for all kinds of merchandizes whatſoever, of moſt neceſſary and common uſe, to be brought into, or carried out of the realme. There is no man I ſuppoſe will ſay, that the law hath given the king power to make ſo unreaſonable a reſtraint as this; for it were to give him a power to deſtroy merchandize, and conſequently to ruine the common-wealth. Beſide, it were againſt the law of nations, and of reaſon itſelf. It cannot be imagined, that any wiſe law in the world ſhould allow it. But if our impoſitions, as it is ſaid, doe implie a reſtraint, and that a reſtraint be always the fore-runner of all impoſitions, then ſuch an unreaſonable reſtraint, as I have ſpoken of, muſt needs be preſuppoſed to have been the ground or fore-runner of our preſent impoſition. For in our impoſitions, are not all the merchandizes of neceſſary and common uſe charged? Are not all the merchants denizens and ſtrangers, importing from any part, or exporting to any part of the world, ſubject to the charge? Is there any limitation of time, but to endure for ever? If I ſay ſuch a reſtraint had been unlawfull, which I ſuppoſe no man will denie, then whatſoever implieth ſuch a reſtraint, which our impoſitions doe, is likewiſe unlawfull. But the ill conſequence of this their argument drawne from the kings power of reſtraint, will beſt appeare by comparing it to other caſes.

I little doubt, but the king upon ſome occaſion may lawfully reſtraine the paſſage of all men through the gates of *London*; as for the purpoſe, when the citie ſhall be beſieged, or in the time of an extreme plague. Nay is it not by authoritie derived onely from him, that the gates are ſhut every night? Doth it follow therefore, that becauſe he may doe it upon ſome extraordinary occaſion, or at ſome time, that he may ſhut up the paſſage for ever; or that preſuppoſing ſuch a reſtraint by his abſolute power, he may lay an impoſition upon every burthen of any thing brought in, or carried out, as the duke of *Florence* and many other ſtates in *Italy* and *Germany* doe, or upon every man by the poll, that ſhall paſſe thro' the gates?

You ſee the weakneſſe and danger of the conſequence of this argument, and how it tends to juſtifie impoſitions within the land. And ſo I leave it, and proceed to the next.

The third argument, that the ports are the kings, and that he may open them and ſhut them upon what conditions he pleaſeth, anſwered.

The ports and haven townes of England *are, ſay they, the kings; and, in regard thereof, he may open and ſhut them upon what conditions he pleaſeth.* I anſwere,

1. That the poſition, that all the ports are the kings, is not generally true; for ſubjects may alſo be owners of ports, as may appeare by the patent roll of 3. *E.* 1. *M.* 1. parl. where you ſhall finde, that king *Ed.* 1. granted to the *lords of port townes* the forfeitures granted to him by parliament, for not duly paying the new cuſtome of the demy-marke within every ſeverall port of theirs, where the merchandizes ſhould happen to be imported or exported. But admitting the truth of the poſition, yet is the conſequence as weake and dangerous, as of any of the reſt of their arguments. For are not all the gates of cities and townes, and all the ſtreets and highways in *England* the kings, and as much ſubject to be open or ſhut at his pleaſure, as the ports are? Nay, whenſoever we ſpeak of the highway in any law buſineſſe, we call it *via regia*, the kings highway; and the king in his commiſſions, ſpeaking of *London*, or any other citie, calls it *civitas noſtra* London, or *civitas noſtra* Exon. Doth it follow therefore, that the king may lay impoſitions upon every man, or upon all commodities that ſhall paſſe through any of theſe places? Nay the gates of the kings owne houſe, for the purpoſe his pallace of *Weſtminſter*, are his in a farre neerer degree then any of theſe. May he therefore by his proclamation impoſe upon every man that ſhall paſſe in or out at *Weſtminſter-hall* doore a ſumme of money? Doubtleſſe he may not; becauſe the king is a perſon publike, and his ſubjects ought to have acceſſe to him, as to the fountaine of juſtice, and to the courts of juſtice ſitting by his authoritie. I make little doubt, but his majeſtie may upon juſt occaſion cauſe any of theſe paſſages to be ſhut, as he may alſo the paſſage at the havens. But when the paſſage may without danger to the ſtate be open, and that the ſubjects may paſſe, his majeſtie may not then exact money for their paſſage; for the law hath given the king power over theſe things, for the good of the common-wealth, and not thereby to charge and burden the ſubject. If the king may not exact money for paſſage in and out of his court gates, becauſe of the publikeneſſe of his perſon; nor for paſſage through the gates of cities; much leſſe may he for paſſage out at the ports, which are the great gates of the kingdom, and which the ſubject ought as freely to enjoy, as the ayre or the water.

The fourth argument, that the king is bound at his owne charge, to protect merchants; and therefore it is neceſſary it ſhould be in his power to lay moderate impoſitions upon merchandizes for raiſing of money to defray his charge, anſwered.

Another of their arguments is this. *The king is bound to protect merchants from ſpoile by the enemie; he ought to fortifie the havens, that their ſhips may there abide in ſafety; he ought, if occaſion be, to ſend ambaſſadors to forrein princes, to negotiate for them*; and many the like charges is the king by the law to undergoe for the protection of his merchants. It is reaſon, therefore, that his expence be defraied out of the profit made by merchants; and conſequently, that he may impoſe upon merchandize a moderate charge, thereby to repay himſelf.

The conſequence of this argument is thus farre true. The law expects, that the king ſhould protect merchants. Therefore it alloweth him out of merchandize a revenue for the maintenance of his charge, which is the old cuſtome due, as at firſt I ſaid, by the common-law. But it is no good conſequence, that therefore he may take what he liſt, no more then he may at his pleaſure increaſe that old revenue, which the law giveth him for protecting of ſubjects in their ſuits, or for protecting wards, &c.

The fifth argument, that all forraine princes have power to impoſe, and if our king had not the like it might be very inconvenient to this ſtate, anſwered.

Another argument of theirs is this. *All other princes of the world may impoſe upon merchandize at their pleaſure; and ſo may make our merchandizes leſſe vendible with them, by laying an impoſition upon them, to be paid by us, when they are brought into their territories, whereby their owne commodities of the ſame nature may be ſold more to the gaine of their merchants, and our merchant impoveriſhed, or driven from his trade. They may alſo lay impoſitions upon our merchants fetching commodities from thence, and leave their owne merchants free from any impoſition in the ſame caſe; by which their merchants ſhall reape all the profit by that commoditie, in affording it better cheape to us here, then we can fetch it, and conſequently our merchants ſhall be undone.* Many the like caſes have been put to prove, that if the king of *England* may not impoſe, as other princes may, they ſhall be able at their pleaſure to deſtroy our trading. This I conceive was the ſame as now it is, during all that time from *Ed.* 3. till queen *Mary*; and doubtleſſe it could not but ſometimes, during that long ſpace, ſo fall out, that forreine princes did put their power in practiſe to our prejudice, and yet we heare not of any impoſition laid by any of our kings by their abſolute power; which may give any man aſſurance, that they tooke ſome other courſe to meet with the inconvenience; and indeed the meanes are divers, which theſe our kings uſed to prevent it.

Firſt, they were carefull in all their leagues and treaties with forrain princes, eſpecially to provide for it; as may appeare by the records of the ancient leagues. Neither is there any league of late time, that hath not had an article for proviſion in this point; which leagues for the moſt part are upon oath on both parts. And yet, for further ſecuritie, our kings have always had ambaſſadors reſident in the courts of ſuch forrain princes, to put them in minde of their leagues, if upon any occaſion our merchants have in that caſe happened to be never ſo little wronged by them; and if upon complaint of the ambaſſador, our merchants have not found redreſſe, our kings have held the league as broken, and denounced warre, or ſeiſed all the goods of the ſame princes ſubjects within *England*; and I dare ſay there have been more warres undertaken by our princes againſt forrain nations onely for this cauſe, then for any one other cauſe whatſoever.

Beſides, our kings have in this caſe ſometimes made uſe of that their prerogative of reſtraint, either by prohibiting our merchants from carrying our commodities into thoſe parts, where they are charged with impoſitions, that ſo by the want of our commodities, forraine princes might be enforced to abate their impoſitions laid upon them; or by reſtraining the merchants of forrain princes to import or export commodities from hence; by which meanes forraine princes have been compelled to deale favourably with our merchants for the good of their owne ſubjects. All theſe are lawfull and ordinary means to prevent or redreſſe the inconvenience which may grow by the impoſitions of other princes. If all theſe ordinary means ſhould happen to faile, which can hardly ſo fall out, and that the laying of impoſitions be indeed the only means that is left to redreſſe the inconvenience, why ſhould not that be done by act of parliament as well in theſe times, as it was in 7 *Hen.* 7. *c.* 7. to take downe the impoſition of foure ducates upon a but of malmſey, impoſed by the *Venetians*, and as it was done by queen *Eliz.* the 19 yeere of her reigne, to prevent the laying of impoſitions by forraine princes upon *ſalt-fiſh*, as may appeare by the printed ſtatutes of 19 *Eliz. cap.* 10? But, as I have ſaid, the providence of the prince and ordinary power of reſtraint may very well meet with the inconvenience.

Theſe are the chiefe reaſons made in maintenance of impoſitions. The weakneſſe of them, and their dangerous conſequence, you cannot but perceive; for, by the ſame reaſons, taxes within the land may be as well proved to be lawfull. On the contrary part, you have heard the reaſons againſt impoſitions fortified by many records and ſtatutes in the point. So as I conclude, that *impoſitions*, neither in the time of warre, or other the greateſt neceſſitie or occaſion that may be, much leſſe in the time of peace, neither upon forraine nor inland commodities of whatſoever nature, be they never ſo ſuperfluous or unneceſſary, neither upon merchants ſtrangers nor denizens, may be laid by the kings abſolute power, without aſſent of parliament, be it for never ſo ſhort a time, much leſſe to endure for ever, as ours. Though this be now my opinion, yet am not I ſo obſtinate therein, but if yet I heare better reaſon, I will once againe change my minde. In the meane while, you ſee I had reaſon to alter my firſt opinion, as being grounded upon very weak reaſons, as now they appeare unto me. And ſo I ſuppoſe they doe alſo unto you.

Mr. Yelverton*'s argument againſt impoſitions by the crown.* (a)

The queſtion is, Whether the king, without aſſent of parliament, may ſet impoſitions upon the wares and goods of merchants exported, and imported, out of, and into this realme.

THREE things have been debated in this parliament, that have much concerned the right of our whole nation, of which every one of them hath exceeded the other by a gradation in weight and moment.

The name of *Britaine* not admitted in legall proceedings.

The firſt was the change of our name, which was a point of honour, wherein we ſhewed our ſelves not willing to leave that name, by which our anceſtors made our nation famous; yet have we loſt it, ſaving onely in thoſe caſes, where our ancient and faithfull protector; the common-law doth retaine it.

Coke l. 7. *Calvins* caſe.

The ſecond was the union, a queſtion of greater moment; for that concerned the freehold of our whole nation; not in ſo high a point as having, or not having, but in point of diviſion and participation, that is, whether we ſhould enjoy the benefits and liberties of the kingdome our ſelves onely, as we and our anceſtors have done, or admit our neighbour nation to have equall right in them, and ſo make our own part the leſs, by how much the greater number ſhould be among whom the diviſion was to be made. This was adjudged againſt us both legally and ſolemnly, and therefore in that we reſt, hoping of that effect of this judgement which we read of in the poet,

Virgil. Æn. l. 1. *Dido's* ſpeech to *Æneas.*

Tros Tyriuſque mihi nullo diſcrimine habetur.

The third is the queſtion now in hand, which exceedeth the other two in importance and conſequence, concerning the whole kingdome; for it is a queſtion of our very eſſence; not what we ſhall be called, nor how we ſhall divide that we have, but whether we ſhall have any thing or nothing: for if there be a right in the king to alter the property of that which is ours without our conſent, we are but tenants at his will of that which we have. If it be in the king and parliament, then have we propertie, and are tenants at our own will: for that which is done in parliament, is done by all our wills and conſents. And this is the very ſtate of the queſtion which is propoſed, that is, whether the king may impoſe without conſent of parliament.

Impoſitions are of two natures, *forreine* and *inteſtine*.

Inteſtine be thoſe which are raiſed within our land in the commerce and dealing that is at home within our ſelves, and may aſwell for that reaſon be ſo called, as for that *veſcuntur inteſtinis reipublicæ*, they are fed and nouriſhed with the conſuming and waſting of the entrails of the common-wealth. Againſt theſe I need not to ſpeake; for the kings learned councell have with great honour and conſcience in full councell acknowledged them to be againſt the law.

Therefore I will apply my ſelf to ſpeak of impoſitions forreine, being the ſingle queſtion now in hand, and maintained on the kings behalfe with great art and eloquence.

The inconvenience of theſe impoſitions to the common-wealth, that is, how hurtfull they are to the merchants, in impoveriſhing them in their eſtates; to the king in the increaſing of his revenues by decay of traffique; and to the whole people in making all commodities exceſſive deare, is confeſſed by all, and therefore need no debate. The point of right is now only in queſtion, and of that I will ſpeak with conſcience and integrity, rather deſirous that the truth may be knowne, and right be done, than that the opinion of my ſelf or any other may prevaile.

The occaſion of this queſtion was given by the book of rates lately ſet out, affronted with the copy of letters patents, dated *July* 28. 6 *Jac.* In which book, beſides the rates, is ſet down every kind of merchandiſe, exported and imported, for the true anſwering of ſubſidy to the king, according to the ſtatute of tonnage and poundage.

In the firſt yeare of his reigne there is an addition of impoſitions upon all thoſe kind of wares, which within the book are expreſſed, and the rate of the impoſition as high and in ſome caſes higher than the rate of the ſubſidy: and this declared to be by authority of thoſe letters patents. Hereupon conſidering with my ſelfe, that heretofore the ſetting on of one only impoſition without aſſent of parliament, upon ſome one kinde of merchandiſe, and that for a ſmall time, and upon urgent neceſſity of actuall war, did ſo affect our whole nation, and eſpecially the great councell of the parliament, being the repreſentative body of the whole common-wealth, that neither the ſun did ſhine, nor the rivers run their courſes until it was taken off by the publick judgment of the whole ſtate: I thought it concerned me, and other members of that councell, that were no leſs truſted for our countrey than thoſe in former times, and have their actions to guide and direct us, to have the ſame care they had in preſerving the rights and liberties of the people, having now more cauſe then they had, for that the impoſitions now ſet on without aſſent of parliament, are not upon one or two ſpeciall kinds of goods, but almoſt indefinite upon all, and do extend to the number of many hundreds, as appeareth by that printed book of rates, and are ſet in charge upon the whole kingdome as an inheritance to continue to the king, his heires and ſucceſſors for ever; which limitation of eſtate in matter of impoſitions was never heard of, nor read of before, as I conceive.

Tit. Liv. l. 3.

The inducements expreſſed in theſe letters patents are much upon point of ſtate, and with reference to the rights and practice of forraine princes. For this I will not take upon me to enter into the conſideration of ſuch great myſteries of policie and government, but will only put you in minde of that I obſerve out of *Tit. Livius* the *Romane* hiſtoriographer. *Omnem divini humanique moris memoriam abolemus, cum nova peregrinaque patriis & priſcis præferimus.*

To that which hath been ſpoken for the kings prerogative, I will give anſwer to ſo much of it as I may conveniently in my paſſage through this debate: wherein I will principally endeavour to give ſatiſfaction to ſuch new objections as were made by the worthie and learned counſellor of the king, that ſpake laſt in maintenance of his majeſties prerogative.

P*a*t. *July* 22. *Jac.* 6.

The caſe in termes is this. The king by his letters patents before recited, hath ordained, willed, and commanded, that theſe new impoſitions, contained in that book of rates, ſhall be for ever hereafter payd unto him his heirs and ſucceſſors, upon paine of his diſpleaſure. Hereupon the queſtion ariſeth, whether by this edict and ordinance ſo made by the king himſelfe, by his letters patents of his own will and power abſolute, without aſſent of parliament, he be ſo lawfully intituled to that he doth impoſe, as that thereby he doth alter the property of his ſubjects goods, and is enabled to recover theſe impoſitions by courſe of law.

I think he cannot; and I ground my opinion upon theſe foure reaſons.

1. It is againſt the naturall frame and conſtitution of the policie of this

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(a) By an order of the commons licencing the publication, this argument appears to have been firſt printed in 1641. But it is here extracted from an edition of 1658.—The title runs thus: ‘ The Rights of the People concerning Impoſitions, ſtated in a learned Argument; with a Remonſtrance preſented to the Kings moſt excellent Majeſty, by the honourable Houſe of Commons, in the Parliament, *An. Dom.* 1610. *Annoq. Regis Jac.* 7. By a late eminent Judge of this Nation.’—The following addreſs to the reader was prefixed. ‘ To the courteous reader. This excellent treatiſe of the no leſs worthy author, happily falling into my hands, I inſtantly thought it my duty to make that publick, which had given ſo much uſeful ſatiſfaction to many learned, and judicious, in private; remembring that antient adage, *bonum quò communius, eò præſtantius.*

‘ I hope it is needleſs to commend either the reverend author deceaſed, the treatiſe, its uſe, or ſtile; ſince the authority by which it is publiſhed, is a ſufficient argument of their known worth.

‘ If thou kindly accept of his good meaning, whoſe onely aim in the publiſhing hereof was the common good, it will be an encouragement to him (and others) to preſent to thy view, what may hereafter fall into his hands worthy thy further peruſal. ‘ Thine; *J. B.*’

The addreſs to the reader was preceded with the following remonſtrance, which was made to king *James* by the houſe of commons 24. *May* 1610.

‘ *A remonſtrance delivered to his majeſty in writing, after the inhibition given by him to the commons houſe of parliament, aſwell by word of mouth, as by letters, not to proceed in the examining his right to impoſe without aſſent of parliament.*

‘ To the kings moſt excellent majeſty.

‘ *Moſt gracious ſovereign,*

‘ Whereas we your majeſties moſt humble ſubjects, the commons aſſembled in parliament, have received firſt by meſſage, and ſince by ſpeech from your majeſty, a command of reſtraint from debating in parliament your majeſties right of impoſing upon your ſubjects goods exported, or imported out of, or into this realm; yet allowing us to examine the grievance of theſe impoſitions in regard of quantity, time, and other circumſtances of diſproportion thereto incident: we your ſaid humble ſubjects nothing doubting but that your majeſty had no intent by that command to infringe the antient and fundamental right of the liberty of parliament in point of exact diſcuſſing of all matters concerning them, and their poſſeſſions, goods, and rights whatſoever, which yet we cannot but conceive to be done in effect by this command, do with all humble duty make this remonſtrance unto your majeſty.

‘ Firſt, we hold it an antient, general and undoubted right of parliament, to debate freely all matters which do properly concern the ſubject, and his right or eſtate; which freedom of debate being once fore-cloſed, the eſſence of the liberty of parliament is withal diſſolved.

‘ And whereas in this caſe the ſubjects right on the one ſide, and your majeſties prerogatives on the other, cannot poſſibly be ſevered in debate of either: we alledge, that your majeſties prerogatives of that kinde concerning directly the ſubjects right and intereſt, are daily handled and diſcuſſed in all courts at *Weſtminſter*, and have been ever freely debated upon all fit occaſions, both in this and all other former parliaments, without reſtraint; which being forbidden, it is impoſſible for the ſubject, either to know, or to maintain his right and propriety to his own lands and goods, though never ſo juſt and manifeſt.

‘ It may further pleaſe your moſt excellent majeſty to underſtand, that we have no minde to impugn, but a deſire to inform our ſelves of your highneſs prerogative in that point, which (if ever) is now moſt neceſſary to be known; and though it were to no other purpoſe, yet to ſatisfie the generality of your majeſties ſubjects, who, finding themſelves much grieved by theſe new impoſitions, do languiſh in much ſorrow and diſcomfort.

‘ Theſe reaſons, dread ſovereign, being the proper reaſons of parliament, do plead for the upholding of this our antient right and liberty. Howbeit ſeeing it hath pleaſed your majeſty to inſiſt upon that judgment in the *Exchequer*, as being direction ſufficient for us without further examination: upon great deſire of leaving your majeſty unſatisfied in no one point of one of our intents and proceedings, we profeſs touching that judgement, that we neither do nor will take upon us to reverſe it; but our deſire is to know the reaſons whereupon the ſame was grounded; and the rather, for that a general conceit is had, that the reaſons of that judgement may be extended much further, even to the utter ruine of the antient liberty of this kingdom, and of your ſubjects right of propriety to their goods and lands.

‘ Then for the judgement it ſelf, being the firſt and laſt that ever was given in that kind (for ought appearing unto us,) and being onely in one caſe, and againſt one man, it can binde in law no other but that perſon; and is alſo reverſible by writ of error granted heretofore by act of parliament; and neither he nor any other ſubject is debarred by it from trying his right in the ſame or like caſe, in any of your majeſties courts of record at *Weſtminſter.*

‘ Laſtly, we nothing doubt, but our intended proceeding in a full examination of the right, nature, and meaſure of theſe new impoſitions (if this reſtraint had not come between) ſhould not have been ſo orderly and ſo moderately carried and imployed to the manifold neceſſities of theſe times, and given your majeſty ſo true a view of the ſtate and right of your ſubjects, that it would have been much to your majeſties content and ſatisfaction, (which we moſt deſire,) and removed all cauſes of fears and jealouſies from the loyal hearts of your ſubjects, which is (as it ought to be) our careful endeavour: whereas contrariwiſe in that other way directed by your majeſty, we cannot ſafely proceed without concluding for ever the right of the ſubject, which without due examination thereof we may not do.

‘ We therefore your loyal and dutiful commons, not ſwerving from the approved ſteps of our anceſtors, moſt humbly and inſtantly beſeech your gracious majeſty, that, without offence to the ſame, we may, according to the undoubted right and liberty of parliament, proceed in our intended courſe of a full examination of theſe impoſitions; that ſo we may chearfully paſs on to your majeſties buſineſs, from which this ſtop hath by diverſion ſo long with held us. And we your majeſties moſt humble, faithful, and loyal ſubjects ſhall ever (according to our bounden duty) pray for your majeſties long and happy reign over us.’

kingdome, which is *jus publicum regni*, and ſo ſubverteth the fundamentall law of the realme, and induceth a new forme of ſtate and government.

2. It is againſt the municipall law of the land, which is *jus privatum*, the law of property and of private right.

3. It is againſt divers ſtatutes made to reſtraine our king in this point.

4. It is againſt the practice and action of our common-wealth, *contra morem majorum*; and this is the modeſteſt rule to limit both kings prerogatives, and ſubjects liberties.

Upon the firſt and fourth of theſe foure principal grounds I will more inſiſt then upon the ſecond and third, both for that in their own nature they are a more proper matter for a councel of ſtate, to the judgement of which I apply my diſcourſe, and they have not been enforced by others; as alſo for that the other two, as more fit for a barre, and the courts of ordinary juſtice, have by ſome profeſſors of the law been already moſt learnedly and exquiſitely diſcuſſed.

1 Reaſon againſt the conſtitution of the ſoveraignty.

For the firſt, it will be admitted for a rule, and ground of ſtate, that in every common-wealth and government there be ſome rights of ſovereignty, *jura majeſtatis*, which regularly and of common right doe belong to the ſoveraign power of that ſtate; unleſs cuſtome, or the proviſional ordinance of that ſtate doe otherwiſe diſpoſe of them: which ſoveraigne power is *poteſtas ſuprema*, a power that can controule all other powers, and cannot be controuled but by it ſelf.

It will not be denied, that the power of impoſing hath ſo great a truſt in it, by reaſon of the miſchiefes may grow to the common-wealth by the abuſes of it, that it hath ever been ranked among thoſe rights of ſoveraign power.

Then is there no further queſtion to be made, but to examine where the ſoveraigne power is in this kingdome; for there is the right of impoſition.

The ſoveraigne power is agreed to be in the king: but in the king is a two-fold power; the one in parliament, as he is aſſiſted with the conſent of the whole ſtate; the other out of parliament, as he is ſole, and ſingular, guided merely by his own will. And if of theſe two powers in the king, one is greater than the other, and can direct and controule the other; that is *ſuprema poteſtas*, the ſoveraigne power, and the other is *ſubordinata*.

It will then be eaſily proved, that the power of the king in parliament is greater than his power out of parliament; and doth rule and controule it; for if the king make a grant by his letters patents out of parliament, it bindeth him and his ſucceſſors; he cannot revoke it, nor any of his ſucceſſors; but by his power in parliament he may defeate and avoyd it; and therefore that is the greater power.

H. 7. 19. 6. *Lib. Intrac.* fol. 302. *c.* 1.

If a judgement be given in the *Kings Bench*, by the king himſelfe, as may be, and by the law is intended, a writ of error, to reverſe this judgement, may be ſued before the king in parliament; which writ muſt be granted by the chancellor, upon bill indorſed by the king himſelf, as the book is 1 *H.* 7. 19. 6. And the forme of the writ of error is, that it being directed to the chiefe juſtice of the *Kings Bench*; *quia in recordo & proceſſu, ac etiam in redditione judicii loquelæ, quæ fuit in curiâ noſtrâ coram nobis, error intervenit manifeſtus ad grave damnum, &c. nos errorem (ſi quis fuerit) modo debito corrigi, & partibus prædictis plenam & celerem juſtitiam fieri volentes, in hâc parte vobis mandamus, quod recordum & proceſſum loquelæ illius cum omnibus ea tangentibus, in præſens parliamentum noſtrum ſub ſigillo tuo diſtinctè & apertè mittas & hoc breve, ut inſpectis, &c. nos de conſilio & adviſamento dominorum ſpiritualium & temporalium, ac communitatis in parliamento noſtro prædicto exiſtentis, ulterius pro errore illo corrigendo fieri faciamus, quod de jure & ſecundum legem & conſuetudinem regni noſtri* Angliæ *fuerit faciendum.* So you ſee the appeal is from the king out of the parliament, to the king in parliament; the writ is in his name; the rectifying and correcting the errours is by him, but with the aſſent of the lords and commons, than which there can be no ſtronger evidence to prove, that his power out of parliament is ſubordinate to his power in parliament; for in acts of parliament, be they lawes, grounds, or whatſoever elſe, the act and power is the kings, but with the aſſent of the lords and commons, which maketh it the moſt ſoveraigne and ſupreme power above all, and controulable by none. Beſides this right of impoſing, there be others in the kingdome of the ſame nature. As the power to make lawes; the power of naturalization; the power of erection of arbitrary government; the power to judge without appeale; the power to legitimate; all which do belong to the king only in parliament. Others there be of the ſame nature, that the king may exerciſe out of parliament, which right is grown unto him in them, more in thoſe others by the uſe and practice of the common-wealth, as denization, coynage, making warre; which power the king hath time out of minde practiſed, without the gainſaying and murmuring of his ſubjects. But theſe other powers beforementioned have ever been executed by him in parliament, and not otherwiſe, but with the reluctation of the whole kingdome.

The booke is not ſo, that the commons ſhould meddle.

Can any man give me a reaſon, why the king can only in parliament make lawes? No man ever read any law whereby it was ſo ordained; and yet no man ever read that any king practiſed the contrary. Therefore it is the originall right of the kingdome, and the very natural conſtitution of our ſtate and policy, being one of the higheſt rights of ſoveraigne power. So it is in naturalization, legitimation, and the reſt of that ſort before recited.

It hath been alleadged, that thoſe, which in this cauſe have enforced their reaſons from this maxime of ours, *that the king cannot alter the law*, have diverted from the queſtion.

I ſay under favor they have not; for that in effect is the very queſtion now in hand; for if he alone out of parliament may impoſe, he altereth the law of *England* in one of theſe two maine fundamental points. He muſt either take his ſubjects goods from them, without aſſent of the party, which is againſt the law; or elſe he muſt give his own letters pattents the force of a law, to alter the property of his ſubjects goods, which is alſo againſt the law.

That the king of *England* cannot take his ſubjects goods, without their conſent, it need not be proved more than a principle. It is *jus indigenæ*, an old homeborne right, declared to be law by divers ſtatutes of the realme. As in 34. *E.* 3. *cap.* 2. that no officer of the kings, or of his heires, ſhall take any goods of any manner of perſon without the aſſent and good will of the party to whom the goods belonged. The ſame is declared in many other ſtatutes made againſt priſages and purveyances. Neither have ever any kings attempted to go plainly and directly againſt that right, but have deviſed certaine legal colours and ſhadowes for their wrongfull doing in that kind, which I doe find were of three ſorts: by way of commiſſion; by way of loan; by way of benevolence. Commiſſions of all other were the moſt inſolent; for they went out (as it were by authority) to levy ayd of the people upon great neceſſity of the common-wealth. Theſe were condemned in parliament, 21 *E.* 3. *numb.* 16. upon a grievous complaint made of the uſe of them by the commons, unto the king in parliament: wherein the people doe pray the king, that he would be pleaſed to remember, how at the parliament held the 17 year of his raign, and at the laſt parliament, it was then accorded, and granted by their ſaid lord the king and his councell, that there ſhould goe out no commiſſions out of *Chauncery* for hobbeleries, archers, and other charges to be levied upon the people, if they were not granted in parliament; which ordinances were not obſerved, by reaſon whereof the people were impoveriſhed and decayed, for which they prayed the king, that he would be pleaſed to take pity of his people, and the ordinances and grants made to his people in parliament to affirme and hold; and that if ſuch commiſſions goe out without aſſent of parliament, that the commons, which are grieved thereby, may have writs of *ſuperſedeas*, according to the ſaid ordinance, and that the people be not bound to obey them.

34 *E.* 3. *c.* 2.

Commiſſions loans or privie ſeales. Benevolence.

That is the Parliament.

To this the kings anſwer is,

Si ul tiel impoſition fuit fait per grand neceſſitie, & ceo del aſſent des prelates, countes, barons, & autres grandes & auctres homes des commons adonq; preſents, neant moins noſtre ſeignior le roy ne v et, que tiel impoſition non duement fait ſoit treit in conſequence, eins voet qu^{e} *les ordinances dont ceſt petition fait mention ſoit bienment gardes.*

Stowes Annals, 17. *H.* 8.

The laſt time that ever king attempted that courſe of exaction was 17 *H.* 8. upon the taking of the *French* king at *Pavia*, by the forces of *Charles* the fifth. Cardinal *Wolſey*, having a purpoſe to put the king into a warre about that quarrel, and finding his coffers empty, adviſed this way, to ſend out commiſſions, and by them to levie ayd of the people, according to the value of their eſtate. But this gave ſuch diſcontent to the whole realme, that it cauſed in many places an actuall rebellion; and the cardinal, being called to give an account of this bad advice, did juſtifie this fact by the example of *Joſeph*, who adviſed *Pharaoh* to take the fifth part of his ſubjects goods. But when he ſaw that would not ſerve the turne, he falſely laid it upon the judges, informing the king, he did it by their advice, being reſolved by them of the lawfulneſs of the fact. So you ſee, that great churchmen found more ſafety in matter of government of our common-wealth, in making a falſe report of a point of the common-law, then in a true text of the ſcripture. And if any churchmen will endeavor by application of the text of ſcripture, to overthrow the antient laws and liberties of the kingdom, I would adviſe them to be admoniſhed by the ill ſucceſs of the cardinal in this particular action, and by the miſerable cataſtrophe of his whole life and fortunes.

Loans and privy ſeals.

Loans and appreſts were thoſe which we call privy ſeals, which though they were more moderate in ſhew, yet being made againſt the good-will of the parties, were as injurious indeed as the other. The commons in parliament, 25 *E.* 3. *num.* 16. made a grievous complaint to the king againſt the uſe of them, and prayed, that none from henceforth ſhould be compelled to make loans againſt their will; and they gave this reaſon, in their petition, for that it is againſt reaſon, and the franchiſe of the land, and prayed that reſtitution might be made to thoſe that have made ſuch loans.

Rot Par. 25 *E.* 3. *num.* 16.

To this the kings reſcript was; *it pleaſeth our lord the king it be ſo.*

Benevolence.

Laſtly, came in thoſe kinde of exactions, which were termed by the fair name of *benevolences*; but they became ſo odious, as they gave the occaſion of a good law to be made againſt themſelves, and againſt all other ſhifts and devices, by what new terms ſoever impoſed upon the ſubjects. The law is, 1 *R.* 3. *cap.* 2. and is thus. The king, remembring how the commons of this his realm, by new and unlawful inventions and inordinate covetiſe, againſt the law of this realm, have been put to great ſervitude and important charges and exactions, and eſpecially by a new impoſition called a *benevolence*, enacted by the adviſe, &c. that the ſubjects and commons of this land from henceforth ſhall in no wiſe be charged by any ſuch charges or impoſitions called the *benevolence*, nor by ſuch like thing.

1 *R.* 3. *c.* 2.

But if you will deny, that the king doth in this caſe take the goods of his ſubject without his aſſent, then you muſt fall upon mine alternative propoſition, that the kings patent hath in this caſe the power of a law, to alter property; for how can he recover the impoſed by a legal courſe of proceeding, and by judgment in his court, but upon a title precedent him, before the action brought, which title muſt be a property in the ſame impoſed; and how cometh he by that property, but by his own letters patents, by which he declareth he will have that ſame as an impoſition? For the judgment giveth not the right, but onely doth manifeſt and declare it, and giveth execution of it. So in this point the queſtion is, whether the kings patent hath the force and power of the law, or not; for if it be not maintained that it hath, it can never be concluded, that he can transfer the property of his ſubjects goods to himſelf, without the aſſent of them; for *quod meum eſt, ſine facto meo alterius fieri non poteſt.*

Bracton, *l.* 1. *c.* 8.

And if you give this power to the kings patent, you ſubject the law, and take away all rules and bounds of ſettled government, and leave in the ſubject no property of his own, neither do you by this advance the kings power and prerogative, but you make him no king; for, as *Bracton* ſaith, *rex eſt, ubi dominatur lex, non voluntas.*

Forteſc. *de laudibus leg. Aug. c.* 9.

Fortefc. *de laud. leg. Ang cap.* 36.

So we ſee, that the power of impoſing and power of making laws are *convertibilia & coincidentia*; and whoſoever can do the one, can do the other. And this was the opinion of ſir *John Forteſcue*, that reverend and honorable judge, a very learned profeſſor of the common-law, and chief juſtice of the *Kings Bench*, in the time of *Henry* 6. His words are theſe, in his book *de laudibus legum Angliæ, cap.* 9. *Non poteſt rex* Angliæ *ad libitum leges mutare regni ſui; principatu namque nedum regali, ſed & politico, ipſe dominatur. Si regali tantum præeſſet iis, leges mutare poſſet; tallagia quoque, & cætera onera imponere, ipſis inconſultis, quale dominium leges civiles indicant, cum dicunt quod principi placuerit legis habet vigorem. Sed longè aliter poteſt rex politicis imperans; quia nec leges ipſe ſine ſubditorum aſſenſu mutare poterit, nec ſubjectum populum renitentem onerare peregrinis impoſitionibus.* In which place I muſt interpret unto you, that *peregrinæ impoſitiones* be not ſtrange and unheard of impoſitions, as was urged by the worthy gentleman that ſpake laſt; but impoſitions upon traffick into and out of forrain countries, which is the very thing in queſtion. Further, in the thirty-ſixth chapter, he ſaith of the king of *England*, *neque rex ibidem per ſe aut miniſtros ſuos tallagia, ſubſidia, aut alia quævis onera imponit ligeis ſuis, aut leges eorum mutat, vel novas condit, ſine conceſſione vel aſſenſu totius regni ſui in parliamento.* So he maketh theſe two powers of making law and impoſing to be concomitant in the ſame hand, and that the one of them is not without the other. He giveth the ſame reaſon for this, as we do now, but in other words; becauſe (as he ſaith) in *England* it is *principatus mixtus & politicus*, the king hath his ſoveraign power in parliament, aſſiſted and ſtrengthened with the conſent of the whole kingdom, and therefore theſe powers are to be exerciſed by him only in parliament. In other countries they admit the ground of the civil law, *quod principi placuerit legis habet vigorem.* Becauſe they have an abſolute power to make law, they have alſo a power to impoſe, which hath the force of a law in transferring property. *Philip Comines*, that lived at that time, in his fourth book, the firſt chapter, the fifth book, the eighth chapter, taketh notice of this policy of *England*, and commends it above all other ſtates, as ſettled in moſt ſecurity; and further to our purpoſe laieth this ground, that a king cannot take one penny from his ſubjects without their conſent, but it is violence. And you may there note the miſchiefs that grew to the kingdom of *France*, by the voluntary impoſitions firſt brought in by *Charles* the ſeventh, and ever ſince continued, and encreaſed, to the utter impoveriſhment of the common people, and the loſs of their free councel of three eſtates. And if this power of impoſing were quietly ſettled in our kings, conſidering what is the greateſt uſe they make of aſſembling of parliaments, which is the ſupply of money, I do not ſee any likelihood to hope for often meetings in that kind, becauſe they would provide themſelves by that other means. And thus much for my firſt reaſon, grounded upon the natural conſtitution of the policy of our kingdom, and the publike right of our nation.

Ph. Com. *l.* 4. *cap.* 1. 5. *cap.* 8.

2 Reaſon, againſt common-law as to property and private right.

Dier. 1. *E.* 165.

2. For the point of common-law, which is my ſecond reaſon, it hath been well debated, and nothing left unſpoken that can be ſaid in it; and therefore I will decline to ſpeak of that, which other men have well diſcuſſed; and the rather, for that there is nothing in our law-book directly, and in point of this matter; neither is the word *(impoſition)* found in them, until the caſe in my lord *Dier*, 1 *Eliz.* 165. for we ſhall finde this buſineſs of an higher ſtrain, and alwaies handled elſewhere, as afterwards ſhall appear. Yet I will offer ſome anſwers to ſuch objections as have been made on the contrary in point of common-law, and have not been much ſtood upon by others to be anſwered.

42. Aſſ. p. 9.

1, and 2. *E. Dier.* 175.

The objections that have been made are theſe; that from the firſt book of the law to the laſt, no man ever read any thing againſt the kings power of impoſing. No judgement was ever given againſt it, in any of the kings courts at *Weſtminſter.* Other points of prerogative as high as this, diſputed and debated, his exceſs in them limited; as in the book of 42. *Aſſ. pl.* 5. where the judges took away a commiſſion from one, that had power given by it to him under the great ſeal to take ones perſon, and to ſeiſe his goods before he was indicted. So maſter *Scrogs* caſe 1, and 2. *El. Dier.* 175. the power of the king in making a commiſſion to determine a queſtion of right depending between two parties, notably debated, and ruled againſt the king, that he could not grant it.

9. *E.* 3. *c.* 1. Every alien and denizen may carry his merchandiſe where it pleaſeth him, notwithſtanding any charter granted, or judgment thereupon. 16, and 17. *R.* 2.

To this I anſwer, that caſes of this nature, of which the queſtion now handled is, have ever been taken to be of that extraordinary conſequence, in point of the common right of the whole kingdom, that the ſtates would never truſt any of the courts of ordinary juſtice with the deciding of them; but aſſumed the cogniſance of them unto the high court of parliament, as the fitteſt place to decide matters ſo much concerning the whole body of the kingdom. As 2. *Ed.* 3. 7. it appears that *Ed.* 1. had granted a charter to the men of *Great Yarmouth*, that all the ſhips of merchants, coming to the port of *Yarmouth*, ſhould land their goods at their haven, and not at any other haven at that port, as at *Garneſton*, and *Little Yarmouth*, which were members of that port. This was very inconvenient for the merchants, and a great hurt to traffick, and therefore the charter was queſtioned in the time of *Ed.* 2. and adjudged good by the council. But the parties not contented with this judgment, in the ſecond year of king *E.* 3. by an order in parliament made upon a petition there exhibited againſt this grant, brought a *ſcire facias* out of the *Chancery* returnable in the *Kings Bench*, to queſtion again the lawfulneſs of the patent. And in that ſuit the cauſe was notably debated, and thoſe reaſons much inſiſted upon that have been enforced in this caſe; as that of the kings power in the cuſtody of the ports. But the matter ſo depending in the ordinary court of juſtice, a writ came out of the parliament, and did adjourn it thither again, where it gave occaſion of a good law to be made to prevent the like grants, and to make them void notwithſtanding any judgment given upon them, and to make ſuch judgments alſo void. The ſtatute is, 9. *E.* 3. *c.* 1. And in the parliament rolls, 2. *H.* 4. *num.* 109. we finde a notable record, which gives warrant for the proceeding in parliament in this manner as hath been in this caſe, notwithſtanding the judgment in the *Exchequer*, and declares to the kingdom, that, notwithſtanding the great wonder made by ſome men, nothing hath been done in this buſineſs by thoſe that ſerve in the parliament, but in imitation of their worthy predeceſſors in the like caſe. In the ſecond year of *H.* 4. the commons ſhew that in the time of *R.* 2. by the means of *John Waltham*, biſhop of *Saliſbury*, treaſurer of *England*, wrongfully, without authority of parliament, and by reaſon of a judgment given in the *Exchequer*, 16, and 17. *R.* 2. by the barons there, againſt certain merchants of *Briſtol*, and other places, paſſage had been taken for wines otherwiſe then in ancient times had been, and therefore they prayed, they might pay their priſe wines in the manner they had uſed to pay, notwithſtanding any judgment given in the *Exchequer*, or other ordinance made by the ſaid treaſurer, contrary to the antient uſage; which petition the king granted, and the judgment thereupon became void, and the priſage wine hath been paid contrary to the judgment ever ſince.

1. *El. Dier.* 165.

In 1. *El. Dier.* 165. upon the complaint, made by the merchants, of the impoſitions ſet upon cloth by queen *Mary*, by her abſolute power, without aſſent of parliament; the cauſe was thought too weighty to be decided in any one court; but, as it appeareth in the book, it was referred to all the judges of *England*, who divers times had conference about it. So it may well be, there is nothing againſt it in our year books, for there is nothing of it.

39 *E.* 3. 13.

18 *El. Dier.* 352.

Dier. 43.

Another objection was this, which was made in the laſt argument, *viz.* that cuſtom is originally due by the common-law of *England*; it can then have no other ground or cauſe, but meerly by the kings royal prerogative, as a right and duty originally belonging to his crown: which if it be, it muſt neceſſarily follow he may impoſe, for that is but the exerciſing of that right. To prove this was alleadged the caſe 39. *E.* 3. 13. by which caſe it appeareth, that king *John* had a cuſtom of eight-pence on a tun of wine in the port of *Southampton*, but the book doth not tell you that the king had it by prerogative, and he might have it as well otherwiſe; as by preſcription, or convention, which ſhall rather be intended, by reaſon of the certainty of the ſum paied; for if it were by prerogative, he might take ſometimes more, ſometimes leſs at his will, the right being indefinite, and the quantity limited onely by his own diſcretion. A common perſon may have ſuch a cuſtom certain, as 18. *El. Dier.* 352. The mayor of *London* hath the twentieth part of ſalt brought into the city by aliens, which is a great impoſition, but is good by preſcription originally, and hath received greater ſtrength ſince, by acts of parliament made for the confirmation of the liberties and cuſtoms of the city of *London.* So it appeareth that *John* of *Britain* had cuſtom of the ſhips that arrived at his port of *Little Yarmouth*, worth twenty pounds *per annum.* And theſe inſtances do infer, that a cuſtom may be otherwiſe then by prerogative, and therefore it is no good argument to conclude, ‘the king had ſuch a cuſtom, therefore ‘he had it by prerogative.’

30 *Hen.* 8. *Dier.* 43.

14 *Ed.* 3. *c.* 21. *ſtat.* 1.

The book in 30 *H.* 8. *Dier.* 43. was much preſſed on this point, which ſaith that cuſtom belonged to the king at common-law, and doth inſtance in wooll woollfels and leather, begun at the common-law, but abridged by the ſtatute of 14 *E.* 3. *cap.* 21. *ſtat.* 1. But this appeareth to be a great error, and miſtaking in the book; for we do finde, that that cuſtom of woolls woollfels and leather was begun by a grant in parliament, as appeareth in ſtatute 15 *E.* 1. *cap.* 7. The words be, ‘granted ‘to us by the commonalty aforeſaid;’ and the laſt mention before was that the king had granted to the biſhops, earls, barons, and all the commonalty of the land, *&c. Novemb.* 3. *Ed.* 1. The king recited in his letters patents, that *prelati, magnates, ac tota communitas mercatorum regni*, granted this new cuſtom. And ſo the ground and motive of that opinion being falſe, all grounded upon that muſt needs be erroneous.

Rot. Char. 31. *E.* 1. *num.* 42. in *Turri.*

It was objected, that the king holdeth at this day the encreaſe of fourpence in the pound, over due cuſtom, paid by merchants aliens according to the purport of the *charta mercatoria* 31 *E.* 1. by meer right of prerogative at the common-law; for by that grant of the merchants he cannot hold it, they being no body politick at the time of the grant; and therefore the grant is meerly void to binde in ſucceſſion; and yet the merchants aliens do pay it at this day.

It is agreed, that by the common-law a contract with a number not incorporate bindeth not ſucceſſion. But we muſt take notice, that they, by whom that grant was made, of the augmentation of cuſtom, by three-pence in the pound, and other encreaſes, 31. *E.* 1. were merchants aliens, who by the law of merchants and nations may contract to bind their ſucceſſors in matters of traffick. For their contracts are not ruled by the common-law of the land, but by the law of nations, *& per legem mercatoriam*, as the book caſe is, 3 *Ed.* 4. 10. and there was a good conſideration given them by the king for this encreaſe of cuſtome, as diſcharge of priſe wines for two ſhillings the tun, and other immunities, which all merchants aliens hold and enjoy at this day, by force of that contract made, 31 *E.* 1. for a ſtranger paieth now but two ſhillings the tun for priſage, whereas it ſtandeth an *Engliſhman* in much more. The rule of commutative juſtice maketh the contract available to the king againſt the merchants, becauſe he parteth with part of his priſage to the merchant; and maketh it available to the merchant againſt the king, becauſe he giveth him encreaſe of cuſtom above that is due by law.

27. *E.* 3. *cap.* 26.

law. But the ſtatute of 27 *E.* 3. *cap.* 26. heretofore cited, doth make this point clear without ſcruple, which confirmeth the charter of 31. *E.* 1. entirely; and by that the encreaſe of cuſtom by three pence in the pound, which is by name mentioned in the ſtatute, is now due by act of parliament.

If you will have the king hold this encreaſe of cuſtom by prerogative, you go directly againſt his meaning; for it appeareth by that which preſently followed this grant, that the king took this encreaſe of cuſtom by way of contract onely, and not by way of prerogative; for the ſame year following he directeth his writs to the officers of his ports, reciting the contract made with the aliens by *charta mercatoria*; adding further, that ſome denizens were willing to pay the like cuſtom, upon the ſame immunities to them to be granted, and doth aſſign his officers to gather it, but with this clauſe, *ſi gratanter & abſque coertione ſolvere voluerint, ita quod aliquem mercatorem de regno & poteſtate noſtrâ ad præſtationes & cuſtumas hujuſmodi invite ſolvendas nullatenùs diſtringatis.* Nothing can more plainly expreſs, that the kings intention was not to demand this by way of prerogative, but by force of the contract. If there were ſuch a prerogative in the crown, as of right to have cuſtom, how cometh it to paſs this prerogative never yet had fruit or effect? For this I can maintain, that the king of *England* hath not one penny cuſtom or impoſition upon merchandizes, elder then the fourth year of queen *Mary*, that he holdeth not by act of parliament, and by the peoples grant. The eldeſt, that he hath, is that of woolls wooll-fells and leather, and that is by act of parliament, as appeareth in the ſtatute 25 *E.* 1. *cap.* 7. the tonnage and poundage by parliament in the firſt year of every kings reign, and the aliens encreaſe of cuſtom by parliament 27 *E.* 3. *cap.* 26. Then this prerogative hath been much neglected, that it was never called on to be put in execution, untill now of late years.

25 *E.* 1. *cap.* 7.

27 *E.* 3. *cap.* 26.

3. Reaſon, againſt ſtatutes.

Concerning the ſtatutes made for reſtraining our kings from the exerciſe of this pretended prerogative, which is the third matter I ſtand upon; thoſe that have maintained the kings prerogative in this point, have endeavored to interpret thoſe ſtatutes to extend onely to reſtrain him from impoſing upon wooll wooll-fells and leather, which are ſtaple commodities. And the reaſon they give for this reſtraint, more then for other goods, is, becauſe the king by ſtatute is reſtrained to a cuſtom certain for thoſe commodities, as the half mark a ſack of wooll, and half a mark three hundred wooll-fells, and thirteen ſhillings four pence a laſt of leather; and therefore great reaſon he ſhould not exceed this cuſtom in theſe commodities.

This objection receiveth many anſwers. Firſt, it appeareth both by the expreſs letter of divers of the laws made in this point, by the occaſion that induced the making of the laws, and by the execution of them, that all other wares and merchandiſes, as well as thoſe of the ſtaple, were within the purpoſe and intent of thoſe laws. Secondly, the reaſon alleadged, why there ſhould be reſtraint for the ſtaple commodities, rather then for the other, is miſtaken; for the lords and commons did grant to *E.* 1. by act of parliament the cuſtom of the half mark for wooll wooll-fells and leather, which was matter of meer grace and liberality, and includeth no reſtraint in it, but rather a favourable extention, quite contrary to the ſence of the objection, according to that rule of interpretation, *gratioſa ampliari decet*, *odioſa reſtringi.* And admit ſome laws be made expreſly to reſtrain impoſitions upon wooll wooll-fells and leather, by reaſon that the occaſion of making ſuch laws was the actual impoſing upon thoſe goods at that time, ſhall we not by good conſtruction, *ſecundum mentem extenſivam legis*, extend this law to other wares and merchandizes that are within the ſame miſchief? If we look to the reaſon of the law, we ſhall make no doubt of it: for that is, becauſe the impoſitions were without aſſent of parliament, not becauſe they were upon ſuch and ſuch commodities. Beſides, thoſe laws ſo made are *declarativæ juris antiqui, non introductivæ novi.*

In the enumeration of thoſe ſtatutes which I conceive make directly to this purpoſe, I will endeavour rather to anſwer the objections made againſt them, then to enforce the ſenſe and meaning of them, which is very plain and open, and needs no interpretation. The firſt ſtatute enforced is *mag. charta*, *cap.* 30. made in the ninth year of *H.* 3. by which it is enacted, that all merchants ſhall have free egreſs and regreſs out of and into this realm, with their goods and merchandizes, to buy and ſell, *ſine omnibus malis tolnetis per antiquas & rectas conſuetudines.* In which words we may infer, that both the uſe and right of impoſing are abſolutely excluded, and debarred; for *conſuetudo*, which in this caſe is to be taken for *uſage*, which is *mos*, (not improperly for *portorium*, a duty paid in money, as our *Engliſh* word cuſtom in one ſence doth ſignifie) implieth a beginning and continuance by conſent and will of the parties, not by power and enforcement, which cannot be a cuſtom; and therefore it cannot be an impoſition; for that ariſeth meerly out of the will and power of the impoſer, and is againſt the will of him upon whoſe goods it is ſet. But take *conſuetudo* either for *mos* or *portorium*, the epithites with which it is qualified, *antiquum* and *rectum*, do deſcribe it to be of that nature that it cannot be an impoſition. For *antiquum*, in legal conſtruction, is that which is time out of mind, that is not an impoſition; for then by continuance of time it ſhould grow a right by preſcription, and were juſtifiable. *Rectum* implieth a limited right, which inferreth there may be a wrong, and exceeding of that right, which is not in impoſitions; for if there be a right in the king to impoſe, the quantity, time, and other circumſtances are in his diſcretion; the right is illimited. And if he ſet on never ſo great an impoſition, there is as much right in it, as if it be never ſo ſmall. The exceſs maketh it a burthen, but not a wrong.

We may further obſerve, that, in the ſtatute, *malum tolnetum*, which is evill toll, is ſet down by way of antitheſis to *antiqua*, and *recta conſuetudo*; by which is inferred, that exactions upon wares and merchandizes not qualified with theſe two properties of *antiquum* and *rectum*, are evill and unjuſt. This is made more evident by a record in the *Tower* of the ſixteenth yeer of *H.* 3. which was a mandat ſent by the king to the cuſtomers of his ports for the execution of this law made in 9. *H.* 3. whereby it is commanded, *quod omnibus mercatoribus in portum ſuum venientibus cum vinis, & aliis merchandizis, ſcire faciant, quod ſalvò & ſecurè in terram* Angliæ *veniant cum vinis & merchandizis ſuis, faciendo inde rectas & dubitas conſuetudines, nec ſibi timeant de malis tolnetis, quæ iis faciat rex, vel in terrâ ſuâ fieri permittat.* By this record the word *conſuetudo* is interpreted to be *mos*, not *portorium*; otherwiſe it ſhould have been *ſolvendo conſuetudines*, not *faciendo.* Alſo theſe words *antiquum & rectum* in the ſtatute in this writ are *rectum & debitum*, which doth more enforce a certainty of right and duty, which by no means can be intended in impoſitions.

Rot. Clauſ. 16. *H.* 3.

Objections againſt this law were made in the laſt argument. Firſt, that it was made for aliens. This is true; the words of the law do plainly ſhew it was made for aliens. But if the ſtate was ſo careful to provide for them, ſhall we not judge, that with denizens it was ſo already? And that this ſtatute was made to extend that liberty by act of parliament to aliens, which denizens had by the common law, ſucceeding times did ſo conceive of it, as appeareth by the ſtatute of 2. *E.* 3. *cap.* 9. The words are, that all merchants ſtrangers and princes may go and come with their merchandizes in *England* after the tenor of the great charter, and that writs be thereupon ſent to all the ſheriffs in *England*, and to mayors and bayliffs of good towns, where need ſhall require.

2. *E.* 3. *cap.* 9.

A ſecond objection was made in the laſt argument, out of theſe words of the ſtatute of *magna charta*, that merchants might freely traffique, *niſi publicè antea prohibiti fuerint:* by which was enforced, that the king had power to reſtrain and prohibit traffique; therefore to impoſe.--It is agreed there may be a publick reſtraint of traffique, upon reſpects of the common good of the kingdom; but whether that which is called *publica prohibitio* in the ſtatute, be intended by the king alone, or by act of parliament, is a queſtion: for ſuch reſtraints have ſtill been by parliament. But admit the king may make a reſtraint of traffique in part for ſome publick reſpect of the commonwealth, he doth this in point of protection, as truſted by the commonwealth to do that which is for the publick good of the kingdom; but if he uſe this truſt to make a gain and benefit by impoſing, that is a breach of the truſt, and a ſale of government and protection. But more of this ſhall be hereafter ſpoken in the anſwering of the main objections.

25. *E.* 1. *cap.* 7.

The next law is that notable ſtatute of *E.* 1. in the 25 year of his reign, made upon the very point in queſtion. The words are theſe. 'And foraſmuch as the moſt part of the commonalty of 'this realm find themſelves ſore grieved with the male toll of woolls, that 'is, to wit, a toll of forty ſhillings for every ſack of wooll, and have pe'titioned to us for to releaſe the ſame; we at their requeſt have clearly 'releaſed it, and have granted for us and our heirs, that we ſhall not take 'ſuch things without their common conſent and good will, ſaving to us 'and our heirs the cuſtoms of woolls ſkins and leather, granted before by 'the commonalty aforeſaid.'

Againſt the application of this law to the queſtion now in hand, many objections were made; ſome out of matter precedent to the law, ſome out of the law it ſelf, ſome out of matter ſubſequent and following after the law.

Tho. Walſingham in E. 1. *fo.* 71, 72, 73. *edit. per W. Camb. impreſ. Francoſ.* 1603.

For matter precedent, it was objected out of *Thomas Walſingham*, an hiſtoriographer of good credit, that writ of that time when the ſtatute was made, that in the petition of grievances given to king *E.* 1. by the people in the 25 year of his reign, upon which petition the ſtatute was made, that they found themſelves not grieved in point of right, but in point of exceſs. The words are, *communitas ſentit ſe gravatam de vectigali lanarum, quod nimis eſt oneroſum*, viz. *de quolibet ſacco* 40s. *& de lanâ fractâ ſeptem marcas.* So they expreſs the cauſe of their grief, that it was too heavy; which is to be applied to the point of exceſs, not of right.

To this I anſwer, that if the words had been, *quia eſt nimis oneroſum*, this conſtruction might have been made out of them; becauſe the word *quia* had induced a declaration of the cauſe of that which was formerly affirmed: but the words are, *quod nimis oneroſum*, which doth only poſitively affirm, that the impoſition *de facto* was intolerable for the greatneſs of it, which doth not therefore admit, that it is tolerable in reſpect of the right the king had to impoſe. But this is made clear by the general word precedent in the preamble of the petition, which doth evidently infer, they grounded their complaint upon point of right, not upon point of exceſs. The words are theſe, *tota terræ communitas ſentit ſe valdè gravatam, quia non tractantur ſecundum leges & conſuetudines terræ, ſecundum quas tractari anteceſſores ſui ſolebant habere, ſed voluntariè excluduntur.* After which preamble, among the particulars, this of forty ſhillings upon a ſack of wooll is ranked, but with a dependency of that expreſſed in the preamble for the point of right. But ſeeing we light upon hiſtory, which, though it be of ſmall authority in a law argument, yet being the hiſtory of our own realm, hath fit and proper uſe in the common counſel of the realm, I will purſue it a little further, out of *Matth. Weſtm.* a writer that lived much nearer the time of the law made, then *Thomas Walſingham.* He ſaith, that the commons by their petitions required, *ne rex de cætero tallagia uſurparet, & voluntarias ſuper his inductas exactiones de cætero quaſi in irritum revocaret*; by which it appeareth, that the point of the complaint was that the exactions laid on them were voluntary, that is, at the kings will without aſſent of parliament.

Matth. Weſtm. fo. 430. *edit. per H. Savilemil. Francofurti* 1601.

Out of the law it ſelf it hath much been preſſed, as firſt the commons made petition to the king; whereupon they infer out of the nature of the word petition, that their proceeding was by way of grievance, for the exceſs and inconvenience, as a matter of grace, not in courſe of juſtice for the wrong.

To this I anſwer, that conſidering the quality of the parties to this action, it being between the king and the ſubject, duty and good manners doth induce gentleneſs and humility of terms, without blemiſh or diminution of the force of right. It is according to the demeanor of *Job*, chap. 9. v. 15. *though I were juſt, yet would I not anſwer, but I would make ſupplication to my judge.* But in our forms of law, be the right of the ſubject never ſo clear, manifeſt, and acknow-

Job. 9. 15.

ledged by all; yet if his own be detained from him by the king, he hath no other writ or action to recover, but a meer petition *ſupplicat celſitudini*, &c. So as if the word petition to the king infer defect of right in the petitioner, there can be no caſe where the king can do the ſubject wrong.

A ſecond objection out of the body of the law is, that the king doth releaſe that impoſition of forty ſhillings, which implieth a right ſetled in him.

But to this I anſwer, that it is no neceſſary inference, whereſoever a releaſe of right is; for it is uſed for claim onely, or where poſſeſſion was, though wrongful, and that *in majorem ſecuritatem, quia abundans cautela non nocet.* But in this caſe, a releaſe was very expedient, and for ſome reſpect neceſſary, to extinguiſh a right the king had in this impoſition againſt the merchants themſelves. For this impoſition, though it were not ſet on by aſſent of parliament, yet was it not ſet on by the kings abſolute power; but was granted to him by the merchants themſelves, who were to be charged with it. So the grievance was the violation of the right of the people, in ſetting it on without their aſſent in parliament, not the damage that grew by it; for that did onely touch the merchants, who could not juſtly complain thereof, becauſe it was their own act and grant. This appeareth by two notable records, the one 22. *E.* 1. a writ to the treaſurer and barons of the *Exchequer* in *Ireland*, to diſcharge the merchants there of impoſitions on woolls; in which the king reciteth, *licet in ſubſidium guerræ regis pro recuperandâ terrâ* Vaſconiâ *mercatores gratanter conceſſerunt per biennium vel triennium, ſi tantum duravit guerra, de ſacco lanæ,* &c. The other record is the writ of publication, that in 26. *E.* 1. went out after the ſtatute of 25. in which writ the king reciteth thus, *cum nos ad inſtantiam communitatis regni noſtri remiſerimus cuſtumam* 40s. *nobis nuper in ſubſidium guerræ noſtræ contra regem* Franciæ *conceſſum,* &c.

22. E. 1. Origin. in Scac. Rem. Theſ.

In 26. E. 1. Mem. Scac. Rem. Theſ.

A third objection made out of the body of the ſtatute, by thoſe which have argued on the contrary part, was upon theſe words, that the king would take no ſuch things without common conſent; by which words they conceived the intention of the law was limited preciſely to impoſitions ſet upon wooll, and not on other commodities, which are not ſuch things, but other; and for this they alledge this reaſon, that it was not probable, when the complaint was only for an impoſition on wooll, that the king would give a remedy for other things not ſpoken of, for which there was no cauſe of complaint.

To this a full anſwer is given many ways. Firſt, out of the *ſaving* in the act, which extends to other things then to wooll, as to wooll-fells and leather; therefore the purview of the act by theſe words, *ſuch things*, extendeth to more then the wooll; for there needs no *ſaving*, but for that which is contained in the purview. Secondly, the reaſon alledged, that no more by likelihood ſhould be remedied but for wooll, becauſe onely that was complained of, is falſe; for the complaint of the commons was not onely for this impoſition on wooll, but divers other burthens and grievances of the like nature. And this will appear if we compare all the parts of the law, the one with the other; for this law is in the form of a charter written in *French*, and beginneth, *Edward by the grace of God*, &c. and is an entire grant, and inſtrument without fractions, ſections, and chapters, as it is now printed, and containeth in it, next before this laſt clauſe concerning the impoſitions on woolls, which in the printed book is *cap.* 6. that the king, for no buſineſs from thenceforth, will take no manner of aids, miſes, nor priſes, but by common aſſent. This word *miſes*, in *French* ſignifieth properly impoſitions, derived of the word *mitto* in *Latine to put.* So the word *ſuch things*, is a concluſion to all the premiſes, and hath relation not onely to that which is made *cap.* 7. by the printer, and concerneth the male toll of woolls, but to that precedent, which is all other aids impoſitions and takings. The writ of publication of this ſtatute ſent out to all parts in 26. *E.* 1. maketh plain this conſtruction. The words of it are, *concedentes quod cuſtumam illam vel aliam, ſine voluntate vel communi aſſenſu non capiamus.* Theſe words, *vel aliam*, are indefinite, and extend to any other whatſoever, beſides that of woolls. The writ doth further diſcharge merchants for the commodities of wooll-fells and leather, which are not complained of by name in the ſtatute; and therefore the law was intended to other impoſitions as well as to thoſe upon woolls.

Mem. Scac. in 26. E. 1. Rem. Theſ.

The objection made out of matter ſubſequent to the ſtatute was this, that notwithſtanding this law of 25 *E.* 1. impoſitions, that before the ſtatute had been ſet on other merchandize then woolls, were ſtill anſwered after the ſtatute; and for inſtance of this, was alledged, that whereas 16. *E.* 1. an impoſition of 40*s.* the tun was ſet upon wines brought into the kingdom, an accompt was made of this in the *Exchequer* in 26. *E.* 1. as by the records there appeareth; by which it ſeemeth that the law of 25. *E.* 1. was not taken to extend to wines, and ſuch other commodities, other then woolls named in the ſtatute. It is true, ſuch an impoſition was ſet on by *E.* 1. in the ſixteenth year of his reign, and an accompt made for it 25. and 26. But it appeareth by the record of the accompt, that it was made for the time ended before the ſtatute made: as from the eighteenth of *May*, 16. *E.* 1. to 23. *Jul.* 22. *E.* 1. But there is no record, that ever any accompt was made for any money received for that impoſition for the time after the ſtatute made; neither was it very willingly anſwered before; for it appeareth by the record, that it was ten years after the ſetting of it.

16. E. 1. Orig. R. Theſ.

25, & 26. E. 1. de compt. T. Mich. R. Theſ.

The third ſtatute alledged on the behalf of the ſubject is that 34. *E.* 1. *c.* 1. the words are theſe. 'No tallage or aid 'ſhall be taken or levied by us, or our heirs in our realm, 'without the good will and aſſent of our arch-biſhops, biſhops, earls, ba'rons, knights, burgeſſes, and other freemen of the land.' Againſt this was objected, that this ſtatute was intended onely upon the taxes and impoſitions of things. The word *auxilium* makes it clear, that it is to be intended further then of things within the realm; for *tallagium* is commonly intended of domeſtical taxes, but *auxilium* is the moſt uſual term for impoſitions upon goods imported and exported; as by the acts of parliament by which ſuch impoſitions are given to the king, in which they are called moſt commonly by the name of aids, as proceeding of good will and benevolence.

34. E. 1. cap. 1.

The fourth ſtatute alledged on this part is that of 5. *E.* 2. *c.* 14. juſt in point of the matter in queſtion; and therefore I will ſet it down as I finde it *verbatim* in the record in the *Tower. Enſement novelles cuſtomes ſont levies, & antients enhaunces, come ſur levies drapes, vine aver du pois, & autre choſes, purquoy les merchantes veynont pluis volement, & meynes de bien, menynent en la terre, & les merchants eſtrangers demurront pluis longment que ils ſoleyent faier, pur le quel demoure le choſes ſont le pluis enhaunces que ils ne ſoloyent eſtre, al dammage de roy, & de ſon people. Nous ordenons que tout manners de male tolls, levies puies de coronement de roy* Ed. *fils de roy* Henry, *ſoyent entirement ouſtes, & de tout eſtreints pur tout jours, nient contriſteant le chartre que le dict roy* Ed. *fiſt a merchants aliens, pur ceo que il fuit fait contre le grand chartre & encountre le franchiſe de la city de* Londres, *& ſans aſſent de baronage, &c. Savant neque dent al roy le cuſtome de leynes, peulx, & de quirs, &c. ſi aver les doet.*

5. E. 2. cap. 14. Rot. Ordin.

By this law is recited, that by the levying of new cuſtomes, and by the raiſing of old, traffique was deſtroyed, and all things made dear; and therefore all new impoſitions and cuſtoms were diſcharged *charta mercatoria*, by which, cuſtom, that was encreaſed on aliens, was taken away; and the reaſon alledged; becauſe it was *ſans aſſent de baronage*, and againſt the great charter. And this is further with this clauſe, ſaving to the king his cuſtom of wooll wooll fells and leather, *ſi aver les doet.*

Great wars have been raiſed againſt the credit of this law in the parliament houſe, and three things have been eſpecially objected againſt it.

Firſt, that it is no law; for it was enforced upon the king by ſome of the nobility that were too ſtrong for him, the realm being then in tumult and mutiny about the quarrel of *Peirce* of *Gaveſton*, ſo never had the kings free conſent; but he gave way unto it for fear of greater miſchief.

Secondly, that in itſelf it is unjuſt, as in taking away the cuſtom granted to the king by *charta mercatoria*, 31. *E.* 1. and in making doubt, whether the king ſhould have the cuſtom of woolls, &c. by thoſe words, *ſaving it to him, ſi aver les doet.*

The third objection is, that if it were a law, it is repealed.

To theſe I give particular anſwers.

To the firſt, that this ſtatute was made both at the inſtance of the king and people, with a purpoſe and intention on all parts to ſettle things in a ſtay and order, both in the kings houſe and commonwealth; the king and his nobles ſtanding in good terms, when this buſineſs was taken in hand. And it was begun and ended with great ſolemnity and ceremony. For the king in the third year of his reign gave commiſſion under his great ſeal to 32 lords ſpiritual and temporal; of which there were eleven biſhops, eight earls, and thirteen barons; they being as committees of the higher houſe to deviſe ordinances for the good government of his houſe and his realm. In which commiſſion he doth for the honor of God, the good of him and of his realm, of his freewill, grant to the prelates earls and barons, and others elected by the whole kingdom, full power to ordain the ſtate of his houſe and realm by ſuch ordinances as by them ſhould be made, to the honor of God, the honor and profit of holy church, the honor of himſelf, the profit of him and his people, according to right and reaſon, and the oath he made at his coronation. Theſe joyning with others of diſcreet commons in parliament, and taking every of them a ſolemn oath for their ſincere demeanor in the buſineſs, did make this and other ordinances, which were ſo well liked of by the king, that, after they were made, he took an oath to obſerve them, and cauſed them to be publiſhed in *Pauls* church-yard by the biſhop of *Saliſbury*, by denouncing excommunication againſt all that ſhould wilfully infringe them; and by his letters pattents dated 5. *Oct.* 5. *regni ſui*, did ſend them through the realm to be publiſhed, and from thenceforth to be obſerved, thereby ſignifying his great liking and approbation of them; after which they had the force and power of laws given unto them in the parliament, in the fifth year of his reign.

Com. 16. Mar. 3. E. 2. Rot. Ordin. 5 E. 2.

Pallic. 3. Kal. Oct. 5. E. 2. Rot. Ord. Pat. 5. Oct. 5. E. 2. Rot. Ord.

The ſecond objection, which is the unjuſtneſs of the law, inſtanced in two points; the taking away of *charta mercatoria*, and the doubting of the kings right to the cuſtom of wooll-fells and leather, &c.—To the firſt of theſe, I deny it to be unjuſt, but to be according to the law of *England*, and liberty of the kingdom: for that charter did contain in it divers grants of things which were not in the power of the king to grant without aſſent of parliament; the trial *per medictatem linguæ*, and other things tending to the alteration of the law, and burdening of the people; and therefore that charter never had his undoubted and ſettled force, until it was confirmed by act of parliament, but lay aſleep almoſt twenty years together, without being put in execution, between 5. *E.* 2. and 27. *E.* 3. when it was confirmed. For the doubt that is ſuppoſed to be made in the ſtatute of the kings right to the cuſtom of wooll wooll-fells and leather, I take it, there is no ſuch doubt made: for the words, *ſaving the kings right to the cuſtom of woolls, ſi aver les doet*, have this conſtruction, that is, at ſuch times as he ought to have it: ſo the word *ſi* hath the ſignification of *quando*; for it had been a folly to have made a ſaving of that, of the right whereof they had doubted; neither is it likely but that they would have taken it away, if it had not been lawful. But there was no colour to doubt of the right of it; for it was given by act of parliament, and ever continued in force without challenge or exceptions to the lawfulneſs of it.

The third objection is, that this ſtatute is repealed. To this I plead, *nullum valet recordum.* If it be repealed, it muſt be by act of parliament; for *unum quodque diſſolvitur iiſdem modis quibus eſt colligatum.* I and others have ſearched the records of the realm, and endeavoured by all means to inform our ſelves of the truth herein, and we can find no act of parliament of repeal. The truth is, ſome kings, finding theſe laws not to ſort to their wills and humors, have endeavoured to ſuppreſs them; but they did never yet obtain a repeal of them by act of parliament.

Rot. Clauſ. 11. E. 2.

Rot. finium 11. E. 2.

But it is further urged, that although there were no formal repeal of the law, yet it was never put in execution as a law, but even preſently upon the making was rejected, and uſe and practice went quite againſt it: and for inſtance hereof, a record was vouched, that *E.* 2. held himſelf ſo little bound by it, as that in the 11. year of his reign he ſet an impoſition without aſſent of parliament upon wooll, wooll-fells, leather, wines cloth, *aver de pois*, and divers other kind of merchandizes. To this I anſwer, that if it were true, that a weak and impotent king, as he was, did contrary to the law, doth this make the law void, and no law? But if we look into the whole record, and ſcan this action of *E.* 2. from the beginning of it unto the end, we ſhall finde it a very good inſtance to prove the practice and execution both of this law of 5. *E.* 2. and of that in 25. *E.* 1. For it is true, that *E.* 2. in the eleventh year of his reign did borrow of the merchants a certain ſum of money, above the due cuſtom of woolls, wooll-fells, wine, *aver de pois*, leather, and ſuch other goods imported and exported. But it appeareth by the record, he took it but for one year; he took it by the advice and counſel of the merchants; and he took it *per viam mutui*, as a loan. The direction of the writ is, *collectoribus mutui nobis per mercatores alienigenas & indigenas de certis rebus & merchandiſis uſque ad certum tempus faciendi.* This was done in good terms, he did not claim it as his right, but did borrow it, which I do think is a good evidence againſt his right. But what became of this? The ſtate would not abide it, for all theſe fair ſhews. And therefore afterwards the king ſendeth out other writs, by which he diſchargeth all merchandizes of this loan, ſaving only wooll wooll-fells and leather; and for the loan taken upon thoſe commodities, it was limited to continue but until *Michaelmas* after, and good ſecurity was given to the merchants by the cuſtomers to pay themſelves, by way of defalcation, out of the cuſtoms which ſhould be due after *Michaelmas*, thoſe ſums which were ſo borrowed of them. The words of the record are worth the obſerving, *cum pro expeditione guerræ* Scotiæ, *& aliis arduis & urgentibus neceſſitatibus nobis multipliciter incumbentibus, pro quarum exoneratione quaſi infinitam pecuniam refundere oportebit, pecunia plurimum indigeamus in præſenti, & nuper pro eo quod exitus regni & terrarum noſtrarum, ſimul cum pecunia nobis in ſubventione præmiſſorum tam per clerum quam communitatem regni noſtri conceſſa, ad ſumptus prædictos cum feſtinatione qua expediret faciendos, non ſufficiunt; exquirentes vias & modos, quibus poſſemus pecuniam habere commodius & decentius pro præmiſſis, de conſilio & adviſamento quorundam mercatorum tam alienigenarum quam indigenarum viam invenimus infra ſcript. viz.* and ſo ſetteth down the manner of the loan; and the ſecurity for the payment of it. This, I take it, was neither an impoſition, nor a wrong in any reſpect. Alſo by the firſt record it appeareth, that the loan ſet on wines, *aver de pois*, and ſuch other commodities, beſides wooll wooll-fells and leather, were preſently diſcharged by *E.* 2. which ſheweth they were taken to be within the intent of the ſtatute of 25. *E.* 1.

14. E. 3. ſtat 1. cap. 21.

The fifth ſtatute alledged on the behalf of the ſubject is that of 14. *E.* 3. *ſtat.* 1. *cap.* 21. by which the commons pray the king to take no more then the old cuſtom of the half mark. The king prayeth aid of the commons for a time above the cuſtom upon his neceſſity of wars. And the concluſion is, that by that act the king doth grant, that after the feaſt of *Penticoſt*, twelve moneths following, he will take no more of woolls wooll-fells and leather but the old cuſtom, and doth promiſe to charge, ſet, or aſſeſs upon the cuſtom but in manner as aforeſaid.

14. E. 3. ſtat. 2. c. 1.

The ſixth ſtatute is 14. *E.* 3. *ſtat.* 2. *cap.* 1. The king doth grant by way of charter to the prelates earls barons commons citizens burgeſſes and merchants, that they be not from henceforth charged nor grieved to make any aid or ſuſtain charge, if it be not by the common conſent of the prelates, earls, barons, and other great men, and commons of the realm, and that in parliament.

Theſe two ſtatutes grew upon an occaſion of an impoſition ſet on wooll by the king without aſſent of parliament. Little hath been objected againſt them, but only to the firſt, that it was obtained of grace, and not upon inſtance of right, which they gather out of the words of the law, which are, "the commons pray the king that he would ſtabliſh, "that from henceforth no more then the old cuſtom be taken". The like reaſon may be made againſt the king out of the ſame words in the ſame law; for the king in the ſame act prayeth the commons to give him an impoſition upon woolls for a time above the old cuſtom. But the record of the petitions exhibited in parliament, on which theſe two laws are made, cleareth the objection.

Rot. Par. 13. E. 3. num. 5.

Rot. Par. 13. E. 3. num. 13.

The firſt was delivered by the lords in this form, *les grands volunt*, that the male toll, ſet on woolls newly, be altogether abated, and that the old cuſtom be held, and that they may have this in point of charter, and by inrolment in parliament. This word, *volunt*, had been too high for a ſuit of grace, and therefore muſt be intended of right. The commons petition in form is ſomewhat humble, but in effect and purpoſe is rough and ſtern. The words are theſe: the commons pray that the male toll of woolls be taken as it was uſed in antient time, which is now enhanced without the aſſent of the commons, and *grandes*, as we conceive; and that if it be otherwiſe demanded, that every one of the commons may arreſt them without being challenged. According to theſe petitions, the firſt of theſe two laws is by inrolment in parliament; the ſecond is in form of a charter: the firſt doth expreſs ſome ſpecial commodities; the ſecond doth reach generally at all.

14. E. 3. ſtat. 2. c. 2.

The ſeventh law directly touching this point is that 14. *E.* 3. *ſtat.* 2. *cap.* 2. the king doth grant according to the great charter, that all merchants denizens and foreigners may without let ſafely come into the realm of *England* with their goods and merchandizes, and ſafely tarry, and ſafely return, paying the ſubſidies, cuſtoms and other profits reaſonably due. Upon the words of this law, was great advantage taken in this, that beſides cuſtom and ſubſidy, which comprehend all the certain and ordinary duties the king hath upon the wares and goods of merchants, there are other profits ſpoken of to be due. Theſe they affirm cannot be underſtood but of impoſitions by the king without aſſent of parliament.

Rot. Par. 50. E. 3. nu. 163.

To this I anſwer; if they were not duties due to the king beſides cuſtom and ſubſidy, which might ſatisfie the intention of theſe words, this objection might have had ſome colour in it; but it is plain, that beſides theſe two, there are other profits due to the king upon merchants goods, as ſcavage, tonnage, and the like. And you ſhall finde a petition in parliament, 50. *E.* 3. againſt the raiſing of theſe above the old rate.

15. E. 3. ſtat. 2. c. 5.

The eighth law is 15. *E.* 3. *ſtat.* 2. *cap.* 5. whereby it is enacted, that every merchant may freely buy and ſell, and paſs the ſea with their merchandizes of wooll and all other things, paying the cuſtom of old time uſed, according to the ſtatute made in the laſt parliament in Mid-Lent, which was the *ſtat.* 14. *E.* 3. *ſtat.* 2. *cap.* 2. This law doth expreſsly exclude the novelty of impoſitions.

18 E. 3. ſtat. 1. c. 3.

The ninth law is that 18. *E.* 3. *ſtat.* 1. *cap.* 3. whereby it is enacted, that the ſea be open to all manner of merchants to paſs with their merchandizes where it ſhall pleaſe them.

27. E. 3. ſtat. 2. c. 2.

The tenth is, 27. *E.* 3. *ſtat.* 2. *cap.* 2. for the aſſurance of merchants-ſtrangers and other, the king doth will and grant for him and his heirs, that nothing ſhall be taken over the due cuſtoms, not taken of them to his uſe by colour of ſuit, or in other manner againſt their wills.

38 E. 3. cap. 2.

The eleventh is 38 *E.* 3. *cap.* 2. that all manner of merchants aliens and denizens may buy and ſell all manner of merchandizes, and freely carry them out of the realm, paying the cuſtoms and ſubſidies thereof due.

22 H. 8. cap. 8.

The laſt is 22 *H.* 8. *cap.* 8. by which it was enacted, that tables ſhould be ſet up in ports, by which the certainty and very duty of every cuſtom, toll, and duty, or ſum of money, to be demanded and required of wares and merchandizes, ſhall and may plainly appear and be declared, to the intent that nothing be exacted otherwiſe then in old time hath been uſed and accuſtomed.

By this late law it appeareth, that the judgment of the whole parliament was at that time, that nothing was due upon wares and merchandizes but that which was certain, and had been antiently due; by which impoſitions are excluded, whoſe qualities are novelty and incertainty, as being ſet on as preſent occaſion moveth, and proportioned for quantity and other circumſtances as the will of the king directeth.

Theſe are the laws, which I conceive moſt directly tend to the reſtraining the kings of *England* from the exerciſe of that irregular power of impoſing, at the firſt offered by them to be put in execution, yet not preſſed as their right, and never practiſed but upon oppoſition of the whole ſtate, and at laſt deſerted and given over until of late; as by that which followeth in the fourth place will appear.

4 Reaſon. It is againſt the practice of former times.

My fourth and laſt aſſertion is, that this practice of impoſing without aſſent of parliament is *contra morem majorum.* In this I will make an hiſtorical perluſtration of the times paſt, whereby I will diſcover and make known, what paſſages have been in this buſineſs in this kingdom, and eſpecially in the high court of parliament for the ſpace of 300 years and more laſt paſt, ſince the beginning of the reign of *E.* 1. ſithence which time, and not before, this kingdom hath grown into the glory and reputation of foraigne traffique. And as a worthy gentleman of the kings learned councel made certain conſiderations upon this queſtion, framed and ſtrengthened out of the greatneſs of his wit and reaſon; ſo I grounding my ſelf upon the practice of former times, which is the ſafeſt rule whereby to ſquare the right both of king and people in this commonwealth, where their right is *jus conſuetudinarium*, a right that groweth by uſe and practice, I will propoſe unto you certaine obſervations out of the action and experience of former times untill the raignes of the two late queens; by which you may the better ground and frame your judgements in the determination of the right in this queſtion.

1. My firſt obſervation is in point of circumſtance, that there never was any impoſition ſet, but in time of actuall war, and *duplicatis vexillis*; they were ſet on very rarely and ſparingly, but for a ſhort time, and that certaine and definite, and upon ſome few commodities, and that by the aſſent of the merchants that were to beare the burthen. In our time the occaſion not ſo ſenſible, the continuance to be perpetual, the number many hundreds, almoſt no kinde of commodity ſpared. I will give you ſome few inſtances of theſe circumſtances out of the records themſelves.

22 E. 1. Orig. Scacc. Rem. Theſ. 22 E. 1. Mem. Scac. R Theſ. T. Mich. Rot. Parl. 17. E. 3. nu. 28.

The maletole of wooll, ſet on by king *E.* 1. which gave the occaſion of the ſtat. 25 yeare of his raigne, was given by merchants. The record ſaith, *mercatores gratanter conceſſerunt in ſubſidium guerræ regis.* It further ſheweth, it was for his neceſſity of warre, which then was great alſo.

For the time of *E.* 3. there need not many inſtances; for his whole raigne was almoſt an actuall warfare. As in the ſixth year of his raigne for his war in *Scotland* and *Ireland*, in the thirteenth year of his raigne for his war in *France*, ſeverall impoſitions were ſet on.

In the ſeventeenth year of *E.* 3. the record in the *Tower* mentioneth, that forty ſhillings impoſition was upon a ſacke of wooll by the grant of merchants, and it was in the time of war.

Rot. Parl. 20. E. 3. nu. 18.

In the twentieth yeare of king *E.* 3. it appeareth in the record, that the impoſition then put upon woolls was by the aſſent of merchants for two years, for the neceſſity the king had in his paſſage over the ſea, to recover his right, and to defend the realme.

2. My ſecond obſervation is, never any impoſition was ſet on by the king out of parliament, but complaint was made of it in parliament; and not one that ever ſtood after ſuch complaint made, but remedy was afforded for it; *et quod rex inconſulto fecit, conſulto revocavit*, his ſoveraigne power controlled his ſubordinate. In which it is a thing very notable, that the king in no one caſe ever claimed, or ſo much as ever named his right or prerogative, which no doubt would have been done, if it had been thought due, but gave ſatisfaction to the complaint by one of theſe three waies;

Either by diſcharging them quite, and making ſome good law againſt them.

Secondly, by intreating the people to hold them ſome ſhort time by their favor.

Thirdly, by waving his preſent poſſeſſion, and taking that of their gift by act of parliament, as an aide which he had ſet on by his abſolute power as an impoſition.

25 *E.* 1. *cap.* 7. *Rot. Parl.* 38 *E.* 3. *n.* 26. 38 *E.* 3. *c.* 2. 45 *E.* 3. *c.* 4. 18 *E.* 3. *cap.* 10, 11. *R.* 18 *E.* 3. *cap.* 3. *l.* 1.

Inſtances of the firſt. 25 *E.* 1. the impoſitions of wools taken off, and a law made againſt it, and the king undertook for him and his ſucceſſors to doe ſo no more. 38 *E.* 3. 26. the impoſition of three ſhillings foure-pence on a ſacke of wooll put off upon complaint; and a law made againſt it, 38 *E.* 3. *ca.* 2. The like ſtatute 45 *E.* 3. *ca.* 4. upon a complaint of an impoſition on wools made in parliament, 45. *E.* 3. *n.* 42. *Rot. Parl.*

21. *E.* 3. *n.* 11. *R. Parl.* 25. *E.* 3. *n.* 22. *R. Parl.*

Inſtances of the ſecond. 21 *E.* 3. *nu.* 11. a petition upon an impoſition of 2s. upon a ſacke of wool, 2s. upon a tunne of wine, and ſix-pence upon *aver de pois*, all diſcharged preſently, ſaving the 2s. upon a ſacke of wool, and for that intreated that it might ſtay till *Eaſter* following, and ſo it did, and was then taken away.

Inſtance of the third. 25 *E.* 3. *nu.* 22. the commons made petition againſt an impoſition of fourty ſhillings upon a ſack of wool granted to the king by the merchants, ſhewing that they ought not to be bound by their act. The king did not claime right or juſtice; but becauſe his warres were great, upon his requeſt had it granted unto him for two yeeres by act of parliament, and pretended no title of prerogative, neither was it ever ſpoken of.

Orig. in Scac. 31 *E.* 1. *R. Theſ.*

3. My third obſervation is, that our kings have acknowledged that it is not their right. *E.* 1. in his writs he ſent to the officers of his ports to levie three-pence on the pound over the old cuſtome of the denizens as well as of the aliens, and to ſuffer the denizens to enjoy thoſe privileges the aliens did enjoy by the payment of the encreaſe of cuſtome, doth give this direction expreſly; that they ſhould not take it of denizens againſt their will. The words of the record expreſs it very fully: *cum mercatores extranei & alienigenæ, pro quibuſdam libertatibus eis per nos conceſſis & priſcis noſtris quibuſcunque remiſſis, nobis de bonis & merchandiſis ſuis quibuſcunque infra regnum & poteſtatem noſtram adducend. ultra antiquas cuſtumas dare conceſſerint præſtationes & cuſtumas ſubſcriptas, viz.* and ſo ſetteth down the increaſes, and amongſt the reſt this three-pence upon the pound, and ſo proceedeth, *ac quidam mercatores de regno noſtro & poteſtate noſtra, ut ipſis dictis libertatibus & immunitatibus uti & gaudere, & quod de priſis noſtris quieti eſſe poſſint, præſtationes & cuſtumas hujuſmodi de bonis & merchandiſis ſuis nobis ſolvere velint, ut accepimus, aſſignavimus vos, &c. ad cuſtumas & præſtationes prædictas de mercatoribus de regno & poteſtate noſtra colligend. qui eas gratanter & ſine coercione ſolvere voluerint.*; *ita tamen quod aliquem mercatorem de dicto regno & poteſtate noſtra ad præſtationes & cuſtumas hujuſmodi nobis invito ſolvend. nullatenus diſtringatis.* Surely if *E.* 1. had claimed the prerogative of impoſing, he would never have given theſe cautions in the requiring of that which he had taken to be his due, as that they ſhould not exact it of any of his ſubjects that were not willing to pay it, nor trouble nor diſtraine them for it.

Rot. Alem. 12. *E.* 3. *dorm.* 21. *in Turr.*

In the twelfth yeere of *E.* 3. we finde the record of certaine letters written from the king, being then at *Barwick* in the *Scottiſh* warres, unto the archbiſhop of *Canterburie*, in which letters the king ſeemeth to have a great confidence in the devotion of the archbiſhop, and therefore earneſtly intreateth him to further his enterpriſes with his prayers to God, and then addeth further:

Ad hoc pater, cum populus regni noſtri variis oneribus, tallagiis, & impoſitionibus, hactenus prægravetur (quod dolentes referimus) ſed inevitabili neceſſitate compulſi de eiſdem oneribus ipſum adhuc relevare non valemus dictum populum, ut tantam neceſſitatem noſtram humiliter & benigne patiatur & caritativè ſuſtineat, & priorem, quam penes nos concepit de cetero inſtanter in orationibus & eleemoſynis ſuis, (oneribus prædictis, quæ non ex maliiia vel preſumptione voluntaria ipſum gravant, non obſtantibus) exhibeant caritatem, indulgentiam muneribus & aliis modis, quibus ſecundum Deum videbitis piis exhortationibus inducatis, & nos penes eundem excuſetis; ſperamus namque per Dei gratiam, cujus manus cunctis indigentibus ſola ſufficiens, & largiflua comprobatur, beneficiis compenſativis dictum populum viſitare & conſolari pro loco & tempore opportunis.

The principall thing I note out of this record, upon the very point of this my third obſervation, is, that the king intending to excuſe himſelf of the burthens by him laid on the people, and to avoid the blemiſh of wrong and injuſtice in laying thereon, ſaith they were not *onera ex preſumptione voluntaria*, that is, burthens that he preſumed to lay on at his owne will, whereby he condemneth impoſitions without aſſent of parliament, which are *(onera ex voluntate regis)* to proceed of preſumption, which doth clearly exclude claime of right, and diſproveth the lawfulneſs of the act. But there are divers other notable paſſages in the record worthy our marking. As out of the word *(prægravantur)* uſed by the king, wee may gather he did accompt theſe impoſitions a grievous burden to his people, which ſheweth his owne pity of them. He ſaith further, *dolentes referimus*, ſhewing his griefe and remorſe at it; *& inevitabili neceſſitate compulſi*, he did it conſtrained by unavoidable neceſſity, ſhewing he was forced to it againſt his will, by that which violateth and breaketh all law; which inferreth, he would not maintaine his action by law. *Adhuc relevare non valemus*; this inſinuates, he would eaſe them in good time. *Curitatem exhiberent*, they ſhould afford him charity in the bearing of them, as if ſo be in point of juſtice or right they need not. *Penes eundem excuſetis*, the biſhop ſhould excuſe him to the people. By this he did clearly leave the point of juſtification, and ſo of right. Laſtly, he promiſeth he would viſit and comfort them *beneficiis compenſativis*, would give them recompence for thoſe ſummes he had ſo raiſed of them; which ſheweth that he claimed them not as due, for then he needed not give recompence for them.

Rot. Parl. 21. *E.* 3. *n.* 16.

In the one and twentieth yeere of *E.* 3. a petition was exhibited in parliament, that levies be not made by commiſſion (ſo they be in this caſe) nor other things laid upon the people unleſs they be granted in parliament. The kings anſwer is, if any ſuch impoſitions were made, it was by great neceſſity, and with aſſent of the prelates barons and ſome of the commons preſent; yet he will not that ſuch impoſitions not duly made be drawne in conſequence. Here the king acknowledgeth an impoſition not to be duly made, though with the conſent of the higher houſe and ſome of the commons, becauſe it was not in full parliament: much rather he would have thought ſo, if it had been by the king alone.

Rot. Parl. 7. *E.* 4. The record begins, *memorandum quod die Veneris* 3. *die Parl.*

King *E.* 4. (that was a rough and warlike prince, and was more beholding to his ſword in the recovery of his right to the crowne then to the affection of the people) at a parliament held the ſeventh yeere of his raigne made a ſpeech to the commons, ſir *John Say* being then ſpeaker, in which ſpeech is contained very notable matter, and very pertinent to our purpoſe; and becauſe the record is not in print, I will ſet downe the kings ſpeech *verbatim* as it is entred upon the parliament roll, and then I will make a paraphraſe upon it. '*John Say*, and ye 'ſirs come to this my court of parliament for the commons 'of this my realme. The cauſe why I have cald and ſummoned this my preſent parliament, is, that I purpoſe to 'live upon mine own, and not to charge my ſubjects but 'in great and urgent cauſes, concerning more the weale of 'themſelves, and alſo the defence of them and of this my 'realme, rather than mine owne pleaſure, as heretofore by commons of 'this land hath beene done, and borne unto my progenitors in time of 'need; wherein I truſt, that yee ſirs, and all the commons of this my land, 'will be as tender and kinde unto me in ſuch caſes as heretofore any 'commons have been to any of my progenitours. And for the good-'will, kindneſs, and true hearts that yee have borne, continued, and 'ſhewed to me at all times heretofore, I thanke you as heartily as I 'can. Alſo I truſt yee will continue in time coming; for which by 'the grace of God I ſhall be to you as good and gracious a king, and 'reigne as righteouſly upon you, as ever did any of my progenitors upon 'commons of this my realme in dayes paſt, and ſhall alſo in time of 'need apply my perſon for the weale and defence of you, and of this my 'realme, not ſparing my body nor life for any jeopardy that might happen to the ſame.'

Out of this, we may obſerve firſt the kings proteſtation to live of his owne, and not to charge his ſubjects; by which I gather he did acknowledge a certain and diſtinct property of that which was his ſubjects from that which was his own, which excludeth the right to impoſe at his will; for if that be admitted, the ſubjects property is *proprietas precaria*, not certaine how much of his is his owne: for that is his which the king will leave him; for there is no limit or reſtraint of the quantity, the right being admitted, but onely the kings will.--The ſecond thing I obſerve is this, that in charging of his ſubjects he would confine himſelfe between theſe two bounds. The one, it ſhould bee in great and urgent cauſes concerning more the weale of them, and the defence of them and his realme, than his owne pleaſure; wherein he condemneth thoſe occaſions that grew upon exceſſe of private expence by over great bounty, or otherwiſe, and admitteth onely ſuch as grow by reaſon of warres, or other ſuch like publique cauſes concerning the whole ſtate. The other bound or limit is, that thoſe burdens ſhould be *ſecundum morem majorum*, as heretofore had been done and borne by the commons to his anceſtours in time of need.--The third thing I obſerve is, that he acknowledged theſe burdens did proceed out of their good-will and kindneſs, and not out of his right and prerogative; out of theſe words, that he truſted they would bee as tender and kinde to him in ſuch caſes, as heretofore any commons had been to his progenitors.--And laſtly, wee may note the recompence promiſed by the king to his ſubjects, for their good wills and kindneſs, his goodneſs and grace, his juſt and righteous government, the jeopardy of his body and life for their weale and defence. Did this king aſſume to himſelfe a right to lay burdens on his ſubjects at his own will without their aſſents, that offered to buy them at his need with the price of his blood, the moſt ſacred relique in the kingdome?

4. My fourth obſervation is, that in all petitions exhibited by the commons in parliament againſt impoſitions, the very knot of their griefe, and the principal cauſe of their complaint, hath been expreſſed in thoſe petitions, that the impoſitions have been without aſſent of parliament; by which is neceſſarily inferred, that their griefe was in point of right, not of burden.

Rot. Parl. 11. *E.* 3. *nu.* 11.

In 21 *E.* 3. *nu.* 11. the complaint of the impoſition of two ſhillings upon a ſacke of wooll, two ſhillings upon a tonne of wine, ſix-pence upon *aver de pois*, the cauſe of grievance expreſſed, becauſe it was done *ſans aſſent de commons.*

Rot. Parl. 25 *E.* 3. *nu.* 22.

25 *E.* 3. *nu.* 22. In a petition the commons complaine, that an impoſition upon wools was ſet by the conſent of the merchants; they pray that commiſſions bee not made upon ſuch ſingular grants, if they be not in full parliament; and if any ſuch grants be made, they may be held as void.

Rot. Parl. 17 *E.* 3. *nu.* 28.

17 *E.* 3. *nu.* 28. The commons in their petition informe the king, it is againſt reaſon they ſhould be charged with impoſitions ſet on by aſſent of merchants, and not in parliament.

5. My fifth obſervation is, that, whenſoever any petition was exhibited againſt impoſitions, there was never any reſpect had of the quantity, but they were ever intirely abated, as well where they were ſmall, as where they were great; no requeſt ever made to make them leſs when they were great, nor excuſe made of their eaſe when they were exceeding ſmall; which ſheweth, that it was not the point of burden or exceſſe was reſpected in their complaint, but the point of meere right.

R. Parl. 25. *E.* 3. *nu.* 22.

25 *E.* 3. *nu.* 22. Fourty ſhillings ſet an impoſition upon a ſacke of wooll, upon complaint, all taken off, and no ſuit to be eaſed of part becauſe it was too great.

Ibid. 36. *E.* 3. *nu.* 26. 21 *E.* 3. *nu.* 11.

36 *E.* 3. *nu.* 26. Three ſhillings and four-pence upon a ſacke of wool all taken off, and no excuſe made for the ſmalneſs; for 21 *E.* 3. *nu.* 11 two ſhillings a ſacke, two ſhillings tonnage, and ſix-pence poundage.

R. Parl 50. *E.* 3. *nu.* 163.

50 *E.* 3. *nu.* 163. A great complaint was made in parliament by the commons, that an impoſition of a penny was ſet upon wools for tonnage over and above the ancient due, which was but a penny, and ſo the ſubject was charged with two-pence; alſo that a penny was exacted for meſonage, which was but an halfe-penny; which impoſitions the record doth expreſs did amount to an hundred pounds a yeere.

This petty impoſition was as much ſtood upon in point of right, as the other great one of fourty ſhillings, and was taken off upon complaint in parliament, without either juſtification or excuſe for the ſmalneſs of it.

6. My ſixth obſervation is, that thoſe which have adviſed the ſetting on of impoſitions without aſſent of parliament, have been accuſed in parliament for giving that advice, as of a great offence in the ſtate, and have ſuffered ſharpe cenſure and great diſgrace by it.

Neither doe I finde that the quality of the perſon hath extenuated the blame; as 50 *E.* 3. *William* lord *Latimer* chamberlaine to the king, and one of his private councell, was accuſed by the commons in parliament of divers deceits and extortions and miſdeeds, and among other things, that he had procured to be ſet upon wooll woollfells and other merchandizes, new impoſitions, to wit, upon a ſack of wooll eleven ſhillings, which the lord *Latimer* ſought to excuſe, becauſe he had the conſent and good liking of the merchants firſt. But judgment was given againſt him, that he ſhould be committed to priſon, be fined and ranſomed at the kings will, and be put from being of the council; and this procuring of impoſitions to be ſet on without aſſent of parliament is expreſly ſet down in the entry of the judgment for one of the cauſes of his cenſure.

Rot. Parl. 50. *E.* 3. *n.* 17, 18, 19, 20.

Richard Lyons, a farmer of the cuſtoms in *London*, the ſame year was accuſed in parliament for the ſame offence. He pleaded, he did it by the kings command, and had anſwered the money to the kings chamber: yet was condemned and adjudged in parliament to be committed to priſon, and all his lands and goods were ſeiſed into the kings hand. And at the laſt the hate againſt theſe authors of impoſitions grew ſo, that 50 *E.* 3. in the ſame parliament, a petition was exhibited in parliament to make this a capital offence. The record is very ſhort, and therefore I will ſet it down *verbatim. Item prie le dit common, que ſoit ordaine per ſtatute en ceſt preſent parliament de touts ceux, queux cy en avant mittont ou font pur lour ſinguler profit novels impoſitions per lour authoritie demeſn, accrocheants al eux eny ul power de riens que ſoit eſtabli en parliament, ſans aſſent de parliament, que ils eyent judgement de vie & member, & de foriſfacture.* To this rough petition the king gave a milde and temperate anſwer, *courre la common ley come eſtoit al avant uſe.*

7. My ſeventh obſervation is, the ceſſation between 50 *E.* 3. after this cenſure in parliament and 4 *Mariæ*, almoſt two hundred years, during which time no king did attempt to impoſe without aſſent of parliament. And yet we finde in the parliament rolls, that there was not one of thoſe kings that reigned in that time, but had impoſitions granted him upon fit occaſion by act of parliament upon all goods and merchandizes, and at divers times during their reigns, ſometimes more, ſometimes leſs upon the ton and pound, but ever for a time certain, and indefinite. So the uſe of them was not given over, but the power of impoſing was ſo clearly and undoubtedly held to be in the parliament, as no king went about to practiſe the contrary.

But to this ceſſation, that was of great weight and credit in our evidence, a colour was given by the other ſide, to avert the inference made upon it againſt the kings right, that is, that during that time there was ſo great a revenue grew to the crown by double cuſtom paid for all merchandizes both in *England* and at *Callais*, by reaſon of an act of parliament made 8 *H.* 4. which was, that no goods ſhould be carried out of the realm but to *Callais*, and by reaſon that the merchants paid cuſtom both there and here for the ſame goods, that in the ſeven and twentieth year of *Henry* the ſixth, the cuſtom of *Callais* was 68000 *l.* the year; a great ſum, if you conſider the weight of money then, what price it bare; and by reaſon hereof princes not delighting to charge their murmuring ſubjects but when need is, being ſo amply ſupplied otherwiſe, did not put that prerogative in practice.

To this I anſwer, that if that were true that was urged, it might be ſome probable colour of the forbearance of impoſing. But I finde it quite contrary, and that by record: for there was no ſuch reſtraint of all commodities not to be tranſported to any place but *Callais*, but onely woolls woollfells leather tinn and lead, that were ſtaple wares, which by the ſtatute 37 *E.* 3. were to be tranſported thither, and not to any other place, and the ſtaple continued at that place for the moſt part from that time untill long after, 27 *H.* 6. but there was no double cuſtom paid both here and there by the ſame owner: but the yearly profits of the cuſtoms of *Callais* at thoſe times were ſo far ſhort of that which hath been alledged in 27 *H.* 6. that it appeareth in an act of parliament, 27 *H.* 6. *cap.* 2. printed in the book at large, that the commons do complain, that, whereas in the time of *E.* 3. the cuſtom of *Callais* was 68000 *l. per annum*, at that time, which was 27 *H.* 6. by reaſon of the ill uſage of merchants, it was fallen to be but 12000 pounds the year. So then there was great cauſe in that reſpect to have ſet on impoſitions by reaſon of that great abatement of cuſtoms, and yet it was not then offered to be done without aſſent of parliament. But if you look a little further into the extreme neceſſities of thoſe times, you ſhall finde there never was greater cauſe to have ſtrained prerogatives; for it appeareth in an act of parliament, 28 *H.* 6. that it was then declared in parliament by the chancellor and treaſurer, who demanded relief of the people for the king, both for payment of his debts and for his yearly livelihood, that the king was then indebted 372000 *l.* which now by the weight of money amounteth to above 1100000*l.* and that his ordinary expences were more then his yearly revenue by 19000 *l.* yearly. So if ever there was cauſe to put a king to his ſhifts, it was then; yet we ſee they did not venture to put in practice this ſuppoſed prerogative. It further appeareth in that ſtatute, that the people, among thoſe reaſons they alleadged, why they were not able to retain the king, gave this for one, that they had ſo often granted him tonnage and poundage upon merchandizes, by which it appeareth he took nothing of merchants by impoſition without grant; for if he had, no doubt they would not have ſtuck to have put him in mind of it. But I pray conſider, what became of this motion of the chancellor and treaſurer. The propoſition had depended in parliament many years. The effect was, the people entreated the king to reſume all grants he had made from the beginning of his reign untill that time, being the twenty-eighth year of his reign, excepting ſuch as were made upon conſideration valuable, that he might ſo enable himſelf by that mean by which he had impoveriſhed himſelf and the whole kingdom. This took effect, and the ſtatute of reſumptions was thereupon made the ſame year; which record, becauſe it is not in print, and declareth theſe things with great gravity and authority, I will ſet down the very text of it, ſo much as is material to our purpoſe.

27 *H.* 6. *cap.* 2.

28 *H.* 6. *Stat. de Reſump. in Turri Lond.* not printed.

'Prayen your commons in this your preſent parliament 'aſſembled to conſider, that where your chancellor of your 'realm of *England*, your treaſurer of *England*, and many 'other lords of your council, by your high commandment to 'your ſaid commons, at your parliament holden laſt at *Weſtminſter*, ſhewed and declared the ſtate of this your realm, which was 'that ye were indebted 372000*l.* which is grievous, and that your 'livelihood in yearly value was but 5000*l.* And foraſmuch as this '5000 *l.* to your high and notable ſtate to be kept, and to pay your ſaid 'debts, will not ſuffice: therefore that your high eſtate may be releived. And furthermore it was declared, that your expences neceſſary 'to your houſhold without all other ordinary charge came to 24000*l.* 'yearly, which exceedeth every year in expence neceſſary over your 'livelihood 19000 *l.* Alſo pleaſeth it your highneſs to conſider, that 'the commons of your ſaid realm be as well willing to their power, for 'the releiving of your highneſs, as ever was people to any king of your 'progenitors that raigned in your ſaid realm of *England*: but your ſaid 'commons been ſo impoveriſhed, what by taking victual to your houſehold, and other things in your ſaid realm, and nought paid for it, and 'the quinzime by your ſaid commons ſo often granted, and by the grant 'of tunnage and poundage, and by the grant of ſubſidy upon woolls, 'and other grants to your highneſs, and for lack of execution of juſtice, 'that your ſaid poor commons be full nigh deſtroyed; and if it ſhould 'continue longer in ſuch great charge, it would not in any wiſe he had, 'ne born. Wherefore pleaſeth it your highneſs, the premiſſes graciouſly 'to conſider, and that ye by the advice and aſſent of your lords ſpiritual 'and temporal, and by the authority of this your preſent parliament, 'for the conſideration of your high eſtate, and in comfort and eaſe of 'your poor commons, would take, reſume, ſeiſe and retain in your 'hands and poſſeſſion all honors, &c.'

This was very plain dealing by the people with their king, and this is the ſucceſs of the demand of ſupply and ſupport had in thoſe days, being required in point of gratification, without any recompence or retribution for it. Thus then we have cleared this point, that between 50 *E.* 3. and 4 *Mariæ*, there was not one impoſition ſet without aſſent of parliament.

Queen *Mary* in the fourth year of her reign, upon the wars with *France*, ſet an impoſition upon clothes for this conſideration, that the cuſtom of woolls was decayed, by reaſon for the moſt part they were made into clothes, which afforded little cuſtom; for that which in wooll paid for cuſtom and ſubſidy 40*s.* made into cloth paid but 4*s.* 4*d.* To recompence this by an indifferent equality, there was ſet upon a cloth 5*s.* 6*d.* which impoſition did not make up the loſs ſuſtained in the cuſtom of wooll, by 13*s.* 4*d.* in 40*s.* This was *juſtum*, but not *juſtè*. This religious prince, invironed with infinite troubles in the church and commonwealth, and much impoveriſhed by her devotion, in renouncing the profits of the church-lands that were in the crown by the ſuppreſſion, was the firſt that made digreſſion from the ſteps of her worthy progenitors, in putting on that impoſition without aſſent of parliament; for that very conſideration of the loſs of cuſtom, by turning of wooll to clothing, came into treaty in the 24 year of *E.* 3. when the art of clothing began firſt to be much practiſed in this kingdom; and then in the recompence of the loſs ſo ſuſtained in the decay of cuſtom of woolls, there was ſet upon a cloth by act of parliament above the olde cuſtom, 14*d.* for a denizen, and for an alien 21 *d.* This is recited in a record in the *Exchequer*, 48 *E.* 3. *Rot.* 2. *R. Theſ. in origin.* But I pray you examine, how this impoſition of queen *Mary* was digeſted by the people. We ſee in the caſe of my lord *Dier*, 1 *El. fol.* 165. that the merchant found great grief at it, and made exclamation and ſuit to queen *Elizabeth* to be unburdened of it. The very reaſon of their grief expreſſed in that caſe is, becauſe it was not ſet on by parliament, but by the queens abſolute power; ſo that was the ground of that complaint, the very point of right.

Orig in Scac. 48 *E.* 3. *Rot.* 2. *R. Theſ.* 1 *Eliz. Dier, fo.* 165.

This cauſe was referred to all the judges, to report whether the queen might ſet on this impoſition without aſſent of parliament. They divers times had conference about it, but have not yet made report for the king; which is an infallible preſumption, that their opinions were not for him. For it is a certain rule among us, that if a queſtion, concerning the kings prerogative or his profit, be referred to the judges, if their opinions be for the king, it will be ſpeedily publiſhed, and it were indiſcretion to conceal it; but if there be no publication, then we make no doubt, but that their opinions are either againſt the king, or at leaſt they ſtick, and give none for him.

The ſame queen *Mary*, upon reſtraint of bringing in of *French* commodities occaſioned by the then wars with *France*, ſet an impoſition upon *Gaſcoyn* wines, which continueth yet. So the kingdom of *England* by the injuſtice of that prince was clogged with theſe two heavy impoſitions, contrary to the right of the kingdom and the acts of her progenitors.

Queen *Elizabeth* ſet on that upon ſweet wines, which grew alſo upon the occaſion of the troubles with *Spain*. That upon allome was none. It was rather a monopoly to maſter *Smith* the cuſtomer of *London*, for the ingroſſing of all allomes into his own hands, for which priviledge he gave a voluntary impoſition upon that commodity. It was like the priviledge granted to *John Pechey* of the ſweet wines by *E.* 3. for which the patentee was called into the parliament houſe, 50. *E.* 3. and was there puniſhed, and his patent taken away and cancelled.

What impoſitions have been ſet on in the kings time, I need not expreſs. They are ſet down particularly in the book of rates that is in print. They are not eaſily numbered. The time for which they are raiſed is not ſhort. The patent prefixed to that book, bearing date 28 *Julii*, 6 *Jacobi*, will inſtruct you ſufficiently in that point. They be limited to the king, his heirs and ſucceſſors; which I ſuppoſe is the firſt eſtate of fee ſimple of impoſitions that ever man read of.

8. My eighth and laſt obſervation is upon tunnage and poundage given to the king of this realm, upon wares and merchandizes exported and imported, which is an impoſition by act of parliament, and, as it will appear, was given out of the peoples good-will, as a very gratification to the king, to enjoyn him thereby from the deſire of voluntary impoſitions, and to conclude him by that gift in parliament from attempting to take any other without aſſent of parliament. For after the ceaſing of voluntary impoſitions, theſe parliamentary ones were frequent in the times of the king that ſucceeded. But they were never given but for years, with expreſs caution how the money ſhould be beſtowed; as towards the defence of the ſeas, protection of traffick, or ſome ſuch other publick cauſes. Sometimes ſpecial ſequeſtrators made by act of parliament, by whoſe hands the money ſhould be delivered, as 5 *R.* 2. *cap.* 3. in a printed ſtatute. The rates that were given were very variable, ſometimes 2 *s.* tunnage, and 6 *d.* poundage, as 7 *R.* 2. 3 *s.* tunnage, and 12 *d.* poundage, 10 *R.* 2. which grants were not to endure, the longeſt of them, above a year; 18 *d.* tunnage, 6 *d.* poundage, in 17 *R.* 2. 3 *s.* tunnage and 12 *d.* poundage granted to *H.* 4. in the thirteenth year of his reign for a certain time, in which ſtatute there is this clauſe, that this aide in time to come ſhould not be taken for an example to charge the lords and commons in manner of ſubſidy, uneſs it be by the wills of the lords and commons, and that by a new grant to be made in full parliament in time to come. This clauſe in good and proper conſtruction may be taken to be a very convention between the king and his people in parliament, that he ſhould not from thenceforth, nor any of his ſucceſſors, ſet on impoſitions without aſſent of parliament. The like impoſition was granted to *H.* 5. in the firſt year of his reign for a ſhort time towards the defence of the realm, and ſafeguard of the ſea, upon condition expreſſed in the act, that the merchants denizens and ſtrangers coming into the realm with their merchandizes, ſhould be well and honeſtly uſed and handled, paying the ſaid ſubſidy as in the time of his father, and his noble progenitors kings of *England*, without oppreſſion or extortion. In the end of which act the commons proteſted being bound by any grant in time to come, for the purpoſes aforeſaid.

5 *R.* 2. *Rot. Par.* 7. *R.* 2. *n.* 13. 10. *R.* 2. *n.* 12. 17. *R.* 2. *n.* 12.

Rot. Parl. 1 *H.* 5. *n.* 17.

H. 6. in the one and thirtieth year of his reign, had tunnage and poundage given him for his life. *E.* 4. had it given him the third year of his reign, as it appeareth in a ſtatute 12 *E.* 4. *cap.* 3. *H.* 8. in the ſixth year of his reign, and all ſince in the firſt year of their reigns have had it given them for term of their life; and being now ſo certainly ſettled, do reach further at that, from which they are in conſcience and honor excluded by this voluntary gratification. For can any man give me a reaſon, why the people ſhould give this impoſition of tunnage and poundage above the due cuſtom upon all commodities, if the king by his prerogative might ſet on impoſitions without aſſent of parliament? And were not that a weak action in a king, to take that of his people as a benevolence from them, with limitation of the ſame, and in what it ſhould be imploied, and how they will be uſed for it, and for what time he ſhall have it, which he might juſtly take without their conſents, unclogged of theſe unpleaſing incumbrances?

Rot. Parl. 31. *H.* 6. 12. *E.* 4. *c.* 3. 6. *H.* 8. *c.* 12. 1. *E.* 6. *c.* 13. 1 *Mar. c.* 18. 1 *Eliz. c.* 19. 1. *Jac. c.* 33.

The ſtatutes of tunnage and poundage made in our times, that are altogether inclined to flattery, do yet retain in them certain ſhews and rumors of thoſe antient liberties, although indeed the ſubſtance be loſt. As in the ſtatute 1 *Jac. cap.* 33. we declare, that we truſt, and have ſure confidence of his majeſties good-will towards us, in and for the keeping and ſure defending of the ſeas; and that it will pleaſe his highneſs, that all merchants, as well denizens as ſtrangers, coming into this realm, be well and honeſtly entreated and demeaned for ſuch things whereof ſubſidy is granted, as they were in the time of the kings progenitors and predeceſſors, without oppreſſion to them to be done. By this clauſe, as it now continueth, the true intent of this ſtatute appeareth to be, that there ought no other impoſition to be laid upon merchants beſides theſe given by this ſtatute; and this intention hath been well interpreted by uſe and practice from the time of *E.* 3. to the time of queen *Mary*, as before is declared.

1 *Jac. c.* 33.

Thus much of this laſt reaſon, made from obſervation, and the action of our nation.

Objections anſwered.

I will anſwer now ſuch main objections as have been made againſt the peoples right, and have not been touched by me *obiter* in my paſſage through this diſcourſe.

That which hath been moſt inſiſted upon is this, that the king by his prerogative royal hath the cuſtody of the havens and ports of this iſland, being the very gates of this kingdom; that he in his royal function and office is onely truſted with the keys of theſe gates; that he alone hath power to ſhut them, and to open them when, and to whom he in his princely wiſdom ſhall ſee good; that by the law of *England* he may reſtrain the perſons of any from going out of the land, or from coming into it; that he may of his own power and diſcretion prohibit exportation and importation of goods and merchandizes; and out of his prerogative and preheminence, the power of impoſing, as being derivative, doth ariſe and reſult; for *cui quod majus eſt licet, & ei quod eſt minus licitum eſt.* So their reaſon briefly is this; the king may reſtrain the paſſage of the perſon, and of the goods; therefore he may ſuffer them not to paſs, but *ſub modo*, paying ſuch an impoſition for his ſufferance, as he ſhall ſet upon them.

For the grounds and propoſitions laid in this objection, I ſhall not be much againſt any one of them. Others of them muſt be qualified, ere they be confeſſed. But the inference and argument made upon them, I utterly deny; for in it there is *mutatio hypotheſis*, and a tranſition from a thing of one nature to a thing of another. As the premiſes are of a power in the king onely fiduciary, and in point of truſt and government, the concluſion infers a right of intereſt and gain.—Admit the king had *cuſtodiam portuum*; yet he hath but the cuſtody, which is truſt, and not *dominium utile.* He hath power to open and ſhut upon conſideration of publike good to the people and ſtate, but not to make gain and benefit by it. The one is protection, the other is expilation. The ports in their own nature are publike, free for all to go in and out; yet for the common good this liberty is reſtrainable by the wiſdom and policy of the prince, who is put in truſt to diſcern the times when this natural liberty ſhall be reſtrained. In 1 *H.* 7. *fol.* 10. in the caſe of the *Florentines* for their allome, the lord chief juſtice *Huſſey* doth write a caſe, that in the time of *E.* 4. a legate from the pope being at *Callais* to come into *England*, it was reſolved in full council, as the book ſaith, before the lords and judges, that he ſhould not have licence to come into *England* unleſs he would take an oath at *Callais*, that he would bring nothing with him that ſhould be prejudicial to the king and his crown.—The king by the common-law may ſend his writ, *ne exeas regnum*, to any ſubject of the realm; but the ſurmiſe of the writ is, *quia datum eſt nobis intelligi, quod tu verſus partes exteras abſque licentia noſtra clam deſtinas te divertere, et quamplurima nobis et coronæ noſtræ prejudicia proſequi.* Fitzh. N. B. 85. b. So in point of government, and common good of the realm, he may reſtrain the perſon. But to conclude therefore he may take money not to reſtrain, is to ſell government, truſt and common juſtice, and moſt unworthy the divine office of a king.

Portus ſunt publici.

1 *H.* 7. *fol.* 10.

Fitzherbert, N. B. 85. *b.*

But let us compare this power of the king in foraign affairs, with the like power he hath in domeſtick government. There is no queſtion but that the king hath the cuſtody of the gates of all the towns and cities in *England*, as well as all the ports and havens, and upon conſideration of the weal publike may open and ſhut them at his pleaſure. As if the infection of the ſickneſs be dangerous in places vicine to the city of *London*, the king may command that none from thoſe places ſhall come into the city. May he therefore ſet an impoſition upon thoſe that he ſuffereth to come into the city? So, if by reaſon of infection he forbid the bringing of wares and merchandizes from ſome cities or towns in this kingdom to any great fair or mart, ſhall he therefore reſtrain the bringing of goods thither, unleſs money be given him by way of impoſition? The king in his diſcretion, in point of equity, and for qualifying the rigor of the law, may enjoyn any of his ſubjects by his chancellor from ſuing in his court of common-law. May he therefore make a benefit by reſtraining all from ſuit in his courts, unleſs they pay him an impoſition upon their ſuits? In 2 *E.* 3. in the caſe of the earl of *Richmond* before-cited, the king had granted unto the men of *Great Yarmouth*, that all the ſhips that arrived at the port of *Yarmouth*, which conſiſted of three ſeveral ports, *Great Yarmouth*, *Little Yarmouth*, and *Gerneſton*, ſhould arrive all at *Great Yarmouth*, and at no other place within that port. The lawfulneſs of this patent being in queſtion in the kings court, it was reaſoned in the kings behalf for the upholding of the grant, as it is now, that the king had the cuſtody of the port; he might reſtrain merchants from landing at all in his kingdom; therefore out of the ſame power might appoint where, and in what haven they ſhould land, and no other. This patent was demurred on in the *Kings Bench*, as being granted againſt the law; but the caſe depending was adjourned into parliament for the weight and conſequence of it, and there the patent was condemned, and a law made againſt ſuch and the like grants.

2 *E.* 3. 7.

9 *E.* 3. *cap.* 1.

The preſidents, that were vouched for maintenance of this power of reſtraint in the king, were four produced almoſt in ſo many hundred years, whereof two were in the ſecond year of *E.* 1. one in the tenth year of *E.* 3. another in the ſeventeenth year of *H.* 6. ſince which time we hear of none but by act of parliament, as they had been uſually and regularly before. To theſe I will give anſwer out of themſelves, out of the common-law, out of divers ſtatutes, and out of the practice of the common-wealth. The reſtraints in the time of *E.* 1. one of them was to forbid the carrying of wooll out of the realm, the other was to forbid all traffick with the *Flemings*. That of 10 *E.* 3. was to reſtrain the exportation of ſhip-timber out of the realm. That of 17 *H.* 6. to prohibite traffique with the ſubjects of the duke of *Burgundy*. Theſe preſidents are rare, yet they have in them inducements out of publique reſpects to the common-wealth. For the rule of common-law in this caſe, I take it to be as the reverend judge ſir *Anthony Fitzherbert* holds in his writ of *ne exeas regnum* in *Nat. Br.* that by the common-law any man may go out of the kingdom, but the king may upon cauſes touching the good of the commonwealth reſtrain any man from going by his writ or proclamation, and if he then go, it is a contempt. This opinion of his is confirmed by the book, 1. *Eliz. fol.* 165. *Dier*, 12. and 13. *Eliz. Dier*, 296. In like manner if a ſubject of *England* be beyond ſea, and the king ſend to him to repair home, if he do it not, his lands and goods ſhall be ſeiſed for the contempt; and this was the caſe of *William de Britain* earl of *Richmond*, 19. *E.* 2. He was ſent by the king into *Gaſcoyne* on a meſſage, and refuſed to return, for which contempt his goods chattels

Ro. Par. 2 *E.* 1 *n.* 16. *Rot fin.* 2 *E.* 1. *n.* 17. *Ro clauſ.* 10 *E.* 3. *dor.* 31. *Ro. clauſ.* 17 *H.* 6. *in dorſ.*

Fitzherbert, N. B. 85.

Dier. 1. *El.* 165. *Dier.* 13. *Eliz.* 296.

19 *E.* 2.

lands and tenements were ſeiſed into the kings hands. The record is cited 2 and 3 *Phil.* and *Mar.* in my lord *Dier.* fol. 128. *b.* 2 & 3 *P.* & *M. Dier.* 128. and the law there held to be ſo at that time upon a queſtion moved in the queens behalf againſt divers, that being beyond the ſeas refuſed to return upon commandment ſent unto them to that purpoſe. The ſame is again for law confirmed in the dutcheſs *Dier.* 2 *Eliz.* 176. 5 *R.* 2. *cap.* 2. of *Suffolke*'s caſe, 2 *Eliz. Dier.* 176. But the common-law was altered in this point by the ſtatute of 5 *R.* 2. *cap.* 2. by which the paſſage of all people is defended, that they may not go without licence, except the lords and other great men of the realm, merchants, and ſouldiers. So for the merchants, which are the people dealt withal, in the buſineſs in hand, the common-law remaineth as it was before the ſtatute; and ſo it was held, 12 *El. Dier.* 196. *Dier.* 12 *El.* 196. where the caſe was, an *Engliſh* merchant, being a papiſt, went over-ſea, and, being there, did ſettle himſelf to remain there for the enjoying the freedom of his conſcience. It was moved here in *England,* that his going without licence ſhould be a contempt; becauſe he went not to traffique as a merchant, but for the cauſe of religion. It was reſolved, no ſuch averment would be taken in this caſe; for that the very calling and vocation of being a merchant did give him liberty to go out of the kingdom when he would, and therefore the ſecret intent of his going was not to be enquired after. *Sed lex inſpicit quod veriſimilius.* Therefore it was in this caſe held no contempt. But at this day the law is as it was before, 5 *R.* 2. *cap.* 2. for that ſtatute is repealed, 4 *Jac. c.* 1. 4 *Jac. cap.* 1. And all men whatſoever are now at liberty by the common-law to paſs out of the realm. There is only againſt this inconvenient liberty a proclamation dated at *Weſtminſter,* *Proclam.* 9. *Jul.* 5 *Jac.* 9. *Jul.* 5 *Jac.* to the very ſame effect in point of reſtraint of paſſage with the ſtatute of *R.* 2. So the ſubject is in this much the more at eaſe and liberty then he was before, that his going over-ſea without licence doth not induce any forfeiture, but onely incurreth the cenſure of a contempt; and therefore it were to be wiſhed that ſome firm law might be made in the caſe, both for the execution of ſo good a point of policy, and for the more quiet of the ſtate, in knowing the certainty of the puniſhment for the offence.

This liberty and freedom of merchants hath been ſtrengthened and confirmed by many notable laws before recited, as 14 *E.* 3. 14 *E.* 3. *ſt.* 2. *c.* 2. 15 *E.* 3. *ſt.* 2. *c.* 5. 18 *E.* 3. *ſt.* 1 *c.* 3. *ſtat.* 2. *cap.* 2. 15 *E.* 3. *ſtat.* 2. *cap.* 5. 18 *E.* 3. *ſtat.* 1. *cap.* 3. and divers other. And therefore though it be admitted that the king may reſtrain perſons and goods, yet it may well be denied, that he hath power of himſelf alone without aſſent of parliament ſimply and indefinitely to reſtrain all traffique in general, or to ſhut up all the havens and ports, and to bar the vent and iſſuing of wares and merchandizes of the whole kingdom; as it appeareth plainly, that this hath been done this three hundred years, or near thereabouts, by act of parliament onely, and that the kingdom of *England* made this matter of traffique ſo tender a caſe to deal in, as that it hath ever held it a matter fit for the conſultation of the great council of the kingdom, and for no other.

In 11 *E.* 3. the exportation of woolls was prohibited by act 11 *E.* 3. *cap.* 1. of parliament, in which ſtatute there was this clauſe, untill that by the king and his council it be thereof otherwiſe provided: which power ſo given to the king, to be uſed for the good of the commonwealth, gave occaſion to him to abuſe it to his profit and commodity, by giving licences of tranſportation to all, that would give forty ſhillings upon a ſack of wooll above the due cuſtom. This appeareth in the records in the *Exchequer,* 13 *E.* 3. *Rot.* 2. *Rem.* 13 *E.* 3. *R. Theſ. rot.* 2. *Theſ.* I will deſcribe the record, that you may perceive the ground of it the better. *Rex collectoribus cuſtumæ in portu magnæ* Jermouth *ſalutem. Quia conceſſimus dilecto & fideli noſtro* Hugoni de Wriothſley, *quod ipſe viginti & ſeptem ſaccos lanæ & dimid. de lanis ſuis propriis in portu prædicto carriare, & eas uſque* Antwerpe *ad ſtapulam noſtram ibidem ducere poſſit, ſolvendo ibidem dilecto clerico noſtro* Willielmo de Northwel *cuſtodi guarderobæ noſtræ* 40 s. *pro quolibet ſacco pro cuſtuma & ſubſidio inde nobis debitis, &c. vobis mandamus, quod prædict.* Hugon. *dictos viginti ſeptem ſaccos lanæ & dimid. in portu prædicto carriare permittatis, &c.* And another the ſame year. 13 *E.* 3. *rot.* 12. *R. Theſ.* *Rex collectoribus cuſtumæ, &c. Cum nuper ordinaverimus, quod paſſagium lanarum, &c. apertum exiſteret, & quod ſigillum noſtrum, quod dicitur coket, quod prius claudi & ſub ſerra cuſtodiri mandavimus, aperiretur, & apertum teneretur; ideo vobis mandavimus, quod ſigillum prædictum in portu prædicto aperiri, & apertum teneri faciatis, & omnes illos, qui hujuſmodi lanas carriare et ducere velint, permittatis, receptis prius ab iiſdem, viz. de mercatoribus & aliis indigenis* 40 s. *de quolibet ſacco lanæ.* Divers other ſuch ſales of traffick occaſioned by this parliamentary reſtraint were made between 11 *E.* 3. that the reſtraint was made, and 14 *E.* 3. that this inconvenience being eſpied, the ſea was opened by 14 *E.* 3. *ſt.* 2. *c.* 2. 15 *E.* 3. *c.* 5. *ſt.* 2. 14 *E.* 3. *c.* 21. *ſt.* 1 *ſt.* 2. *c.* 1. ſtatute, and the reſtraint removed, 14 *E.* 3. *ſtat.* 2. *c.* 2. 15 *E.* 3. *cap.* 5. *ſtat.* 2. And this forty ſhillings ſo exacted was complained of as an impoſition in parliament, and the occaſion and the effect were both taken away together by act of parliament, 14 *E.* 3. *ſtat.* 1. *cap.* 21. and *ſtat.* 2. *cap.* 1.

It followed in all kings times ſithence the death of *E.* 3. that this opening and ſhutting of the havens, reſtraining and enlarging of traffick, was done by act of parliament.

I will give one inſtance in the reign of every king. 5 *R.* 2. 5 *R.* 2. *c.* 2. *ſt.* 2. *cap.* 2. *ſtat.* 2. for the paſſage of wooll wooll-fells and leather. 6 *H.* 4. *c.* 4. 6 *H.* 4. *cap.* 4. for the traffique and commerce with merchants aliens. 2 *H.* 5. *c.* 6. *ſt.* 2. 2 *H.* 5. *cap.* 6. *ſtat.* 2. for the reſtraint of ſtaple commodities to places certain, and for the traffique of the merchants of the weſt. 27 *H.* 6. *c.* 1. 27 *H.* 6. *cap.* 1. that is enacted in parliament, which is contained in the proclamation 17 *H.* 6. cited for a preſident, that is, becauſe the duke of *Burgundy* made an ordinance whereby the traffick of the *Engliſh* nation was reſtrained, that therefore the *Engliſhmen* ſhould not traffick with the ſubjects of the duke of *Burgundy.* The ſame thing enacted upon the like occaſion, 4 *E.* 4 *E.* 4. *c.* 1. 4. *c.* 1. 19 *H.* 7. *c.* 21. 19 *H.* 7. *cap.* 21. the importation of divers commodities forbidden, as being prejudicial to the manufactures within the realm. 6 *H.* 8. *cap.* 12. 6 *H.* 8. *cap.* 12. the exportation of *Norfolk* woolls out of the realm forbidden. 26 *H.* 8. *cap.* 10. 26 *H.* 8. *cap.* 10. power is given to the king to order and diſpoſe of the traffick of merchants at his pleaſure; and the reaſon is given, becauſe otherwiſe the leagues and amities with foreign princes might be impeached by reaſon of reſtraint made by divers ſtatutes then ſtanding on foot; whereby it appeareth that it was not then taken to be law, that the king had an abſolute power in himſelf to order and diſpoſe of the courſe of traffick without help of a ſtatute. 2 *E.* 6. *c.* 9. 2 *E.* 6. *cap.* 9. exportation of leather reſtrained. 1 & 2 *P.* & *M. c.* 5. 1 & 2 *Ph.* & *Mar.* the exportation of herring, butter, cheeſe, and other victuals forbidden. 18 *El. c.* 8. 18 *Eliz. cap.* 8. the exportation of tallow, raw hides, leather. So in all times no uſe of proclamations in matters of this nature, but acts of parliament ſtill procured. Wherefore in mine opinion it behoveth them that do ſo earneſtly urge this argument, the king may reſtrain traffick, therefore may impoſe, to prove better then they have done, that the king may reſtrain traffick of his own abſolute power: for as the natural policy and conſtitution of our commonwealth is, we may better ſay, that is law which is *de more gentis,* then that which floweth from the reaſon of any man guided by his general notion and apprehenſion of power regal, *in genere,* not *in individuo.*

The laſt aſſault made againſt the right of the kingdom, was an objection grounded upon policy, and matter of ſtate; as, that it may ſo fall out that an impoſition may be ſet by a foreign prince that may wring our people, in which caſe the counterpoiſe is, to ſet on the like here upon the ſubjects of that prince; which policy, if it be not ſpeedily executed, but ſtayed until a parliament, may in the mean time prove vain and idle, and much damage may be ſuſtained that cannot afterwards be remedied.

This ſtrain of policy maketh nothing to the point of right. Our rule is in this plain commonwealth of ours, *oportet neminem eſſe ſapientiorem legibus.* If there be an inconvenience, it is fitter to have it removed by a lawful means, then by an unlawful. But this is rather a miſchief then an inconvenience; that is, a prejudice in preſent of ſome few, but not hurtful to the commonwealth. And it is more tolerable to ſuffer an hurt to ſome few for a ſhort time, then to give way to the breach and violation of the right of the whole nation; for that is the true inconvenience. Neither need it be ſo difficult or tedious to have the conſent of the parliament, if they were held as they ought, or might be. But our ſureſt guide in this will be the example of our anceſtors in this very caſe, and that in the time of one of the moſt politick princes that ever reigned in this kingdom. 7 *H.* 7. *cap.* 7. you ſhall finde an act of parliament, in 7 *H.* 7. *cap.* 7. which it was recited that the *Venetians* had ſet upon the *Engliſh* merchants that laded malmſeys at *Candy* four duckets of gold upon a butt, which in ſterling is eighteen ſhillings the butt. It was therefore enacted, that every merchant ſtranger, that brought malmſey into this kingdom, ſhould pay eighteen ſhillings the butt over and above the due cuſtom uſed; this impoſition to endure, until they of *Venice* had ſet aſide that of four duckets the butt upon the *Engliſhmen.*

Much hath been learnedly uttered upon this argument in the maintenance of the peoples right, and in anſwering that which hath been preſſed on the contrary. But my meaning is not to expreſs in this diſcourſe all that hath or may be ſaid on either ſide, but onely to make a remembrance ſomewhat larger of that which I myſelf offered as my *ſymbolum* towards the making up of this great reckoning of the commonwealth, which if it be not well audited, may in time coſt the ſubjects of *England* very dear. My hope is of others, that labored very worthily in this buſineſs, that they will not ſuffer their pains to die, and therefore I have forborn to enter into their province. I will end with that ſaying of that true and honeſt counſellor *Philip Comines* in his fifth book, *Ph. Com. l.* 5. *c.* 18. the 18 chapter, *that it is more honorable for a king to ſay,* '*I have ſo faithful and obedient ſubjects, that they deny me nothing I demand,*' *then to ſay,* '*I levy what me liſt, and I have priviledges ſo to do.*'

[*At the end of the foregoing argument by* Yelverton, *an extract from a petition of grievances addreſſed by the commons to king* James *in* 1610 *is added, one ſubject of which is impoſitions by prerogative. But the whole petition is in Mr.* Petyt's Jus Parliamentarium; *and as we are not aware, that it is to be found either in the* Parliamentary Hiſtory, *the* Journals of the Commons, *or any other printed book, except the two before mentioned, it is here inſerted as a fragment of ſome curioſity. To this petition, we ſhall add lord* Bacon's *ſpeech on preſenting it to the king. The king's anſwer to ſo much of the petition as regarded impoſitions, is in the* Parliamentary Hiſtory, *vol.* 5. *p* 239. *Mr.* Petyt, *in his book before cited, gives ſome remarks of his own on the ſubject, with an extract from the* Journal of the Lords *for* 23*d* May *and* 6*th* June 1612, *when it was unſucceſsfully attempted to obtain the opinion of the judges on the queſtion of impoſitions.*]

Petition of Grievances by the Commons in 1610. *from* Petyt's Jus Parliamentarium, *page* 321.

To the king's moſt excellent majeſty.

Moſt gracious ſovereign,

Grievances complained of.

YOUR majeſty's moſt humble commons aſſembled in parliament, being moved as well out of their duty and zeal to your majeſty, as out of the ſenſe of juſt grief, wherewith your loving ſubjects are generally through the whole realm at this time poſſeſſed, becauſe they perceive their common and ancient right and liberty to be much declined and infringed in theſe late years, do with all duty and humility preſent theſe our juſt complaints thereof to your gracious view, moſt inſtantly craving juſtice therein, and due redreſs.

And although it be true, that many of the particulars, whereof we now complain, were of ſome uſe in the late queen's time, and then not much impugned, becauſe the uſage of them being then more moderate, gave not ſo great occaſion of offence, and conſequently not ſo much cauſe to enquire into the right and validity of them; yet the right being now more thoroughly ſcanned, by reaſon of the great miſchiefs and inconveniencies which the ſubjects have thereby ſuſtained: we are very confident that your majeſty will be ſo far from thinking it a point of honour or greatneſs to continue any grievance upon your people, becauſe you found them begun in your predeceſſor's times, as you will rather hold it a work of great glory to reform them; ſince your majeſty knoweth well, that neither continuance of time, nor errors of men, can or ought to prejudice truth or juſtice; and that nothing can be more worthy of ſo worthy a king, nor more anſwerable to the great wiſdom and goodneſs which abound in you, than to underſtand the griefs, and redreſs the wrongs of ſo loyal and well deſerving people.

In this confidence, dread ſovereign, we offer theſe grievances (the particulars whereof are hereunder ſet down) to your gracious conſideration.

And we offer them out of the greateſt loyalty and duty, that ſubjects can bear to their prince; moſt humbly and inſtantly beſeeching your majeſty, as well for juſtice ſake (more than which, as we conceive, in theſe petitions we do not ſeek) as alſo for the better aſſurance of the ſtate, and general repoſe of your faithful and loving ſubjects, and for teſtimony of your gracious acceptation of their full affections; declared as well by their joyful receiving of your majeſty at your happy entrance into theſe kingdoms, which you have been often pleaſed with favour to remember, as alſo by their extraordinary contributions granted ſince unto you, ſuch as have been never yielded to any former prince, upon the like terms and occaſions, that we may receive to theſe our complaints your moſt gracious anſwer.

Which we cannot doubt but will be ſuch as may be worthy of your princely ſelf, and will give ſatisfaction and great comfort to all your loyal and moſt dutiful loving ſubjects, who do and will pray for the happy preſervation of your moſt royal majeſty.

New impoſitions.

The policy and conſtitution of this your kingdom appropriates unto the kings of this realm, with the aſſent of the parliament, as well the ſovereign power of making laws, as that of taxing, or impoſing upon the ſubjects goods or merchandizes, wherein they have juſtly ſuch a propriety, as may not without their conſent be altered or changed.

This is the cauſe that the people of this kingdom, as they ever ſhewed themſelves faithful and loving to their kings, and ready to aid them in all their juſt occaſions with voluntary contributions; ſo have they been ever careful to preſerve their own liberties and rights, when any thing hath been done to prejudice or impeach the ſame.

And therefore, when their princes, occaſioned either by their wars, or their over great bounty, or by any other neceſſity, have without conſent of parliament ſet impoſitions either within the land, or upon commodities either exported or imported by the merchants; they have in open parliament complained of it, in that it was done without their conſents; and thereupon never failed to obtain a ſpeedy and full redreſs, without any claim made by the kings of any power or prerogative in that point.

And though the law of propriety be originally and carefully preſerved by the common laws of this realm, which are as ancient as the kingdom itſelf; yet theſe famous kings, for the better contentment and aſſurance of their loving ſubjects, agreed, that this old fundamental right ſhould be farther declared and eſtabliſhed by act of parliament: wherein it is provided, that no ſuch charges ſhould ever be laid upon the people, without their common conſent; as may appear by ſundry records of former times.

We therefore, your majeſty's moſt humble commons aſſembled in parliament, following the example of this worthy care of our anceſtors, and out of a duty to thoſe for whom we ſerve, finding that your majeſty, without advice or conſent of parliament, hath lately in time of peace ſet both greater impoſitions, and far more in number, than any your noble anceſtors did ever in time of war, have with all humility preſumed to preſent this moſt juſt and neceſſary petition unto your majeſty, that all impoſitions ſet without the aſſent of parliament may be quite aboliſhed and taken away: and that your majeſty, in imitation likewiſe of your noble progenitors, will be pleaſed, that a law may be made during this ſeſſion of parliament, to declare, that all impoſitions ſet or to be ſet upon your people, their goods or merchandiſes, ſave only by common aſſent in parliament, are and ſhall be void: wherein your majeſty ſhall not only give your ſubjects good ſatisfaction in point of their right, but alſo bring exceeding joy and comfort to them which now ſuffer; partly through the abating the price of native commodities, and partly through the raiſing of all foreign; to the overthrow of merchants and ſhipping; the cauſing of a general dearth and decay of wealth among your people, who will be hereby no leſs diſcouraged than diſabled to ſupply your majeſty, when occaſion ſhall require it.

Commiſſions eccleſiaſtical.

Whereas by the ſtatute 1 *Eliz. cap.* 1. intituled, *an act reſtoring to the crown the ancient juriſdiction over the ſtate eccleſiaſtical*, &c. power was given to the queen and her ſucceſſors, to conſtitute and make a commiſſion in cauſes eccleſiaſtical;

The ſaid act is found to be inconvenient and of dangerous extent in divers reſpects:

Firſt, For that it enableth the making of ſuch a commiſſion, as well to any one ſubject born as to more.

Secondly, For that, whereas by the intention and words of the ſtatute, eccleſiaſtical juriſdiction is reſtored to the crown, and your highneſs by that ſtatute enabled to give only ſuch power eccleſiaſtical to the ſaid commiſſioners; yet under colour of ſome words in that ſtatute, where the commiſſioners are authoriſed to execute their commiſſion, according to the tenor and effect of your highneſs's letters patents, and by letters patents grounded thereupon; the ſaid commiſſioners do fine and impriſon, and exerciſe other authority not belonging to the eccleſiaſtical juriſdiction reſtored by that ſtatute; which we conceive to be a great wrong to the ſubject; and that thoſe commiſſioners might as well, by colour of thoſe words, if they were ſo authoriſed by your highneſs's letters patents, fine without ſtint, and impriſon without limitation of time; as alſo, according to will and diſcretion, without any rules of law, ſpiritual or temporal, adjudge and impoſe utter confiſcation of goods, forfeiture of lands; yea and the taking away of a limb, and of life itſelf; and this for any matter whatſoever pertaining to ſpiritual juriſdiction. Which never was nor could be meant by the makers of that law.

Thirdly, For that by the ſtatute, the king and his ſucceſſors (however your majeſty hath been pleaſed out of your gracious diſpoſition otherwiſe to order) may make and direct ſuch commiſſion into all the counties and dioceſes, yea into every pariſh of *England*; and thereby all cauſes may be taken from juriſdiction of biſhops, chancellors and archdeacons, and laymen ſolely to be enabled to excommunicate and exerciſe all other cenſures ſpiritual.

Fourthly, That every petty offence, pertaining to ſpiritual juriſdiction, is by colour of the ſaid words and letters patents, grounded thereupon, made ſubject to excommunication and puniſhment by that ſtrange and exorbitant power and commiſſion; whereby the leaſt offenders, not committing any thing of any enormous or high nature, may be drawn from the moſt remote places of the kingdom to *London* or *York*; which is very grievous and inconvenient.

Fifthly, For that limit touching cauſes ſubject to this commiſſion, being only with theſe words; *viz. ſuch as pertain to ſpiritual or eccleſiaſtical juriſdiction*; it is very hard to know what matters or offences are included in that number: and the rather becauſe it is unknown, what ancient canons or laws ſpiritual are in force, and what not. From hence ariſeth great inconveniency, and occaſion of contention.

And whereas upon the ſame ſtatute a commiſſion eccleſiaſtical is made, therein is grievance apprehended thus:

Firſt, For that thereby the ſame men have both ſpiritual and temporal juriſdiction, and may both force the party by oath to accuſe himſelf of any offence, and alſo enquire thereof by a jury: and laſtly, may inflict for the ſame offence at the ſame time, and by one and the ſame ſentence, both a ſpiritual and a temporal juriſdiction.

Secondly, Whereas upon ſentences of deprivation or other ſpiritual cenſures given by force of ordinary juriſdiction, an appeal lyeth for the party aggrieved, that is here excluded by expreſs words of the commiſſion. Alſo here is to be a trial by jury, yet no remedy by traverſe nor attaint; neither can a man have any writ of error, though a judgment or ſentence be given againſt him, amounting to the taking away of all his goods, and impriſoning of him during life, yea, to the adjudging him in caſe of *præmunire*, whereby his lands are forfeited, and he out of the protection of the law.

Thirdly, That whereas penal laws and offences againſt the ſame cannot be determined in other courts, or by other perſons than by thoſe truſted by parliament with the execution thereof; yet the execution of many ſuch ſtatutes (divers whereof were made ſince the firſt of *Eliz.*) are commended and committed to theſe commiſſioners eccleſiaſtical, who are either to inflict the puniſhment contained in the ſtatute being *præmunire*, and of other high nature, and ſo enforce a man upon his own oath to accuſe and expoſe himſelf to thoſe puniſhments, or elſe to inflict other temporal puniſhments at their pleaſure. And yet beſides and after that done, the party ſhall be ſubject, in the courts mentioned in the acts, to puniſhment by the ſame acts appointed and inflicted. Which we think very unreaſonable.

Fourthly, That the commiſſion giveth authority to enforce men called into queſtion, to enter into recognizance, not only for appearance from time to time, but alſo for performance of whatſoever ſhall be by the commiſſioners ordered.

And alſo that it giveth power to enjoin parties defendant or accuſed to pay ſuch fees to the miniſters of the court, as by the commiſſioners ſhall be thought fit.

And touching the execution of the commiſſion, it is found grievous theſe ways among other:

Firſt, For that laymen are by the commiſſioners puniſhed for ſpeaking (otherwiſe than in judicial places and courſes) of the ſimony and other miſdemeanors of the ſpiritual men, though the thing ſpoken be true, and the ſpeech tending to the inducing of ſome condign puniſhment.

Secondly, in that theſe commiſſioners uſually appoint and allot to women diſcontented at and unwilling to live with their huſbands, ſuch portion and allowance for preſent maintenance, as to them ſhall ſeem meet; to the great encouragement to wives to be diſobedient and contemptuous againſt their huſbands.

Thirdly, in that their purſuivants and other miniſters employed in the apprehenſion of ſuſpected offenders in any thing ſpiritual, and in the ſearching for any ſuppoſed ſcandalous books, uſe to break open mens houſes, cloſets, and deſks, rifling all corners and ſecret cuſtodies, as in caſes of high treaſon or ſuſpicion thereof.

All which premiſes, amongſt other things conſidered, your majeſty's moſt loyal and dutiful commons in all humbleneſs beſeech you, that, for the eaſing of them, as well from the preſent grievance, as from the fear and poſſibility of greater in times future, your highneſs would vouchſafe your royal aſſent and allowance to and for the ratifying of the ſaid ſtatute, and the reducing thereof, and conſequently of the ſaid commiſſion, to reaſonable and convenient limits, by ſome act to be paſſed in the preſent ſeſſion of parliament.

Proclamations. Amongſt many other points of happineſs and freedom, which your majeſty's ſubjects of this kingdom have enjoyed under your royal progenitors, kings and queens of this realm, there is none which they have accounted more dear and precious than this, to be guided and governed by certain rule of law, which giveth both to the head and members that which of right belongeth to them; and not by any uncertain or arbitrary form of government.

Which, as it hath proceeded from the original and conſtitution and temperature of this eſtate, ſo hath it been the principal means of upholding the ſame in ſuch ſort, as that their kings have been juſt, beloved, happy and glorious; and the kingdom itſelf peaceable, flouriſhing and durable, ſo many ages.

And the effect, as well of the contentment that the ſubjects of this kingdom have taken in this form of government, as alſo of the love, reſpect and duty, which they have, by reaſon of the ſame, rendered unto their princes, may appear in this, that they have, as occaſion hath required, yielded more extraordinary and voluntary contributions to aſſiſt their kings, than the ſubjects of any other known kingdom whatſoever.

Out of this root hath grown the indubitable right of the people of this kingdom, not to be made ſubject to any puniſhment that ſhall extend to their lives, lands, bodies or goods, other than ſuch as are ordained by the common laws of this land, or the ſtatutes made by their common conſent in parliament.

Nevertheleſs, it is apparent, both that proclamations have been of late years much more frequent than heretofore, and that they are extended, not only to the liberty, but alſo to the goods, inheritances, and livelihood of men; ſome of them tending to alter ſome points of the law, and make them new:

Other ſome made ſhortly after a ſeſſion of parliament, for matter directly rejected in the ſame ſeſſion:

Others appointing puniſhments to be inflicted before lawful trial and conviction;

Some containing penalties in form of penal ſtatutes;

Some referring the puniſhment of offenders to the courts of arbitrary diſcretion, which have laid heavy and grievous cenſures upon the delinquents:

Some, as the proclamation for ſtarch, accompanied with letters commanding enquiry to be made againſt the tranſgreſſors at the quarter ſeſſions:

And ſome vouching former proclamations, to countenance and warrant the latter; as by a catalogue hereunder written more particularly appeareth.

By reaſon whereof there is a general fear conceived and ſpread amongſt your majeſty's people, that proclamations will by degrees grow up and increaſe to the ſtrength and nature of laws.

Whereby not only that ancient happineſs [freedom] will be as much blemiſhed (if not quite taken away) which their anceſtors have ſo long enjoyed;

But the ſame may alſo (in proceſs of time) bring a new form of arbitrary government upon the realm.

And this our fear is the more increaſed, by occaſion as well of certain books lately publiſhed, which aſcribe a greater power to proclamations than heretofore hath been conceived to belong unto them; as alſo of the care taken to reduce all the proclamations made ſince your majeſty's reign into one volume, and to print them in ſuch form as acts of parliament formerly have been, and ſtill are uſed to be; which ſeemeth to imply a purpoſe to give them more reputation and more eſtabliſhment than heretofore they have had.

We therefore, your majeſty's humble ſubjects, the commons in this parliament aſſembled, taking theſe matters into our conſideration, and weighing how much it doth concern your majeſty, both in honour and ſafety, that ſuch impreſſions ſhould not be enforced to ſettle in your ſubjects minds, have thought it to appertain to our duties, as well towards your majeſty, as to thoſe that have truſted and ſent us to their ſervice, to preſent unto your majeſty's view theſe fears and griefs of your people; and to become humble ſuitors unto your majeſty, that thenceforth no fine or forfeiture of goods, or other pecuniary or corporal puniſhment, may be inflicted upon your ſubjects (other than reſtraint of liberty, which we alſo humbly beſeech may be but upon urgent neceſſity, and to continue but 'till other order may be taken by courſe of law) unleſs they ſhall offend againſt ſome law or ſtatute of this realm in force at the time of their offence committed; and for the greater aſſurance and comfort of your people, that it will pleaſe your majeſty, to declare your royal pleaſure to that purpoſe, either by ſome law to be made in this ſeſſion of parliament, or by ſome ſuch other courſe (whereof your people may take knowledge) as to your princely wiſdom ſhall ſeem moſt convenient.

A catalogue of ſome of the proclamations complained of.

I. Proclamations importing alterations of ſome points of the law, and making new:

11 *January*, 1 *Jac. fol.* 57. forbiddeth chuſing of knights and burgeſſes bankrupt or outlawed; and commandeth choice of ſuch as are not only taxed to ſubſidies, but alſo have ordinarily paid and ſatisfied the ſame, *f. l.* 57.

If returns be made contrary to proclamation, they are to be rejected as unlawful and inſufficient, *fol.* 60.

25 *Auguſt*, 5 *Jac. fol.* 151. That the proclamation ſhould be a warrant to any officer or ſubject to ſeize ſtarch, and to diſpoſe or deſtroy any ſtuff, *&c.* And reſtraineth all men not licenſed to make ſtarch, *fol.* 154.

II. A proclamation made ſhortly after parliament, for matter directly rejected the precedent ſeſſion:

1 *March*, 2 *Jac. fol.* 112. A proclamation for building with brick, after a bill to that end rejected.

III. Proclamations touching the freehold livelihood of men:

16 *September*, 1 *Jac. fol.* 41. Raiſing and pulling down houſes authoriſed, and prohibition to build them again at any time.

12 *October*, 5 *Jac. fol.* 160. Forbidding building and taking away the materials; and appointing the owners land to be lett by other men at what price they pleaſe, *fol.* 101.

IV. Proclamations, referring puniſhments to be done by juſtices of the peace, mayors, bailiffs, conſtables, and other officers; or ſeizure by perſons who have no authority to enquire, hear and determine of thoſe offences; ſo it is to be inflicted before lawful trial and conviction.

8 *January*, 2 *Jac. fol.* 72. A proclamation for folding wools, *&c.*

23 *Auguſt*, 5 *Jac. fol.* 151. A ſeizure of ſtarch, *&c.*

V. Proclamations penned with penalties, in form of penal ſtatutes:

4 *November*, 1 *Jac. fol.* . . . Pain of confiſcation of goods.

18 *January*, 2 *Jac. fol.* 72. Ten days impriſonment, and ſtanding in the pillory.

Juſtices of peace to forfeit twenty pounds if they ſee not the proclamation of folding wools executed.

23 *Auguſt*, 5 *Jac. fol.* 151. Forfeiture of one moiety of ſtarch, *&c.* ſeized, *&c.*

VI. Puniſhment of offenders in courts of arbitrary diſcretion, as *Star-Chamber:*

1 *March*, 2 *Jac. fol.* 102. Proclamation for building.

12 *October*, 5 *Jac. fol.* 159. A proclamation for building.

July, 6 *Jac. fol.* 177. Proclamation for ſtarch.

25 *July*, 6 *Jac. fol.* 180. Proclamation for building.

VII. Former proclamations become precedents, and vouched in latter proclamations:

18 *June*, 2 *Jac. fol.* 75. avoucheth 5 *Ed.* VI. and 4 *Eliz. fol.* 73.

25 *July*, 6 *Jac. fol.* 180. mentioneth former proclamations againſt buildings, and explaineth and qualifieth them.

Your majeſty's commons, in this ſeſſion of parliament aſſembled, do chearfully acknowledge the ſpring and fountain of public juſtice of this ſtate to be originally in your majeſty, Writs of prohibition, &c.

For the benefit thereof is conveyed and derived into every member of this politick body by your highneſs's writs.

Amongſt which none are more honourable for the ſupport of the common juſtice of the realm, than the writs of *prohibition*, *habeas corpus*, *&* *de homine replegiando:* which writs have been ever held and found to be a chief means of relief unto the poor, diſtreſſed and oppreſſed ſubjects of this kingdom, and can be no inconvenience at all: ſeeing they are no way concluſive againſt any man, and do draw no benefit to the procurers, but rather a fruitleſs charge, if they be obtained upon any unjuſt ground or pretence.

In the free granting of, and proceeding upon, ſome of which writs, eſpecially that of prohibition, there hath of late been obſerved to be ſome obſtruction, by reaſon that upon the complaints and the importunity of ſome, who deſire the ſupport of inferior courts againſt the principal courts of the common law, (wherein your majeſty hath been greatly troubled) you have taken into your royal conſideration the ſeveral extents of the juriſdiction of the ſaid ſeveral courts.

Since which time the ſaid writs have been more ſparingly granted, and with ſtricter cautions than anciently hath been accuſtomed.

It is therefore moſt humbly deſired that it may pleaſe your majeſty, (whoſe glory is never more conſpicuous than when the pooreſt of the commonality are bleſſed with the influence of the ancient beams of juſtice) to require your judges in the courts of *Weſtminſter* to grant the ſaid writs, in caſes wherein ſuch writs do lye, and by law are grantable; and in ſuch ſort as that ſuch perſons whoſe bodies being either committed to priſon, or their cauſes like to recover great prejudice by proceedings againſt them in times of vacation, may not be debarred nor deferred from having the ſpeedy relief and benefit of thoſe writs, more than in former times.

Four ſhires near *Wales*.

Foraſmuch as the exerciſe of authority over the counties of *Glouceſter*, *Hereford*, *Wigórn*, and *Salop*, by the preſident and council of *Wales*, by way of inſtructions upon a pretext of a ſtatute made in the 34th year of the reign of king *Henry* VIII. is conceived not to be warranted by that, or any other law of this realm of *England*.

And for that in the ſecond ſeſſion of this preſent parliament, there did a bill paſs the houſe of commons, whereby it was declared that the true intent and meaning of that before mentioned ſtatute was not thereby to ſubject theſe counties to that kind of government by inſtructions; and yet notwithſtanding the inhabitants of thoſe counties are ſince utterly diſcouraged, and in effect debarred from the tryal of the right of that kind of juriſdiction over thoſe counties, by the ordinary courſe of the common laws of this land, by reaſon of prohibitions which were heretofore frequently granted (upon ſuggeſtion that thoſe counties are not part of *Wales*, or of the marſhes of the ſame, which is the very point in queſtion) are now very hard to be obtained, except in caſes where thoſe of that council do exceed the inſtructions ſet down to them by your majeſty:

As alſo for that, in caſes where actions have been brought at the common law, whereby that queſtion might have come to deciſion, the plaintiffs have been ſtopped, ſometimes by injunctions out of your majeſty's court of *Chancery* from their proceedings, ſometimes before, ſometimes after judgments, and alſo by impriſonment:

The precedents of which proceedings do concern all your majeſty's loyal and dutiful ſubjects of this kingdom, as well in reſpect of the ſtopping of the free courſe of juſtice, as alſo by reaſon that if that kind of juriſdiction were at firſt extended over theſe four counties, and be now ſtill continued without warrant of law; the conſequence of this example may in future times give countenance to the erecting of like juriſdictions in other places of this realm:

And foraſmuch as your majeſty was pleaſed to command all the judges to conſider of this queſtion, and that they thereupon beſtowed very many days in hearing the cauſe argued by learned counſel on both ſides, and in viewing and conſidering great numbers of records, produced before them concerning that cauſe; whereby they have (no doubt) truly informed themſelves of the right:

It is therefore the moſt humble petition of the commons in this preſent parliament aſſembled, that your moſt excellent majeſty will alſo be pleaſed to command, that the judges may deliver their opinion upon that ſo exact and deliberate hearing, which was had before them, concerning the right of the aforeſaid juriſdiction over thoſe four counties, by force of that ſtatute; and that the opinion which they ſhall deliver therein, may be in ſuch ſort publiſhed, as that all your majeſty's ſubjects whom it may concern, may have means to take knowledge thereof; and that your majeſty will vouchſafe to declare it, by your moſt princely pleaſure, that any of your majeſty's ſubjects, who may have occaſion thereof, may try his or their right in that point, by the due and ordinary courſe of the common law, either by ſuing out of prohibitions, or any other your majeſty's writs, without reſtraint; and that if the ſaid juriſdiction over theſe four counties ſhall appear to your majeſty by the opinion of the judges, or otherwiſe, not to be warranted by law, that then your majeſty will be pleaſed, out of your moſt princely and gracious favour towards all your loyal dutiful ſubjects, to order the ceaſing of the ſaid juriſdiction over thoſe counties, to the great comfort of the inhabitants of thoſe counties, and of the reſt of your ſubjects of all the kingdom.

New drapery.

Complaint was made in all humble manner, the ſecond ſeſſion of this preſent parliament, of many diſorders, outrages, and oppreſſions, committed upon occaſion of letters patents granted to the duke of *Lenox*, for ſearching and ſealing of ſtuffs and manufactures, called by the name of new draperies.

Which patent we held in all, or the moſt part of it, to be queſtionable, and in many apparently unlawful, and the execution thereof we found ſtretched by the farmers and deputies beyond the extent of the ſaid letters patents, as appears in the particulars ſet down in the ſaid grievance.

To which it pleaſed your majeſty to give this gracious anſwer; 'that the validity of the ſaid patent ſhould be left to be judged by the 'law, and whenſoever any abuſe ariſing in the execution thereof ſhould 'appear, it ſhould ſeverely be puniſhed.'

Which was for that time to our good ſatisfaction.

Yet finding by divers complaints made now in parliament, that not only the ſaid letters patents are ſtill in force, and the validity of them undecided by judgment, but diſorders in the execution of them are ſo far from being reformed, that they multiply every day, to the grievance of your majeſty's ſubjects; and thoſe of the poorer ſort, who exerciſing theſe manufactures, are ſubject to much oppreſſion, to the great hindrance of ſome, and utter undoing of many, as hath appeared in the particularities of the complaints preſented to us:

Our humble deſire is, that your majeſty will be pleaſed, according to your former reſolution, to give order that this cauſe, which hath thus long hung in ſuſpence, be ſpeedily brought to judgment; and that before all the judges, becauſe it concerneth all the ſubjects of the land; and in the mean time that the execution of the ſaid letters patents, ſo far forth as they concern the ſaid new drapery, may be ſuſpended till judgment be given: whereby your ſubjects, who do in all humility preſent this grievance unto your majeſty, may be relieved, and have no occaſion to reiterate their complaints.

Licence of wines.

Whereas by ancient and late ſtatutes it hath been enacted, that wines ſhould be retailed at ſuch low rates and prices, as for this fifty years paſt they could not be afforded,

And for redreſs thereof, it was ordained by a ſtatute in the 5th year of the late queen *Elizabeth*, that (thoſe former laws notwithſtanding) wines might be ſold at ſuch prices, as by proclamation from time to time to be made by conſent of many great offences, ſhould be publiſhed and ſet down:

Which proclamation, nevertheleſs, the late queen and your moſt excellent majeſty have been drawn to forbear, upon the earneſt ſuit of certain perſons, who therein only intended their private game:

By reaſon whereof, both great ſums of money in fines, rents, and annual payments, have been gotten and raiſed unto the ſaid perſons, and their aſſignees, and great damage and prejudice hath likewiſe fallen and light upon your people; not only by enhancing the prices of wines, licencing over many taverns, and appointing of unmeet perſons, in unfit places, to keep the ſame; but alſo by reaſon that corrupt, mingled, evil, and unwholeſome wines have been uttered and ſold, to the great hurt of the health of your highneſs's people; one man ſometimes engroſſing all the licences deſigned for that place.

Whereupon complaint being made to your majeſty, amongſt other grievances of your people, in the ſecond ſeſſion of this preſent parliament, your highneſs was pleaſed to anſwer, that your grants in that behalf were no other than ſuch as were warrantable by the law.

Whereas the grievance was the greater, for that all laws concerning the ſale of wines being intended and conceived to ſtand and be repealed, there were nevertheleſs, by the overſight of them which were truſted in that buſineſs, caſually omitted, and left unrepealed, certain obſolete laws impoſſible to be obſerved:

As namely, one, in the time of king *Edward* I. commanding wines to be ſold at one ſhilling the ſextern:

And one other made in the 28th year of king *Henry* VIII. prohibiting all perſons, under penalty, to ſell any *French* wines above eight-pence the gallon; and other wines, as ſacks and ſweet wines, above one ſhilling the gallon:

And one branch of a ſtatute made in the 7th year of king *Edward* VI. prohibiting men to ſell any wines by retail in their houſes.

Whereupon your majeſty hath been induced and drawn to ground new patents of diſpenſation, and to grant the benefit thereof unto the lord admiral:

Whereby the like diſcommodities and inconveniencies have ſince enſued unto the common-wealth, as formerly did ariſe and grow upon the other repealed laws, whereof in the former petitions of your ſubjects, exhibited unto your majeſty in the ſaid ſecond ſeſſion, your highneſs never had any direct and clear information:

May it therefore pleaſe your moſt excellent majeſty, at the humble requeſt of your commons, (who have taken into conſideration the greateſt charges and expences which the ſaid lord admiral hath been at in your majeſty's ſervice, and have conſidered likewiſe the preſent licences and grants, for valuable conſiderations unto many hundreds of your highneſs's ſubjects, which, without great loſs to the ſaid grantees, cannot be ſo ſuddenly made void) out of your princely wiſdom and goodneſs, wherein you have profeſſed not to extend and ſtrain your prerogative royal, againſt the publick good of your people, for the particular gain of any private perſons, to vouchſafe: that from thenceforth there may no more grants of that nature be made unto any of your ſubjects whomſoever; but that the ſaid ſtatute of the 5th of *Elizabeth* for the apprizing of wines, to be publiſhed by proclamation, as time and occaſion ſhall require, may be put in execution: and that your majeſty will likewiſe vouchſafe to grant your royal aſſent to a bill of repeal of the ſaid obſolete ſtatutes, and all other whereupon any ſuch *non obſtantes* and diſpenſations might be grounded.

In which ſtatute of repeal, proviſion ſhall be made for the indemnity of all ſuch, as under your majeſty's great ſeal have already procured licence for ſuch ſale of wines.

Ale-houſes.

Whereas by the laws of this your majeſty's realm of *England*, no taxes, aids, or impoſitions of any kind whatſoever, ought or can be laid or impoſed upon your people, or upon any of their goods or commodities, but only by authority and conſent of parliament:

Which being undoubtedly the ancient and fundamental law of the land, is yet for more abundant clearneſs expreſly declared in ſundry acts of parliament, made and enacted in the time of ſundry your majeſty's progenitors, the nobleſt and moſt prudent kings of this realm:

Your commons with juſt grief do complain unto your majeſty of the late tax and impoſition laid and impoſed yearly upon ſuch as are allowed to keep victualling houſes, or ſell ale and beer by retail:

Which impoſition not being taxed by aſſent of parliament, but commanded and directed only by letters and inſtructions, your commons are perſuaded that the ſame proceeded rather from miſinformation, than by the direction and judgment of your moſt noble and royal heart.

Wherefore your ſaid commons, knowing the grief of your people in this behalf, do (according to their duties) in all humility inform and ſignify unto your majeſty,

Firſt, that the ſaid taxation being ſingular and without example, and it is in itſelf a precedent of dangerous conſequence, and (as your people fear) may eaſily (in time) be extended farther, as to badgers of corn, makers of malt, drovers of cattle, and ſuch like, who in ſuch ſort are to be licenced by juſtices of the peace, as thoſe perſons are, upon whom, at this time, this preſent tax is charged and laid.

Secondly, ſuch houſes being often times (at the beſt) harbours of idleneſs, drunkenneſs, whoredom, and all manner of villanies, the licences are now (the honeſter ſort in moſt places refuſing to undergo the new charge) rented and taken by the looſer and baſer ſort of people, who have no conſcience how they gain. By reaſon whereof all manner of vice and evil behaviour is likely every day to increaſe. Neither can the juſtices of the peace conveniently prevent the ſame: for that the perſons licenced under the late contribution, affirm with clamour, that they have a toleration for a year, and that ſuch perſons are not friends unto the crown that ſeek to ſuppreſs them, and thereby to diminiſh your majeſty's revenues.

Thirdly, many juſtices of the peace, (being ſworn to execute their office) which for this particular conceive to be, that ale-houſe keepers formerly licenced, are not to be ſuppreſſed without juſt and reaſonable cauſe, cannot be ſatisfied touching their ſaid oath, but are much diſtracted and perplexed what to do (the late inſtructions notwithſtanding) againſt ſuch perſons, as otherwiſe being not known to be of evil behaviour, only to refuſe to pay this late taxed and impoſed ſum of money.

In conſideration whereof, your humble commons moſt inſtantly beſeech your moſt excellent majeſty, that the former letters and inſtructions may be countermanded or ſtayed, and all further directions and proceedings in that kind forborn.

Sea coal. Among many reſemblances which are obſerved to be between natural and politick bodies, there is none more apt and natural than this, that the diſeaſes of both do not at one inſtance commonly ſeize upon all parts; but beginning in ſome one part, do by tract of time, and by degrees, get poſſeſſion of the whole, unleſs by applying of wholeſome and proper remedies in due time they may be prevented, which, as it is in many things very viſible, ſo it is in nothing more apparent than in this matter of impoſitions: which beginning at the firſt, either with foreign commodities brought in, or ſuch of your own as were tranſported, is now extended to thoſe commodities, which growing in this kingdom are not tranſported, but uttered to the ſubjects of the ſame:

For proof whereof, we do in all humility preſent unto your majeſty's view the late impoſition of one ſhilling the chaldron of ſea-coals, riſing in *Blith* and *Sunderland*, not by virtue of any contract or grant (as in the coals of *Newcaſtle)* but under a mere pretext of your majeſty's moſt royal prerogative:

Which impoſition is not only grievous for the preſent (eſpecially to thoſe of the poorer ſort, the price of whoſe only and moſt neceſſary fuel is thereby to their great grief enhanced) but dangerous alſo for the future, conſidering that the reaſon of this precedent may be extended to all the commodities of this kingdom.

May it therefore pleaſe your moſt excellent majeſty, which is the great and ſovereign phyſician of the eſtate, to apply ſuch a remedy as this diſeaſe may be preſently cured, and all diſeaſes for time to come of like nature prevented.

Speech of ſir Francis Bacon *to the king, the 7th of* July 1610, *on preſenting the petition to his majeſty, who was attended on the occaſion by ſir* Francis *and eleven other members; taken from* Bacon'*s works, laſt 4to ed. vol.* 2. *page* 212.

Moſt gracious ſovereign,

THE knights, citizens, and burgeſſes aſſembled in parliament, in the houſe of your commons, in all humbleneſs do exhibit and preſent unto your moſt ſacred majeſty, in their own words though by my hand, their petitions and grievances. They are here conceived and ſet down in writing, according to ancient cuſtom of parliament: they are alſo prefaced according to the manner and taſte of theſe later times. Therefore for me to make any additional preface, were neither warranted nor convenient; eſpecially ſpeaking before a king, the exactneſs of whoſe judgment ought to ſcatter and chaſe away all unneceſſary ſpeech as the ſun doth a vapour. This only I muſt ſay. Since this ſeſſion of parliament we have ſeen your glory in the ſolemnity of the creation of this moſt noble prince; we have heard your wiſdom in ſundry excellent ſpeeches which you have delivered amongſt us. Now we hope to find and feel the effects of your goodneſs, in your gracious anſwer to theſe our petitions. For this we are perſuaded, that the attribute, which was given by one of the wiſeſt writers to two of the beſt emperors, *divus* Nerva *et divus* Trajanus, ſo ſaith *Tacitus*, *res olim inſociabiles miſcuerunt, imperium et libertatem*, may be truly applied to your majeſty. For never was there ſuch a conſervator of regality in a crown, nor ever ſuch a protector of lawful freedom in a ſubject.

Only this, excellent ſovereign, let not the ſound of grievances, though it be ſad, ſeem harſh to your princely ears. It is but *gemitus columbae*, the mourning of a dove, with that patience and humility of heart which appertaineth to loving and loyal ſubjects. And far be it from us, but that in the midſt of the ſenſe of our grievances we ſhould remember and acknowledge the infinite benefits, which by your majeſty, next under God, we do enjoy; which bind us to wiſh unto your life fulneſs of days, and unto your line royal a ſucceſſion and continuance even unto the world's end.

It reſteth that unto theſe petitions here included I do add one more that goeth to them all: which is, that if in the words and frame of them there be any thing offenſive; or that we have expreſſed ourſelves otherwiſe than we ſhould or would; that your majeſty would cover it and caſt the veil of your grace upon it; and accept of our good intentions, and help them by your benign interpretation.

Laſtly, I am moſt humbly to crave a particular pardon for myſelf that have uſed theſe few words; and ſcarcely ſhould have been able to have uſed any at all, in reſpect of the reverence which I bear to your perſon and judgment, had I not been ſomewhat relieved and comforted by the experience, which in my ſervice and acceſs I have had of your continual grace and favour.

XIV. *The Caſe of Mixed Money in* Ireland, Trin. 2. Jam. 1605.

[*As the following caſe relates to the king's prerogative of regulating the coinage and value of money, in which the whole ſtate is ſo immediately and eſſentially intereſted, it properly falls within the ſcope of this collection. It is taken from the* Engliſh *edition of ſir* John Davies's Reports. *None of the marginal notes and references are in the* French *original. They were all added by the editor of the tranſlated edition. This caſe, being earlier than* Bates'*s, would have been placed before it, if the former had not occurred to the editor too late.*]

QUEEN *Elizabeth* in order to pay the royal army which was maintained in this kingdom for ſeveral years, to ſuppreſs the rebellion of *Tyrone*, cauſed a great quantity of *mixed money*, with the uſual ſtamp of the arms of the crown, and inſcription of her royal ſtile, to be coin'd in the *Tower* of *London*, and tranſmitted this money into this kingdom, with a proclamation, bearing date 24 *May*, in the 43d. year of her reign, by which her majeſty declared and eſtabliſhed this *mixed money*, immediately after the ſaid proclamation, to be the lawful and current money of this kingdom of *Ireland*, and expreſly commanded that this money ſhould be ſo uſed, accepted and reputed by all her ſubjects and others, uſing any traffick or commerce within this kingdom; and that if any perſon or perſons ſhould refuſe to receive this *mixed money* according to the denomination or valuation thereof, *viz.* ſhillings for ſhillings, ſixpenny pieces for ſixpenny pieces, *&c.* being tendered for payment of any wages, fees, ſtipends, debts, *&c.* they ſhould be puniſhed as contemners of her royal prerogative and commandment. And to the intent that this *mixed money* ſhould have the better courſe and circulation, it was further declared by the ſame proclamation, that after the 10th. day of *June* immediately following, all other money which had been current within this kingdom, before the ſaid proclamation, ſhould be cried down and annulled and eſteemed as bullion, and not as lawful and current money of this kingdom.

In *April*, before this proclamation was publiſhed, when the pure coin of *England* was current within this kingdom, one *Brett* of *Drogheda*, merchant, having bought certain wares of one *Gilbert* in *London*, became bound to the ſaid *Gilbert* in an obligation of 200*l.* on condition that he ſhould pay to the ſaid *Gilbert*, his executors or aſſigns, 100*l. ſterling, current and lawful money of* England, at the tomb of earl *Strongbow* in *Chriſt-Church*, *Dublin*, at a certain day to come; at which day and place, *Brett* made a tender of the 100*l.* in the mixed money of the new ſtandard, in performance of the condition of the obligation; and whether this tender was ſufficient to ſave the forfeiture of the obligation, or whether the ſaid *Brett* ſhould now, upon the change or alteration of money within this kingdom, be compelled to pay the ſaid one hundred pound in other or better coin than in the mixed money, according to the rate and valuation of it, at the time of the tender, was the queſtion at the council table, where the ſaid *Gilbert*, who was a merchant of *London*, exhibited his petition againſt the ſaid *Brett*, for the ſpeedy recovery of his debt aforeſaid.

And, inaſmuch as this caſe related to the kingdom in general, and was alſo of great importance in conſideration and reaſon of ſtate, ſir *George Carew*, then lord deputy and alſo treaſurer, required the chief judges, (being of the privy council) to confer on and conſider this caſe, and to return to him their reſolution touching it; who upon conference and conſideration on all the points of the ſaid proclamation, reſolved that the tender of the one hundred pounds in the mixed money, at the day and place aforeſaid, was good and ſufficient in the law, to ſave the forfeiture of the ſaid obligation, and that *Brett* ſhould not be obliged at any time after, to pay other money in diſcharge of the debt, than this mixed money, according to the rate and valuation that it had, at the time of the tender; and this reſolution was certified by them to the lord-deputy, and the certificate entered in the council book. And in this caſe divers points were conſidered and reſolved.

Neceſſity of money, *Lock* of coin. *Cotton* 4.

Firſt, it was conſidered, that in every commonwealth, it is neceſſary to have a certain ſtandard of money. For no commonwealth can ſubſiſt without contracts, and no contracts without equality, and no equality in contracts without money. For although in the firſt ſocieties of the world, permutation of one thing for another was uſed, yet that was ſoon found cumberſome, and the tranſportation and diviſion of things was found difficult and impoſſible; and therefore money was invented, as well for the facility of commerce, as to reduce contracts to an equality. *Cum non facile concurrebat, ut cum tu haberes quod ego deſiderarem, ego invicem haberem quod tu accipere velles, electa materia eſt, cujus publica & perpetua eſtimatio difficultatibus permutationem ſubveniret. Paul. lib.* 1. *ff. de contrahendis empt.* and therefore money is ſaid by *Bodin* to be *menſura publica*; and *Budelius lib.* 1. *de re nummariâ, ca.* 3. ſaith, *moneta eſt juſtum medium & menſura rerum commutabilium, nam per medium monetæ fit omnium rerum, quæ in mundo ſunt, conveniens & juſta æſtimatio.* And to this purpoſe *Keble* ſaith, 12 *H.* 7. 23. *b.* that every thing ought to be valued *per argent*; by which word *argent*, he meaneth money coined. And the great utility of a certain ſtandard of money and of meaſures is well expreſſed by *Budelius* in this verſe,

Una fides, pondus, menſura, moneta ſit una,
Et ſtatus illæſus totius orbis erit.

King's prerogative in making or coining money. 2 *Ro. ab.* 166. 1 *Co.* 146. 5 *Co.* 114. 1 *H. H. P. C.* 188.

Secondly, it was reſolved, that it appertaineth only to the king of *England*, to make or coin money within his dominions; ſo that no other perſon can do it without ſpecial licenſe or commandment of the king; and if any perſon preſume to do it of his own head, it is treaſon againſt the perſon of the king by the common law; and this appears by the ſtat. of 25 *Ed.* 3. *c.* 2. (which is only a declaration of the common law,) and by *Glanvil*, *Britton* and *Bracton*, before that ſtatute, *Stamford fol.* 2. and 3. And in the caſe of Mines, *Plowd.* 316. *a.* this point is expreſſed more clearly, where it is ſaid, that the king ſhall have mines of gold and ſilver; for if a ſubject had them, he by law could not coin ſuch metals, nor ſtamp a print or value upon them, for it appertaineth to the king only to put a value upon coin, and make the price of the quantity, and to put a print to it; which being done the coin is current; and if a ſubject doth this it is high treaſon at common law, as appears, 23 *Aſſ. p.* 2. and it is high treaſon to the king, becauſe he hath the ſole power of making money, *&c.*

Things eſſential to the legitimation of money.

And in this book three things are expreſſed, which are requiſite to the making of lawful money, *viz.* the authority of the prince, the ſtamp, and the value. But upon the conſideration of the caſe in queſtion, it was obſerved, that ſix things or circumſtances ought to concur, to make lawful and current money, *viz.* 1. Weight. 2. Fineneſs. 3. Impreſſion. 4. Denomination. 5. Authority of the prince. 6. * Proclamation. For every piece of money ought to have a certain proportion of weight or poiſe, and a certain proportion of purity or fineneſs, which is called alloy. Alſo every piece ought to have a certain form of impreſſion, which may be knowable and diſtinguiſhable; for as wax is not a ſeal without a ſtamp, ſo metal is not money without an impreſſion: *& moneta dicitur a monendo, quia impreſſione nos moneat, cujus ſit moneta. Cujus imago eſt hæc?* Cæſaris: *date* Cæſari *quæ ſunt* Cæſaris. Alſo every piece of money ought to have a denomination or valuation for how much it ſhall be accepted or paid, as for a penny, a groat or a ſhilling. And all this ought to be by authority and commandment of the prince, for otherwiſe the money is not lawful; and it ought to be publiſhed by the proclamation of the prince, for before that, the money is not current.

* But ſee 1 *H. H. P. C.* 196. that proclamation is not always neceſſary.

Theſe circumſtances appear in the antient ordinances made by the king for the coinage of money, as well in this kingdom as in *England*, which are to be found in the *Tower* of *London* there, and in the *Caſtle* of *Dublin* here. Alſo the indentures between the king and the maſters of the mint preſcribe the proportion of weight, fineneſs, and alloy, the impreſſion or inſcription, the name and the value. See the ſtat. 2 *Hen.* 6. *c.* 12. where mention is made of theſe indentures; ſee alſo *Wade*'s caſe, 5 *Co.* 114. *b.* that the king by his proclamation may make any coin lawful money of *England*; *a fortiori*, he may, by his proclamation only, eſtabliſh the ſtandard of money coined by his authority within his own dominions.

King's prerogative in putting a value on money.

And that the king by his prerogative may alſo put a price or valuation on all coins, appears by a remarkable caſe, 21 *Ed.* 3. 60. *b.* In the time of *Will.* the Conqueror, the abbot of St. *Edmundſbury* complained to the king in parliament, that whereas he was exempted from the juriſdiction of the ordinary by divers antient charters, the biſhop of *Norwich* had viſited his houſe, contrary to thoſe charters of exemption; upon which it was granted and ordained in parliament, that if from thenceforward the biſhop of *Norwich* or any of his ſucceſſors ſhould go againſt the aforeſaid exemption, they ſhould pay to the king or his heirs thirty *talents* or *beſaunts*. Afterwards in the time of *Ed.* 3. the biſhop of *Norwich* viſited the houſe again, againſt the ordinance aforeſaid; and this contempt being found in the *King's Bench*, a *ſcire facias* iſſued againſt the biſhop to ſhew why he ſhould not pay to the king the thirty *talents* or *beſaunts*; and upon an inſufficient plea pleaded by the biſhop, the court awarded that they ſhould recover the *talents* or *beſaunts*, and that it ſhould be interpreted by the king himſelf of what value they ſhould be, more or leſs; by which it is manifeſt that where *talents* or *beſaunts*, or ſuch other pieces or quantities of gold or ſilver are of uncertain value (for *Budelius* ſaith that *talentâ ſunt varia, & pondera ſunt, potius quam numiſmata)* the king hath a power to put a certain value upon them, according to the rule well known to the civilians, *monetæ æſtimationem dat, qui cudendi poteſtatem habet.* And in this point the common law of *England* agrees well with the rules of the civil law, *jus cudendæ monetæ ad ſolum principem, hoc eſt, imperatorem, de jure pertinet. Monetandi jus principum oſſibus inhæret. Jus monetæ comprehenditur in regalibus, quæ nunquam a regio ſceptro abdicantur.*

Yet by antient charters, this privilege or prerogative hath been communicated to ſome ſubjects in *England*; as, to the archbiſhop of *Canterbury* by charter of king *Athelſtan*, *Lamb. peramb. Kant. fol.* 291. The archbiſhop of *York* and biſhop of *Durham* had mines and power of coining money, as appears by the ſtatute of 14 *Hen.* 8. *c.* 12. and the dean of St. *Martin's-le-grand* had the ſame privilege, as is manifeſt from the ſtat. of 19 *Ed.* 4. *c.* 1. And this right of coining money hath been granted to ſeveral great perſonages in *France* heretofore, as *Choppinus* relates, *lib. de Domanio* Franc. *fol.* 217. *a.* And this prerogative at this day is imparted too generally to all the inferior princes and ſtates of *Germany* by grant or permiſſion of the emperor; for it is a law of the empire, *jus cudendæ monetæ, niſi cui ab imperatore conceſſum fuerit, nemo uſurpato.*

King's prerogative in changing the ſtandard of coin. 1 *H. H. P. C.* 192.

Thirdly, it was reſolved that as the king by his prerogative may make money of what matter and form he pleaſeth, and eſtabliſh the ſtandard of it, ſo may he change his money in ſubſtance and impreſſion, and enhance or debaſe the value of it, or entirely decry and annul it, ſo that it ſhall be but bullion at his pleaſure. And note, that bullion, which in *Latin* is called *billio, eſt moneta defenſa & prohibita, quæ videlicet uſu caret.*

And that the king hath uſed this prerogative in *England*, appears by ſeveral notorious changes of money, made in the time of ſeveral kings ſince the *Norman* Conqueſt. *Anno* 26 *Hen.* 2. *Monetâ veteri reprobatâ, nova ſucceſſit. Matt. Paris hiſt. mag. fol.* 35. *a. Anno* 7. *Joh.* a new money was coined, at which time the firſt *ſterling* money was coined, according to the opinion of *Cambden*, where he ſpeaketh of *Sterling-Caſtle* in *Scotland*, *fol.* 700. *b. Anno* 32 *Hen.* 3. the king was obliged to make new money, *cum moneta* Angliæ *circumcidebatur à circumciſis* Judæis, as *Matt. Paris* ſaith, *fol.* 703. *a. Anno* 7 *Ed.* 1. the ſtandard of money was renewed, when the ſterling penny was eſtabliſhed to contain *viceſimam partem unciæ*, as appears by the old *magna charta*, in the ordinance called *compoſitio menſurarum*, where it is ordained, *quod viginti denarii faciant unciam. Anno* 29 *Ed.* 1. when the money called pollards was cried down, a new ſterling money was alſo coined; ſee 6 *Ed.* 6. *Dyer* 82. *b. & lib. rubr. Scacc. Dubl. part* 2. *fol.* 1. *b.* After this new monies were made, 9 *Ed.* 3. and 13 *Hen.* 4. and 5 *Ed.* 4. and 19 *Hen.* 7. and 36 *Hen.* 8. and laſtly 2 *Eliz.* when all mixed and baſe money was cried down, and the ſtandard of pure ſilver eſtabliſhed, which continues to this day, of which *Bodin* maketh honourable mention, *libro* 6 *de republicâ, cap.* 3.

Without act of parliament.

And it ſeems theſe changes of money in *England* were made by the authority of the king without parliament; although ſeveral acts of parliament have been made for the ordering of exchange, and to prohibit the exportation of money made and ordained by the king, and the importation and utterance of foreign and falſe money, under certain pains and penalties, of which ſome were capital and ſome pecuniary. And ſeveral ordinances of the king made without the parliament are called ſtatutes; as *ſtatutum de monetâ magnum, & ſtatutum de monetâ parvum*; which are called ſtatutes, becauſe the ordinance of the king with proclamation in ſuch caſe hath the force of an act of parliament.

King's prerogative in inhancing or debaſing the value of coin in *England*. 1 *H. H. P. C.* 192.

And as the king hath uſed to change the ſtandard of his money, to wit, the form and the ſubſtance, ſo hath he uſed by his prerogative to enhance or debaſe the value of it, notwithſtanding that the form and ſubſtance continueth as it was before. And this was done, 5 *Ed.* 4. as appears by the book of 9 *Ed.* 4. 49. where *Danby* ſaith, that a noble was better then, than it was *anno* 20 of that king, by 20 *d.* in each noble. And king *Hen.* 8. by ſpecial commiſſion dated 24 *July*, *anno* 18. of his reign, authoriſed cardinal *Wolſey*, with the advice of other of the privy council, to put a value on all the moneys of *England*, from time to time, according to the rates and values of the monies of foreign nations, which were then too much enhanced, eſpecially by the emperor and the king of *France*, as is expreſſed in the ſaid commiſſion. See alſo 6 and 7 *Ed.* 6. *Dyer* 82 and 83. ſeveral caſes on the debaſement of money.

And it is to be obſerved, that between the 36 of *Hen.* 8. when ſeveral ſorts of debaſed money were coined in *England*, and 2 *Eliz.* when the pure ſtandard of ſilver money was eſtabliſhed, there were three notorious falls or cry-downs of baſe monies publiſhed by proclamation; the firſt, 9 *July*, 5 *Ed.* 6. the ſecond, 17 *Auguſt*, the ſame year, as is mentioned, *Dyer* 83. *a.* the third, 28 *Sep.* 2 *Eliz.*

And in *Ireland*.

And as the king hath always uſed to make and change the money of *England*, he hath alſo uſed the ſame prerogative in *Ireland* ever ſince the 12th year of king *John*, when the firſt ſtandard of *Engliſh* money was eſtabliſhed in this kingdom, as is recorded by *Matt. Paris*, *magn. hiſt.* 220. *b.* where it is ſaid, that this king being in *Ireland*, *conſtituit ibidem leges & conſuetudines* Anglicanas, *ponens ibidem vicecomites, aliſque miniſtros, qui populum regni illius juxta leges* Anglicanas *judicarent. Præfecit autem ibidem* Johannem de Gray *epiſcopum* Norwicenſem, *juſtitiarium, qui denarium terræ illius ad pondus numiſmatis* Angliæ *fecerat publicari, & tam obolum quam quadrantem rotundum fieri præcepit: juſſit quoque rex, ut illius monetæ uſus tam in* Anglia *quam in* Hibernia *communis ab omnibus haberetur, & utriuſque regni denarius in theſauris ſuis indifferenter poneretur.*

By which it appeareth that the ſtandard of money in *England* and in *Ireland* was equal at firſt, and that the *Engliſh* money was not a fourth part better in value than the *Iriſh*, as it hath been ſince the time of *Ed.* 4. for before that, as there was one and the ſame ſtandard of money in both kingdoms, ſo always when the money was changed in *England*, it was alſo changed in *Ireland*. As in the year 1279, *viz.* 7 *Ed.* 1. when that king eſtabliſhed new money in *England*, as is ſhewn before, there was likewiſe a change of money in *Ireland*, as is obſerved in the annals of this kingdom, publiſhed by *Cambden* in his *Britannia*, where it is ſaid, that in the year 1279, *dominus* Robertus de Ufford *juſticiarius* Hiberniæ *intravit* Angliam, *& conſtituit loco fratrem* Robertum de Fulbourne *epiſcopum* Waterford, *cujus tempore mutata eſt moneta*. So 29 *Ed*. 1. when by ſpecial ordinance of the king the *pollards* and *crockards* were decried and annulled, the ſame ordinance was tranſmitted into this kingdom, and enrolled in the *Exchequer* here, as is found in *lib. rubr. ſcacc. part* 2. *fol*. 2. *b*. Alſo in the annals aforeſaid it is obſerved in the ſame year, *numiſma pollardarum prohibetur in* Angliâ & Hiberniâ.

And as the ſtandard of the monies was equal, ſo the mints and coinage in this kingdom were ordered and governed in the ſame manner as in *England*, as appears by the account of *Donat* and *Andrew de Sperdſholſt* aſſay maſters in *Dublin*, 9 and 10 *Ed*. 1. *in archivis* Caſtri Dublin, and in *libr. rubr. ſcacc. hic part* 2. *fol*. 1. and in *rot. parl. in* Caſtro Dublin, 12 *Ed*. 4. *c*. 60. See alſo ſeveral ordinances there touching the mint and monies, 7 *Ed*. 4. *c*. 9. 10 *Ed*. 4. *c*. 4. 16 *Ed*. 4. *c*. 2. 19 *Ed*. 4. *c*. 1. 1 *R*. 3. *c*. 7.

Different ſtandards in *England* and *Ireland*.

But the firſt difference and inequality between the ſtandard of *Engliſh* and *Iriſh* monies, is found in 5 *Ed*. 4. for then it was declared in parliament here, that the *noble* made in the time of *Ed*. 3. *Rich*. 2. *Hen*. 4. *Hen*. 5. and *Hen*. 6. ſhould be from that time forth current in this kingdom for 10 *s*. and ſo of the *demy-noble*, and all other coins according to the ſame rate. See *rot. parl*. 5 *Ed*. 4. *c*. 40. and 11 *Ed*. 4. *c*. 6. and 15 *Ed*. 4. *c*. 5. in the *Roll's-office* in the *Caſtle* of *Dublin*. After which time the money made in *Ireland* or for *Ireland* was always leſs in value than the money of *England*, and the uſual proportion of the difference was the fourth part only, *viz*. the *Iriſh* ſhilling was only 9 *d*. *Engliſh*. See the proclamation aforeſaid, dated the 24 of *May*, 43 *Eliz*. enrolled in the *Chancery* here, where the queen makes mention of this difference made by her progenitors between the ſtandard of money made for this kingdom, and the money of *England*. And note, that That which is called the ſtandard of money in this caſe, is the ſame which is called by the *French pied de money*, by *Bodin pes monetarum*; as if the prince there *pedem figat*, having eſtabliſhed the weight and purity of money in a certain proportion, which ſhould not be tranſgreſſed by the moneyers.

And ſo it is manifeſt, that the kings of *England* have always had and exerciſed this prerogative of coining and changing the form, and when they found it expedient of enhancing and abaſing the value of money within their dominions: and this prerogative is allowed and approved not only by the common law, but alſo by the rules of the imperial law. *Budelius de re nummariâ, libr*. 1. *c*. 5. *Princeps ad arbitrium ſuum, irrequiſito aſſenſu ſubditorum, valorem monetæ conſtituere poteſt; quia populus, quantum ad hoc, omnem poteſtatem & juriſdictionem in principem ſeu imperatorem tranſtuliſſe dicitur*. And a little after in the ſame chapter, although ſome doctors are of opinion, *principem ſine aſſenſu populi monetam mutare non poſſe*, yet he concludes, *ſi princeps conſueviſſet mutare monetam auctoritate propriâ, ſine conſenſu populi, a tempore cujus initii memoria non exiſtit, tunc libere impoſterum eum hoc facere poſſe. L. hoc jure Paragr. ductus aquæ. ff. de aqua quotid. &c*. And *Covarruvias, libro de collatione veterum numiſmatum, cap. de mutatione monetæ*, ſaith, *princeps poteſt mutare monetam ratione publicæ utilitatis, viz. tempore belli, vel ſi alias utile populo ſit futurum, ita etiam, ut ex corio fieri poſſit*. And it is obſerved by *Molineus, libro de mutatione monetæ, cap*. 100. that the ſtate of *Rome* in the firſt Punick war, when *Hannibal* had poſſeſſion of a great part of *Italy*, and all their treaſure was exhauſted, enhanced baſe money to a great value, for the payment of their armies; and yet the juſtice of that ſtate was then famous throughout the world. But *nihil eſt magis juſtum, quam quod neceſſarium*; by which it appears, that the mixed money was made by queen *Eliz*. on a juſt and honourable cauſe.

Sterling money what, and from whence ſo called.

Fourthly, it was reſolved, that the ſaid mixed money having the impreſſion and inſcription of the queen of *England*, and being proclaimed for lawful and current money within this kingdom of *Ireland*, ought to be taken and accepted for *ſterling* money; and on conſideration of this point, the name and the nature of *ſterling* money were enquired and diſcovered. As to the name of *ſterling*, ſome doctors of the civil law, being deceived by the erroneous report of *Polydore Virgil*, have conceived, that this *Engliſh* money was called *ſterling*, becauſe the form of a *ſtare*, the diminutive of which is *ſterling*, was imprinted or ſtamped upon it, and therefore *Covarruvias, lib. de collatione veterum numiſmatum, c*. 2. ſterling (ſaith he) *eſt argenteus nummus* Anglicus *ex viceſima ſexta parte unciæ, nam viginti ſex nummi argentei ſterlingi pendebant unciam, autore* Polydore Virgilio, *in hiſt*. Anglicâ, *lib*. 16. *Dictus autem eſt hic nummus, ut idem author tradit*, ſterling, *quod ſturnus avis*, Anglice a ſterling, *in altera parte nummi eſſet impreſſa*. To the ſame purpoſe *Choppinus de Domanio* Franc. *lib*. 2. *tit*. 7. hath this note, *cæterum Errico* 3. Britanniæ *rege, primum percuſſa eſt nunc uſitatiſſima ſterlingorum moneta, ab effigie ſturni ſic dicta, anno* 1249. Theſe doctors being ſtrangers, were, it ſeems, miſinformed by *Polydore Virgil*, who was alſo an alien and a ſtranger. But our *Linwood* alſo (who made his gloſs on the provincial conſtitutions of *England*, in the time of *Hen*. 6.) *tit. de teſtam. C. Item, quia, verbo, Centum ſolidos*, ſaith, ſterling *nomen erat argenteæ monetæ, & habebat ſimilitudinem denarii uſualis, hoc ſalvo, quod in unâ quartâ habebat effigiem avis, quæ vocatur ſturnus*, Anglice, ſterling.

Others have been of opinion, that this *Engliſh* money had the name of *ſterling*, becauſe the firſt money of this ſtandard was coined in the *Caſtle* of *Sterling* in *Scotland* by king *Ed*. 1. But this is alſo an erroneous opinion, as is noted by *Cambden* in *Scotia, pag*. 700. where ſpeaking of *Sterling-Caſtle*, he ſaith, that *quidam monetam probam* Angliæ *quæ* ſterling money *dicitur, hinc denominatam volunt, fruſtra ſunt; a* Germanis *enim, quos* Angli Eſterlingos *ab orientali ſitu vocarunt, facta eſt appellatio; quos* Johannes *rex, ad argentum in ſuam puritatem redigendum, primus evocavit; & ejuſmodi nummi*, Eſterlingi, *in antiquis ſcripturis ſemper reperiuntur*.

And this latter opinion, without doubt, is the better and more probable, by the judgment of all the moſt learned antiquarians of *England*. For in all the antient ſtatutes which make mention of this money, it is called *Eſterling*. As 9 *Ed*. 3. *c*. 2. *&c. no falſe money counterfeit* eſterling *ſhall be imported into our realm*; and the ſame year *c*. 3. *no* eſterling *halfpenny or farthing ſhall be molten to make veſſel*, &c. and 25 Ed. 3. c. 13. *the money of gold and ſilver, which is now current, ſhall not be impaired in weight or allay, but ſhall be put in the antient ſtate as in the* eſterling. And *Matt. Paris, magn. hiſt. fol*. 403. where he expreſſes the form of the obligation made by the clergy of *England* to the pope's bankers reſident in *London*, makes mention of this money by the name of *eſterling*; *Noveritis nos recipiſſe ab A*. and *B. &c. centum uncias bonorum & legalium eſterlingorum, treſdecim ſolidis & quatuor ſterlingis pro qualibet unciâ computatis*. And the ſame author *fol*. 710. ſaith, *eodem tempore moneta* Eſterlingorum, *propter ſui materiam deſiderabilem, deteſtabili circumciſione cæpit deteriorari & corrumpi*. And *fol*. 575. *Comitiſſa de* Biarde *venit ad regem cum* 60 *militibus, ducta cupidine* Eſterlingorum, *quibus noverat regem* Angliæ *abundare, & accepit a rege qualibet die pro ſtipendio treſdecim libras* Eſterlingorum, *&c*. And *Hoveden* in *Rich*. 1. *fol*. 377. *b*. makes mention of this money in theſe words, *videns igitur* Galfridus Eboracenſis *electus, quod niſi mediante pecuniâ amorem regis fratris nullatenus habere poſſit, promiſit ei tria millia librarum* Sterlingorum *pro amore ejus habendo*; and this was before the time of king *John*; from whence it ſeems, that the time when this money was firſt coined is uncertain; for ſome ſay that it was made by *Oſbright* a king of the *Saxon* race 160 years before the *Norman* Conqueſt. And ſo as *nummus* is called from *Numa*, who was the firſt king who made money in *Rome*, ſo *ſterling* is called from the *Eſterlings* who firſt made the money of this ſtandard in *England*, by a *metonymia*, ſubſtituting the name of the inventor for the thing invented, as Ceres *pro frumento*, Bacchus *pro vino*, &c.

And it is to be obſerved, that the *Eſterlings* were the firſt founders of the four principal cities of *Ireland*, *viz*. *Dublin*, *Waterford*, *Cork* and *Limerick*, and of the other maritime towns in this kingdom, and were the ſole maintainers of traffick and commerce, which was utterly neglected by the *Iriſh*. Theſe cities and towns were under the protection of king *Edgar* and *Edward* the Confeſſor before the *Norman* Conqueſt: and theſe *Eſterlings* in the antient records of this kingdom are called *Oſtmanni*. And therefore, when *Hen*. 2. upon the firſt conqueſt, thought it better to people theſe cities and towns with *Engliſh* colonies taken from *Briſtol*, *Cheſter*, &c. he aſſigned to theſe *Oſtmen* certain proportion of land next adjoining to each of theſe cities, which portion is called in the records of antient times, *Cantreda Oſtmannorum*. And all this was obſerved on the name of *Sterling*.

For the nature or ſubſtance of this money, firſt it was obſerved, that the coin which was properly called the *ſterling* was the *denier* or ſilver penny, as appears in the ordinance called *compoſitio menſurarum* made in the time of *Ed*. 1. where it is ſaid, *denarius* Angliæ, *qui nominatur ſterlingus, rotundus, ſine tonſura, ponderabit triginta & duo grana in medio ſpicæ, &c*. and every other coin or piece of ſilver was meaſured by the *ſterling* penny, as the groat contained the value of four *ſterlings*, and the half groat the value of two *ſterlings*, 25 *Ed*. 3. *c*. 6. and the ſhilling conſiſted of twelve *ſterlings*, Linwood *de teſtamentis, C. item quia, verb. Centum ſolidos*; and the *mark* conſiſted of 13*s*. and four *ſterlings*, as before is ſhewn from *Matt. Paris*; and the *maile* (half-penny) was the half of a *ſterling*; and the farthing the fourth part of a *ſterling*. See an ordinance without date in the *magna charta* printed by *Tottel, anno* 1556. *fol*. 167. and in *Raſtall*'s old abridgment, *money* 52. *quia multorum regum temporibus proviſum fuit, quod propter pauperes denarius argenti*, viz. *ſterlingus, divideretur in obolum & quadrantem, ex parte domini regis precipitur, quod quicunque recuſaverit obolum vel quadrantem debitam habentem formam, capiatur*. See 6 and 7 *Ed*. 6. *Dyer* 82. in the caſe of *pollards*, where it appears that a *ſterling* and a *denier* were the ſame; for there it is ſaid that two *pollards* paſſed for one *ſterling*, and accordingly two **ſterlings* were paid for one *denier*. And indeed in antient time, every ſort of money, made of the ſeveral metals of which money was uſually coined, was properly called a *denarius*; and therefore the *French* and *Italians* ſpeak properly, when they call all money *deniers* and *denarii*, for coins *(nummi)* were either copper, ſilver or gold; each ſilver one was worth ten of copper, and ſo was called a *denier*; and each gold one was worth ten of ſilver, and in this reſpect theſe were likewiſe *deniers*. And the antient proportion of gold to ſilver was as ten to one; and this proportion, as it ſeems, *David* obſerved in the treaſure of gold and ſilver which he prepared for the building of the temple; for the text ſays, *Chron. chap*. 22. *ver*. 14. *that he provided for that purpoſe* 100,000 *talents of gold, and* 1,000,000 *talents of ſilver*. So the firſt and proper *ſterling* coin was a *denier*.

Weight and purity of it.

And for the ſubſtance of this *denier* or *ſterling* penny in weight and purity: as to the weight, it was at firſt the twentieth part of an ounce, *viz*. an ounce was cut into twenty *ſterling deniers* and no more. See the *compoſitio menſurarum* made in the time of *Ed*. 1. *in veteri libro de magnâ chartâ, fol*. 113. *b*. and in *Raſtall*'s old abridgment, *tit. weights and meaſures*, 4. where it is ſaid, that *viginti denarii faciunt unciam, & duodecim unciæ faciunt libram*; and ſo it was until 9 *Ed*. 3. at which time the ounce of ſilver was cut into 26 pence. *Annal. de Rob. de Aveſbury M. S*. See ſeveral ordinances touching the new *ſterling* money, made 9 *Ed*. 3. *Raſtall, money* 345. And ſuch proportion was continued until 2 *Hen*. 6. when the ounce of ſilver made 32 pence; and this appears by the ſtat. of 2 *Hen*. 6. *c*. 13. and alſo by *Linwood de teſtamentis, cap. item quia, verb. cent. ſolid. Hic ſolidus* (ſaith he) *ſumitur pro duodecim denariis* Anglicanis; *horum* 26 *ponderabant unciam, cum tamen jam* 32 *denarii vix faciant unciam*. And this gloſs was wrote in the beginning of the reign of *Hen*. 6. as it is mentioned in the preface to his book. This ſtandard was continued until the 5 *Ed*. 4. and then the ounce of ſilver made 40 pence; 9 *Ed*. 4. 49. *a*. and 12 *Ed*. 4. *c*. 60. *in Rot. parl. Dublin*. And this continued until 36 *Hen*. 8. when the king prepared for his journey to *Bullogne*; and then an ounce of ſilver was cut into 60 pence, and that ſtandard remains to this day. And ſo the

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* So in the original; but qu. whether it ſhould not be *pollards*.

ſterling penny, which was at firſt the twentieth part of an ounce, is now the ſixtieth part of an ounce; and by conſequence, the antient *ſterling* penny contained as much ſilver as is contained in the three-penny piece that is now current.

1 *H. H. P.* C. 190.

And as to the purity of this *ſterling* money, 18 *s.* 5½ *d.* of the pureſt ſilver was contained in each pound, and each pound of *ſterling* money had 1 *s.* 6½ *d.* allay of copper, and no more; and of this allay of *ſterling* money, the ordinances or ſtatutes of 25 *Ed.* 3. *c.* 13. and 2 *Hen.* 6. *c.* 13. make mention. But this is well known to all moneyers, and is contained in all the indentures made between the king and the maſters of the mint.

Whether the mixed money ſhould be deemed *ſterling.*

Then the *ſterling* money being of ſuch weight and fineneſs, the doubt, *primâ facie*, was, how this mixed money ſhould be ſaid to be *ſterling*. And for the clearing of this doubt, it was ſaid, that in each common piece of money, there is *bonitas intrinſeca, & bonitas extrinſeca: intrinſeca conſiſtit in prætioſitate materiæ & pondere, viz.* fineneſs and weight; *extrinſeca bonitas conſiſtit in valuatione ſeu denominatione, & in formâ ſeu charactere. Budel. de re nummariâ, lib.* 11. *cap.* 7. And this *bonitas extrinſeca*, which is called *eſtimatio ſive valor impoſititius, eſt formalis & eſſentialis monetæ*, and this form giveth name and being to money; for without ſuch form, the moſt precious and pure metal that can be is not money; and therefore, *Molinæus, lib. de mutat. Monetæ*, ſaith, *non materia naturalis corporis monetæ, ſed valor impoſititius eſt forma & ſubſtantia monetæ, quæ non eſt corpus phyſicum ſed artificiale*, as *Ariſtotle* ſaith, *Ethic. lib.* 5. And ſo *Polit. lib.* 1. he ſaith to this effect, that money was firſt ſigned and imprinted with a certain character, to the intent, that the people might accept it on the credit of the prince or ſtate who publiſhes it, without examination or trial of the weight or purity. And to this purpoſe *Molineus* hath this rule, *Q.* 99. *de jure non refert ſive plus ſive minus argenti inſit, modo publica, proba, & legitima moneta ſit. Et Baldus l. ſingulari*, ſaith, *in pecunia potius attenditur uſus & curſus quam materia.* And *Seneca, lib.* 5. *de beneficiis, Æs alienum habere dicitur, & qui aureos debet, & qui corium formâ publicâ percuſſum.* And it was ſaid that the king hath the ſame prerogative to give value to baſe metal by his impreſſion or character, as he hath to give eſtimation to a mean perſon by imparting the character of honour to him; *ſic fiet viro quem rex honorare deſiderat.*

And ſo it was concluded, that after the *Eſterlings*, by command of the king of *England*, had made this pure *Engliſh* money, which from the name of the makers was called *eſterling* or *ſterling* money, the ſtandard of which hath been always the moſt fixed and unchanged in all the world, (which hath been a great honour to our nation, for in all other kingdoms and ſtates, the ſtandards of their money are more unſteady and variable,) all money coined by the authority of the king of *England*, and having his character and impreſſion, not only in *England*, but alſo in *Scotland* and *Ireland*, hath been *ſterling* money, and ſo called, reputed and taken by all people, whether the matter of it were mixed or pure. And this appears by the ordinance which is called *ſtatutum de moneta magnum*, by which all money is prohibited, only the money of *England*, of *Ireland* and of *Scotland*, which was properly the *ſterling* money. And therefore *Freherus, lib. de re nummariâ*, where he enumerates the different money of different nations; *ſterlingi*, ſaith he, *habentur in* Anglia, Scotia & Hibernia. And *Bodin, lib.* 6. *de republ. c.* 3. ſpeaking of the money of *Scotland*; in *Scotland*, ſaith he, are two pounds, *(livers)* very different; one of *eſterlings*, the other cuſtomary. And certainly the uſual *Scottiſh* pound *(liver)* is like the *French livre*, and the pound *(livre) eſterling* current there is that of *England*. And that baſe or mixed money may be current for *ſterling*, appears by the ſaid caſe of *pollards, Dyer* 82. *b.* where it is ſaid, *quod currebat quædam moneta in* Anglia *loco ſterlingi quæ vocabatur pollards, viz. duo pollardi pro uno ſterlingo.*

Iriſh money lawful money of *England.*

Fifthly, it was reſolved, that although this mixed money was made to be current within this kingdom of *Ireland* only, yet it may well be ſaid, current and lawful money of *England*, for two cauſes.—1. Becauſe this kingdom is only a member of the imperial crown of *England*; and this appears 3 *Hen.* 7. 10. *a.* where a queſtion was propounded to the juſtices by *Hobart*, attorney-general, *ſi quis ſciens monetam ad ſimilitudinem monetæ regis* Angliæ *contrafactam, talem monetam in* Angliam *extra* Hiberniam *deferat, ſi ſit proditio necne: & dixerunt quod* Hibernia *eſt quaſi membrum* Angliæ, *& ibidem legibus* Angliæ *utuntur, & authoritate regia faciunt monetam.* And to this purpoſe it is recited in the ſtatute of Faculties, enacted in this kingdom, 28 *Hen.* 8. *c.* 19. *that this the king's land of* Ireland *is a member appendant, and rightfully belongeth to the imperial crown of the realm of* England, *and united unto the ſame.* And in the act of 33 *Hen.* 8. *c.* 1. by which the ſtile and title of king of *Ireland* was given to *Hen.* 8. his heirs and ſucceſſors, it is moreover enacted, that the king ſhall enjoy that ſtile and title, and all other royal pre-eminences, prerogatives and dignities, *as united and annexed to the imperial crown of the realm of* England.—2. It is called lawful money of *England*, in reſpect to the place of coinage, which was in *England, viz.* in the *Tower* of *London*. For although in antient times the king had ſeveral mints in this kingdom, as he had in *England*, yet ſince the commencement of the reign of queen *Elizabeth*, all the mints have been reduced to one place, *viz.* the *Tower* of *London*; and this was done upon good reaſon of ſtate, to prevent the falſification of money. And therefore, before the *Norman* Conqueſt, all money was coined in monaſteries; for it was preſumed, that in ſuch places no falſity or corruption would be found. And this agrees with the prudence of the *Roman* ſtate, which had but one mint for all *Italy*, and that was in the temple of *Juno* at *Rome*, who for this cauſe was called *Juno moneta.* And for this purpoſe, the emperor *Charlemain* made a law in theſe words, *viz. de falſis monetis, quia in diverſis locis contra juſtitiam fiunt, volumus, ut in nullo alio loco moneta, niſi in palatio noſtro, fiat. Choppinus de Domanio* Franciæ, 217. *a.* Yet in 28 *Ed.* 1. this prudent king, for the facility of exchange, cauſed ſeveral mints to be eſtabliſhed in ſeveral towns in *England*; one in the *Tower* of *London* with thirty furnaces, another at *Canterbury* with eight furnaces, another at *Kingſton* upon *Hull* with four furnaces, another at *Newcaſtle* upon *Tyne* with two furnaces, another at *Briſtol* with four furnaces, and another at *Exeter* with four furnaces. *Tractat. de monetâ* Angliæ, made in the time of *Ed.* 1. which I found in the library of ſir *Robert Cotton*, which was the book of lord *Burleigh*, late lord high treaſurer of *England*. See alſo the cloſe rolls of 29 *Ed.* 1. in the *Tower* of *London*. And this appears alſo by the inſcription of divers antient coins, on which are expreſſed the names of the cities where they were coined, according to a verſe made in the time of *Ed.* 1. and taken by *Stow* out of *Robert le Brun*, an antient manuſcript:

Edward *did ſmite round penny, half-penny, farthing.*

And then followed,

On the king's ſide, was his head and his name written,
On the croſs ſide, the city where it was ſmitten.

And this ſame king having eſtabliſhed a mint at *Dublin* with four furnaces, and having conſtituted *Alexander Norman* of *Luſk* maſter of the mint there, as appears in ſeveral records in the archives of the *Caſtle* of *Dublin*; afterwards, *viz.* 32 *Ed.* 1. when he had altered the form of the coin, he cauſed divers ſtamps conſiſting of two parts, of which the one contained the pile, and the other the croſs, to be tranſmitted to the treaſurer of this kingdom, as is recorded in the red book of the *Exchequer* here, in this manner. *Magiſter* Gulielmus *de* Wimundham, *cuſtos cambiorum domini regis in* Anglia, *de præcepto venerabilis patris* Bathon. & Wellenſis *epiſcopi, theſaurarij ejuſdem domini regis, miſit domino* Gulielmo *de* Eſenden, *theſaurario in* Hibernia, *viginti quatuor pecias cuneorum, pro moneta ibidem facienda*, viz. *tres pilas cum ſex crucellis pro denarijs, tres pilas cum ſex crucellis pro obolis, & duas pilas cum quatuor crucellis pro ſerlingis, per* Johannem le Minor, Thomas Dowle, & Johannem *de* Shorditch, *clericos, de ſocietate operariorum & monetariorum* London, *per eoſdem ad monetam prædictam operandam & monetandam.* And there it is likewiſe mentioned, before what witneſſes the ſaid ſtamps were delivered; for *cuneus monetæ tanquam ſigillum regni cuſtodiri debet*, as it is ſaid in the treatiſe *de moneta* Angliæ before mentioned; and the reaſon is, becauſe to counterfeit the one or the other is high treaſon.

And at this time there was but one mint in *Ireland, to wit*, at *Dublin.* But long afterwards, *viz.* 3 *Ed.* 4. a mint was eſtabliſhed at *Waterford*, another at *Trim*, and another at *Galway*; *Rot. Parl.* 3 *Ed.* 4. *in Caſtro Dublin.* And 12 *Ed.* 4. *Rot. Parl. ibid.* it is ordained, that the maſters of the mint in *Ireland* ſhould make, in the caſtles of *Dublin* and *Trim*, and in the town of *Drogheda*, five ſorts of coin, the groat, the half-groat, the penny, half-penny and farthing; by which it is manifeſt that in former times, there were five ſeveral mints in *Ireland*, in the ſeveral towns aforeſaid. But all theſe were diſcontinued in the time of *Ed.* 6. ſo that ſince the reign of that king, all the money made in *Ireland*, hath been coined in *England*; and therefore this mixed money, coined in the *Tower* of *London*, may be properly called current and lawful money of *England.*

If an obligee refuſeth a tender at the time and place in mixed money (*viz.* under the pure ſtandard) the obligor ſhall not be bound to pay better money afterwards.

Sixthly and laſtly, it was reſolved, that although at the time of the contract and obligation made in the preſent caſe, pure money of gold and ſilver was current within this kingdom, where the place of payment was aſſigned; yet the mixed money, being eſtabliſhed in this kingdom before the day of payment, may well be tendered in diſcharge of the ſaid obligation, and the obligee is bound to accept it; and if he refuſes it, and waits until the money be changed again, the obligor is not bound to pay other money of better ſubſtance, but it is ſufficient if he be always ready to pay the mixed money according to the rate for which they were current at the time of the tender. And this point was reſolved on conſideration of two circumſtances, *viz.* the time and the place of the payment; for the time is future, *viz. that if the ſaid* Brett *ſhall pay or cauſe to be paid* 100 *l.* ſterling, *current money*, &c. and therefore ſuch money ſhall be paid as ſhall be current at ſuch future time; ſo that the time of payment, and not the time of the contract, ſhall be regarded.

Alſo, the future time is intended by the words *current money*; for a thing which is paſſed is not *in curſu*; and therefore all the doctors, who write *de re nummaria*, agree in this rule, *verba currentis monetæ tempus ſolutionis deſignant.* And to this purpoſe are ſeveral caſes ruled in our books. 6 and 7 *Ed.* 6. *Dyer* 81. *b.* After the fall and embaſement of money, 5 *Ed.* 6. debt was brought againſt the executors of leſſee for years, for rent in arrear for two years, ending *Mich.* 2 *Ed.* 6. at which time the ſhilling (which at the time of the action brought, was cried down to 6 *d.*) was current for 12 *d.* the defendants pleaded a tender of the rent on the days when it became due, *in peciis monetæ* Angliæ *vocat.* ſhillings, *qualibet pecia vocat.* ſhilling, *adtunc ſolubili pro* 12 *d.* and that neither the plaintiff nor any other for him was ready to receive it, &c. and concluded that they are ſtill ready to pay the arrears *in dictis peciis vocat.* ſhillings, *ſecundum ratam*, &c. On this plea, although the plaintiff demurred, yet he was content to take the money at the rate aforeſaid, without coſts or damages. To the ſame purpoſe is the caſe of *pollards* adjudged, 29 *Ed.* 1. and reported by *Dyer* 82. *b.* where in debt on an obligation for payment of 24 *l.* at two ſeveral days, the defendant pleads, that, at the days limited for payment of the debt in demand, *currebat quædam moneta quæ vocabatur* pollards, *loco ſterlingi*, &c. and that the defendant at the firſt day of payment tendered the moiety of the debt in the money called *pollards*, which the plaintiff refuſed, and that he is ſtill ready, &c. and offered it in court, which is not denied by the plaintiff; *ideo conceſſum eſt*, that he recovered one moiety in *pollards*, and the other in *pure ſterling money.* See 9 *Ed.* 4. 49. *a.* a remarkable caſe on the change of money, where it is ſaid, that if a man in an action of debt demands 40 *l.* it ſhall be intended money, which is current at the time of the writ purchaſed. And there a caſe in the time of *Ed.* 1. is put, which is directly to this purpoſe. In debt brought upon a deed for thirty quarters of barley, price 20 *l.* it was found for the plaintiff, and the jury was charged to enquire of the price at the time of the payment; and it was ſaid that at the time of the payment, a quarter was at 12 *s.* but at the time of the making of the deed, it was only at 3 *s.* and the plaintiff recovered 18 *l.* for the corn according to the price of it at the time of the payment. To this purpoſe alſo, *Linwood* hath a notable gloſs on the conſtitution of *Simon Mepham*, *lib.* 3. *de teſtamentis cap. item quia.* For where the conſtitution is ſuch, *pro publicatione teſtamenti pauperis, cujus inventarium bonorum non excedit centum ſolidos ſterlingorum, nihil penitus exigatur*, he maketh this gloſs, *hic ſolidus ſumitur pro duodecim denarijs* Anglicanis, &c. *Sed quæro*, ſaith he, *numquid circa hos centum ſolidos debeat conſiderari valor in moneta jam currente, vel valor ſterlingorum qui currebant tempore ſtatuti*; and there he reſolveth, *quod ubi diſpoſitio ſurgit ex ſtatuto, ut hic, licet moneta ſit diminuta in valore, tamen debet conſiderari reſpectu monetæ novæ currentis, & non reſpectu antiquæ. Nam mutata moneta, mutari videtur ſtatutum, ut ſcilicet intelligatur de nova, & non de veteri.* See *Regiſt.* 50. *a.* and 54. *b.* where the king iſſues his writ, to be certified of the value of a church. The words of the writ are *ſecundum taxationem decimæ jam currentis.* And 31 *Ed.* 3. *Fitz. H. Annuity* 28. an annuity was granted to *I. S.* until he was promoted by the grantor to a ſufficient benefice; *I. S.* brings a writ of annuity againſt the grantor, who pleads that he had tendered to the plaintiff a ſufficient benefice; and there iſſue was taken on the value of the benefice at the time of the tender.

But it was ſaid that, although in contracts theſe words *currentis monetæ* ſhall relate to the time of the payment; yet in wills, they ſhall relate to the time of making the will; for the bequeſt is in the preſent tenſe, *I give and bequeath*, &c. and therefore legacies ſhall be paid in ſuch money as is current at the time of the making the teſtament, or according to the rate thereof. It was alſo ſaid, that if a man hath 1000 *l.* of pure ſilver in marriage with his wife, and afterwards they are divorced *cauſa præcontractus*, by which the wife is to receive her portion: or if a man recovers by an erroneous judgment 100 *l.* in debt, and hath execution in pure ſilver money, and afterwards the judgment is reverſed, ſo that he is to be reſtored to all that he hath loſt, although baſe money be eſtabliſhed in the mean time, reſtitution ſhall be in ſuch money as was current at the time of the marriage, and at the time of the recovery. But theſe latter caſes were not reſolved.

And as to the circumſtance of place, it was reſolved, that although the contract was made in *London*, yet, the place of payment being appointed in *Dublin*, of neceſſity the obligor muſt make his tender in the mixed money at the time of the payment; for all other money was cried down and made bullion by the proclamation aforeſaid, and this money only eſtabliſhed; ſo that if the obligee had refuſed this mixed money, he had committed a contempt, for which he might be puniſhed. Alſo the judges are not bound to take notice of any money, that is not current by proclamation. And therefore *Priſot* ſaith, 34 *Hen.* 6. 12. *a. we are not apprized of* 61. Flemiſh, *as we are of* 100 *nobles*; and therefore in all contracts of merchants, *conſuetudo & ſtatuta loci, in quem eſt deſtinata ſolutio, reſpicienda ſunt. Budelius de re nummariâ, lib.* 2. *c.* 21. And it was ſaid, that if at this day the law ſhould be taken, as it was taken in the time of *Ed.* 1. that upon judgment in debt given in *England*, on a *teſtatum* that the defendant hath nothing in *England*, but that he hath goods and lands in *Ireland*; a writ of execution ſhall be awarded to the chief-juſtice or deputy of *Ireland*, to levy the debt there, (which writ is found in *Regiſtro brev. jud.* 43. *b.*) the ſum in ſuch caſe ſhall be levied according to the rate of *Iriſh* money, and not of *Engliſh* money, and in ſuch coin as ſhall be current in this kingdom, at the time of the execution.

And according to this reſolution, ſeveral other caſes on the ſame point were afterwards ruled and adjudged in the ſeveral courts of record in *Dublin*.

XV. *The Caſe of* Præmunire *in* Ireland, *or the Conviction and Attainder of* Robert Lalor *Prieſt, being indicted on the Statute of the* 16 R. II. cap. 5. Hill. 4 Jam. 1607.

[*This caſe is extracted from Sir* John Davies's Reports. *It was originally publiſhed in* Engliſh, *with marginal notes containing the heads of the caſe, in the ſame manner as it is here printed.*]

Of what quality and credit *Robert Lalor* was.

THIS *Robert Lalor*, being a native of this kingdom, received his orders of prieſthood above 30 years ſince at the hands of one *Richard Brady*, to whom the pope had given the title of biſhop of *Kilmore* in *Ulſter*; and for the ſpace of 20 years together his authority and credit was not mean within the province of *Leinſter*. He had alſo made his name known in the court of *Rome*, and held intelligence with the cardinal who was protector of this nation; by means whereof he obtained the title and juriſdiction of vicar-general of the ſee apoſtolick, within the archbiſhoprick of *Dublin* and the biſhopricks of *Kildare* and *Fernes*. This pretended juriſdiction, extending well-nigh over all the province of *Leinſter*, he exerciſed boldly and ſecurely many years together, until the proclamation was publiſhed, whereby all Jeſuits and prieſts ordained by foreign authority were commanded to depart out of this kingdom by a certain time prefixed. After which time he began to lurk and to change his name. Howbeit at laſt he was apprehended in *Dublin*, and committed to priſon in the *Caſtle* there. Upon his firſt examination taken by the lord-deputy himſelf, he acknowledged that he was a prieſt, and ordained by a popiſh titulary biſhop; that he had accepted the title and office of the pope's vicar-general in the three dioceſes before-named, and had exerciſed ſpiritual juriſdiction *in foro conſcientiæ*; and in ſundry other points he maintained and juſtified the pope's authority. Only he ſaid, he was of opinion that the pope had no power to excommunicate or depoſe his majeſty, becauſe the king is not of the pope's religion.

His apprehenſion and firſt examination.

His firſt indictment and conviction.

The next term after he was indicted upon the ſtatute of 2 *Eliz.* enacted in this realm againſt ſuch as ſhould wilfully and adviſedly maintain and uphold the juriſdiction of any foreign prince or prelate in any cauſes eccleſiaſtical or civil within this realm. By which ſtatute the firſt offence of that kind is puniſhed with loſs of goods, and one year's impriſonment; the ſecond offence incurreth the penalty of the *præmunire*; and the third offence is made high treaſon. Upon this indictment he was arraigned, convicted and condemned, and ſo reſted in priſon during the next two terms without any farther queſtion. He then made petition unto the lord-deputy to be ſet at liberty: whereupon his lordſhip cauſed him to be examined by ſir *Oliver St. John*, ſir *James Fullerton*, ſir *Jeffery Fenton*, the attorney and ſolicitor general. At firſt he made ſome evaſive and indirect anſwers; but at laſt voluntarily and freely he made this enſuing acknowledgment or confeſſion, which being ſet down in writing word for word as he made it, was adviſedly read by him, and ſubſcribed with his own hand, and with the hands of thoſe who took his examination; and afterwards he confirmed it by his oath before the lord-deputy and council.

His ſecond examination.

The confeſſion or acknowledgment of Robert Lalor *prieſt, made the* 22*d of* December, 1606.

His confeſſion or acknowledgment.

FIRST, he doth acknowledge, that he is not a lawful vicar-general in the dioceſes of *Dublin*, *Kildare* and *Fernes*, and thinketh in his conſcience that he cannot lawfully take upon him the ſaid office.

Item, he doth acknowledge our ſovereign lord king *James*, that now is, to be his lawful chief and ſupreme governor in all cauſes, as well eccleſiaſtical as civil, and that he is bound in conſcience to obey him in all the ſaid cauſes; and that neither the pope, nor any other foreign prelate, prince or potentate, hath any power to controul the king in any cauſe eccleſiaſtical or civil within this kingdom, or any of his majeſty's dominions.

Item, he doth in his conſcience believe, that all biſhops ordained and made by the king's authority within any of his dominions are lawful biſhops; and that no biſhop made by the pope, or by any authority derived from the pope, within the king's dominions, hath any power or authority to impugn, diſannul or controul any act done by any biſhop made by his majeſty's authority as aforeſaid.

Item, he profeſſeth himſelf willing and ready to obey the king, as a good and obedient ſubject ought to do, in all his lawful commandments, either concerning his function of prieſthood, or any other duty belonging to a good ſubject.

After this confeſſion made, the ſtate here had no purpoſe to proceed againſt him ſeverely, either for his contempt of the proclamation, or offence againſt the law: ſo as he had more liberty than before, and many of his friends had acceſs unto him; who telling him what they heard of his confeſſion, he proteſted unto them, that he had only acknowledged the king's civil and temporal power, without any confeſſion or admittance of his authority in ſpiritual cauſes. This being reported unto the lord-deputy by ſundry gentlemen, who gave faith unto what he ſaid, his lordſhip thought fit, that ſince he had incurred the pain of *præmunire*, by exerciſing epiſcopal juriſdiction, as vicar-general to the pope, that he ſhould be attainted of that offence; as well to make him an example to others of his profeſſion, (for almoſt in every dioceſe of this kingdom there is a titulary biſhop ordained by the pope), as alſo that at the time of his trial a juſt occaſion might be taken, to publiſh the confeſſion and acknowledgment which he had voluntarily made, ſigned, and confirmed by oath before the lord-deputy and council, who have likewiſe ſubſcribed their names as witneſſes thereof.

Hereupon, in *Hill.* term, 4 *Jacobi*, an indictment was framed againſt him in the *King's Bench* upon the ſtatute of 16 *Rich.* 2. *cap.* 5. containing theſe ſeveral points.

1. That he had received a bull or brief purchaſed or procured in the court of *Rome*, which bull or brief did touch or concern the king's crown and dignity royal, containing a commiſſion of authority from the pope of *Rome* unto *Richard Brady* and *David Magragh* to conſtitute a vicar-general for the ſee of *Rome*, by the name of the *See Apoſtolick*, in the ſeveral dioceſes of *Dublin*, *Kildare* and *Fernes*, within this kingdom of *Ireland*.

The indictment of *Lalor* upon the ſtat. of 16 *Ric.* 2.

2. That by pretext or colour of that bull or brief he was conſtituted vicar-general of the ſee of *Rome*, and took upon him the ſtile and title of vicar-general in the ſaid ſeveral dioceſes.

3. That he did exerciſe eccleſiaſtical juriſdiction as vicar-general of the ſee of *Rome*, by inſtituting divers perſons to benefices with cure of ſouls, by granting diſpenſations in cauſes matrimonial, by pronouncing ſentences of divorce between divers married perſons, and by doing all other acts and things pertaining to epiſcopal juriſdiction, within the ſaid ſeveral dioceſes, againſt our ſovereign lord the king, his crown and dignity royal, and in contempt of his majeſty, and diſheriſon of his crown, and contrary to the form and effect of the ſtatute, &c.

To this indictment *Lalor* pleaded *not guilty*; and when the iſſue was to be tried, the name and reputation of the man, and the nature of the cauſe, drew all the principal gentlemen both of the pale and provinces that were in town to the hearing of the matter. At which time a ſubſtantial jury of the city of *Dublin* being ſworn for the trial, and the points of the indictment being opened and ſet forth by the king's ſerjeant; the attorney-general thought it not impertinent, but very neceſſary, before he deſcended to the particular evidence againſt the priſoner, to inform and ſatisfy the hearers in two points.

1. What reaſon moved us to ground this indictment upon the old ſtatute of 16 *Rich.* 2. rather than upon ſome other later law made ſince the time of king *Henry* 8.

2. What were the true cauſes of the making of this law of 16 *Rich.* and other formal laws againſt proviſors, and ſuch as did appeal to the court of *Rome* in thoſe times, when both the prince and people of *England* did for the moſt part acknowledge the pope to be the thirteenth apoſtle, and only oracle in matters of religion, and did follow his doctrine in moſt of thoſe points wherein we now diſſent from him.

1. For the firſt point, we did purpoſely forbear to proceed againſt him upon any latter law, to the end that ſuch as were ignorant might be informed, that long before king *Henry* 8. was born divers laws were made againſt the uſurpation of the biſhop of *Rome* upon the rights of the crown of *England*, well-nigh as ſharp and ſevere as any ſtatutes which have been made in later times; and that therefore we made choice to proceed upon a law made more than 200 years paſt, when the king, the lords and commons, which made the laws, and the judges, which did interpret the laws, did for the moſt part follow the ſame opinions in religion which were taught and held in the court of *Rome*.

The true cauſe of making the ſtat. of 16 *R.* 2. and other ſtatutes againſt proviſors.

2. For the ſecond point, the cauſes that moved and almoſt enforced the *Engliſh* nation to make this, and other ſtatutes of the ſame nature, were of the greateſt importance that could poſſibly ariſe in any ſtate. For theſe laws were made to uphold and maintain the ſovereignty of the king, the liberty of the people, the common law, and the commonweal, which otherwiſe had been undermined and utterly ruined by the uſurpation of the biſhop of *Rome*.

For albeit the kings of *England* were abſolute emperors within their dominions, and had under them as learned a prelacy and clergy, as valiant and prudent a nobility, as free and wealthy a commonalty, as any was then in Chriſtendom; yet if we look into the ſtories and records of theſe two imperial kingdoms, we ſhall find, that if theſe laws of proviſion and *præmunire* had not been made, they had loſt the name of imperial, and of kingdoms too, and had been long ſince made tributary provinces to the biſhop of *Rome*, or rather part of St. *Peter*'s patrimony in demeſne. Our kings had had their ſcepters wreſted out of their hands, their crowns ſpurned off from their heads, their necks trod upon; they had been made laquies or footmen to the biſhop of *Rome*, as ſome of the emperors and *French* kings were; our prelates had been made his chaplains and clerks, our nobility his vaſſals and ſervants, our commons his ſlaves and villains, if theſe acts of manumiſſion had not freed them. In a word, before the making of theſe laws, the flouriſhing crown and commonwealth of *England* was in extreme danger to have been brought into moſt miſerable ſervitude and ſlavery, under colour of religion and devotion to the ſee of *Rome*. And this was not only ſeen and felt by the king, and much repined at and proteſted againſt by the nobility, but the commons, the general multitude of the ſubjects, did exclaim and cry out upon it. For the commons of *England* may be an example unto all other ſubjects in the world in this, that they have ever been tender and ſenſible of the wrongs and diſhonours offered unto their kings, and have ever contended to uphold and maintain their honour and ſovereignty. And their faith and loyalty have been generally ſuch, (though every age hath brought forth ſome particular monſters of diſloyalty) as no pretence of zeal or religion could ever withdraw the greater part of the ſubjects to ſubmit themſelves to a foreign yoke, no not when popery was in her height and exaltation; whereof this act and divers others of the ſame kind are clear and manifeſt teſtimonies. For this act of 16 *Rich.* 2. was made at the prayer of the commons: which prayer they make not for themſelves, neither ſhew they their own ſelf-love therein, (as in other bills which contain their grievances) but their love and zeal to the king and his crown. When after the *Norman* Conqueſt they importuned their kings for the *great charter*, they ſought their own liberties; and in other bills preferred commonly by the commons againſt ſhriefs, eſcheators, purveyors, or the like, they ſeek their own profit and eaſe. But here their petition is to the king, to make a law for the defence and maintenance of his own honour. They complain, that by bulls and proceſſes from *Rome*, the king is deprived of that juriſdiction which belongs of right to his imperial crown; that the king doth loſe the ſervice and council of his prelates and learned men by tranſlations made by the biſhop of *Rome*; that the king's laws are defeated at his will, the treaſure of the realm is exhauſted and exported to enrich his court; and that by thoſe means the crown of *England*, which hath ever been free, and ſubject unto none, but immediately unto God, ſhould be ſubmitted unto the biſhop of *Rome*, to the utter deſtruction of the king and the whole realm; which God defend, ſay they: and thereupon, out of their exceeding zeal and fervency, they offer to live and die with the king in defence of the liberties of the crown. And laſtly, they pray and require the king by way of juſtice, to examine all the lords in parliament, what they thought of theſe manifeſt wrongs and uſurpations, and whether they would ſtand with the king in defence of his royal liberties, or no. Which the king did according to their petition: and the lords ſpiritual and temporal did all anſwer, that theſe uſurpations of the biſhop of *Rome* were againſt the liberties of the crown, and that they were all bound by their allegiance to ſtand with the king, and to maintain his honour and prerogative. And thereupon it was enacted with a full conſent of the three eſtates, that ſuch as ſhould purchaſe in the court of *Rome*, or elſewhere, any bulls or proceſſes, or other things which might touch the king in his crown and dignity royal, and ſuch as ſhould bring them into the realm, and ſuch as ſhould receive them, publiſh them, or execute them, they, their notaries, proctors, maintainers and counſellors, ſhould be all out of the king's protection, their lands and goods forfeited to the king, their bodies attached if they might be found, or elſe proceſs of *præmunire facias* to be awarded againſt them. Upon theſe motives, and with this affection and zeal of the people, was the ſtatute of 16 *Rich.* 2. made, whereupon we have framed our indictment.

The ſtatute of *præmunire* made at the prayer of the commons.

The effect of the ſtatute of 16 *R.* 2. *cap.* 5.

Now let us look higher and ſee, whether the former laws made by king *Edw.* 1. and king *Edw.* 3. againſt the uſurpation of the biſhop of *Rome* were not grounded upon the like cauſe and reaſon.

The effect of the ſtatute of 38 *Edw.* 3. *cap.* 1.

The ſtatute of 38 *Edw.* 3. *cap.* 1. expreſſing the miſchiefs that did ariſe by *breves of citation*, which drew the bodies of the people, and by bulls of proviſion and reſervation of eccleſiaſtical benefices, which drew the wealth of the realm, to the court of *Rome*, doth declare, that by theſe means the ancient laws, cuſtoms and franchiſes of the realm were confounded, the crown of our ſovereign lord the king diminiſhed, and his perſon falſely defamed, the treaſure and riches of the land carried away, the ſubjects of the realm moleſted and impoveriſhed, the benefices of holy church waſted and deſtroyed, divine ſervice, hoſpitality, alms-deeds and other works of charity neglected.

The ſtatute of 27 *Edw.* 3. *cap.* 1.

Again, 27 *Edw.* 3. *cap.* 1. upon the grievous and clamorous complaint (for that phraſe is there uſed) of the great men and commons touching citations and proviſions, it is enacted, that the offenders ſhall forfeit their lands, goods and chattels, and their bodies be impriſoned and ranſomed at the king's will.

The ſtatute of 25 *Edw.* 3. reciting the ſtatute of 25 *Edw.* 1.

But in the ſtat. of 25 *Edw.* 3. wherein the firſt law againſt proviſors made 25 *Edw.* 1. is recited, there is a larger declaration of theſe inconveniences than in the two laſt acts before mentioned. For there all the commons of the realm do grievouſly complain, that whereas the holy church of *England* was firſt founded in eſtate of prelacy by the kings and nobility of that realm, and by them endowed with great poſſeſſions and revenues in lands, rents and advowſons, to the end the people might be informed in religion, hoſpitality might be kept, and other works of charity might be exerciſed within the realm; and whereas the king and other founders of the ſaid prelacies were the rightful patrons and advowees thereof, and upon avoidance of ſuch eccleſiaſtical promotions had power to advance thereunto their kinſmen, friends, and other learned men of the birth of that realm, which being ſo advanced became able and worthy perſons to ſerve the king in counſel, and other places in the commonweal; the biſhop of *Rome*, uſurping the ſeignory of ſuch poſſeſſions and benefices, did give and grant the ſame to aliens, which did never dwell in *England*, and to cardinals, which might not dwell there, as if he were rightful patron of thoſe benefices; whereas by the law of *England* he never had right to the patronage thereof; whereby in ſhort time all the ſpiritual promotions in the realm would be engroſſed into the hands of ſtrangers, canonical elections of prelates would be aboliſhed, works of charity would ceaſe, the founders and true patrons of churches would be diſinherited, the king's council would be weakened, the whole kingdom impoveriſhed, and the laws and rights of the realm deſtroyed. Upon this complaint it was reſolved in parliament, that theſe oppreſſions and grievances ſhould not be ſuffered in any manner: and therefore it was enacted, that the king and his ſubjects ſhould thenceforth enjoy the rights of patronage; that free elections of archbiſhops, biſhops, and other prelates elective, ſhould be made according to the ancient grants of the king's progenitors and their founders; that no bulls of proviſion ſhould be put in execution, but that the proviſors ſhould be attached, fined, and ranſomed at the king's will, and withal impriſoned, till they had renounced the benefits of their bulls, ſatisfied the party grieved, and given ſureties not to commit the like offence again.

Now, Mr. *Lalor*, what think you of theſe things? Did you believe that ſuch laws as theſe had been made againſt the pope 200, 250, 300 years ſince? Was king *Hen.* 8. the firſt prince that oppoſed the pope's uſurped authority? Were our proteſtants the firſt ſubjects that ever complained of the court of *Rome*? Of what religion, think you, were the propounders and enacters of theſe laws? Were they good catholicks, or good ſubjects, or what were they? You will not ſay they were proteſtants, for you will not admit the reformed religion to be ſo ancient as thoſe times: neither can you ſay they were undutiful, for they ſtrove to uphold their liege lord's ſovereignty. Doubtleſs the people in thoſe days did generally embrace the vulgar errors and ſuperſtitions of the *Romiſh* church, and in that reſpect were papiſts as well as you. But they had not learned the new doctrine of the pope's ſupremacy, and tranſcendant authority over kings; they did not believe he had power to depoſe princes, and diſcharge ſubjects of their allegiance, to abrogate the fundamental laws of kingdoms, and to impoſe his canons as binding laws upon all nations, without their conſents; they thought it a good point of religion to be good ſubjects, to honour their king, to love their country, and to maintain the laws and liberties thereof, howſoever in other points they did err and were miſs-led with the church of *Rome*.

Theſe laws made by ſuch as did profeſs the *Romiſh* religion.

So as now (Mr. *Lalor*) you have no excuſe, no evaſion, but your conſcience muſt condemn you as well as the law; ſince the law-makers in all ages, and all religious papiſts and proteſtants, do condemn you: unleſs you think yourſelf wiſer than all the biſhops that were then in *England*, or all the judges, who in thoſe days were learned in the civil and canon laws as well as in the common laws of *England*.

Laws againſt proviſors made in *Ireland*.

But you, being an *Iriſhman*, will ſay, perhaps, theſe laws were made in *England*, and that the *Iriſh* nation gave no particular conſent thereunto, only there was an implicit conſent wrapt and folded up in general terms given in the ſtatute of 10 *Hen.* 7. *cap.* 22. whereby all ſtatutes made in *England* are eſtabliſhed and made of force in *Ireland*. Aſſuredly, though the firſt parliament held in *Ireland* was after the firſt law againſt proviſors made in *England*, yet have there been as many particular laws made in *Ireland* againſt proviſions, citations, bulls and breves of the court of *Rome*, as are to be found in all the parliament-rolls in *England*. What will you ſay if in the ſelf-ſame parliament of 10 *Hen*. 7. *cap*. 5. a ſpecial law were made, enacting, authorizing and confirming in this realm all the ſtatutes of *England* made againſt proviſors; if before this the like law were made 32 *Hen*. 6. *cap*. 4. and again 28 *Hen*. 6. *cap*. 30. the like; and before that, the like law were made 40 *Edw*. 3. *cap*. 13. in the famous parliament of *Kilkenny*; if a ſtatute of the ſame nature were made 7 *Edw*. 4. *cap*. 2. and a ſeverer law than all theſe, 16 *Edw*. 4. *cap*. 4. that ſuch as purchaſe any bulls of proviſion in the court of *Rome*, as ſoon as they have publiſhed or executed the ſame to the hurt of any incumbent, ſhould be adjudged traitors; which act, if it be not repealed by the ſtatute of queen *Mary*, may terrify Mr. *Lalor* more than all the acts which are before remembred?

When the pope began firſt to uſurp upon the liberties of the crown of *England*.

But let us aſcend yet higher, to ſee when the pope's uſurpation, which cauſed all theſe complaints, began in *England*, with what ſucceſs it was continued, and by what degrees it roſe to that height, that it well-nigh over-topped the crown; whereby it will appear whether he had gained a circle by preſcription, by a long and quiet poſſeſſion, before the making of theſe laws.

The firſt encroachment of the biſhop of *Rome* upon the liberties of the crown of *England*, was made in the time of king *William* the Conqueror. For before that time the pope's writ did not run in *England*, his bulls of excommunication and proviſion came not thither; no citation, no appeals were made from thence to the court of *Rome*; our archbiſhops did not purchaſe their palls there, neither had the pope the inveſtiture of any of our biſhopricks. For it is to be obſerved, that as under the temporal monarchy of *Rome*, *Britany* was one of the laſt provinces that was won, and one of the firſt that was loſt again: ſo under the ſpiritual monarchy of the pope of *Rome*, *England* was one of the laſt countries of Chriſtendom that received his yoke, and was again one of the firſt that did reject and caſt it off. And truly, as in this, ſo in divers other points, the courſe of this ſpiritual monarchy of the pope may be aptly compared with the courſe of the temporal monarchies of the world. For as the temporal monarchies were firſt raiſed by intruſion upon other princes and commonweals; ſo did this ſpiritual prince (as they now ſtile him) grow to his greatneſs by uſurping upon other ſtates and churches. As the temporal monarchies, following the courſe of the ſun, did riſe in the eaſt, and ſettle in the weſt; ſo did the hierarchy or government of the church. Of the four temporal monarchies, the firſt two were in *Aſia*, the latter two in *Europe*; but the *Roman* monarchy did ſurpaſs and ſuppreſs them all. So were there four great patriarchs, or eccleſiaſtical hierarchies, two in the eaſt, and two in the weſt; but the *Roman* patriarch exalted himſelf, and uſurped a ſupremacy above them all. And as the riſing of the *Roman* empire was moſt oppoſed of *Carthage* in *Africa*, (*æmula* Romæ Carthago;) ſo the council of *Carthage* and the *African* biſhops did firſt forbid appeals to *Rome*, and oppoſed the ſupremacy of the pope. And doth not *Daniel*'s image, whoſe head was of gold, and legs and feet of iron and clay, repreſent this ſpiritual monarchy as well as the temporal; whereas the firſt biſhops of *Rome* were golden prieſts, though they had but wooden chalices, and that the popes of later times have been for the moſt part worldly and earthly-minded? And as the northern nations firſt revolted from the *Roman* monarchy, and at laſt brake it in pieces; have not the north and north-weſt nations firſt fallen away from the papacy; and are they not like in the end to bring it to ruin?

A compariſon of the ſpiritual monarchy of the church with the temporal monarchies of the world.

The pope had no juriſdiction in *England* in the time of the *Britains*.

But to return to our purpoſe. The biſhop of *Rome* before the firſt *Norman* Conqueſt had no juriſdiction in the realm of *England*, neither in the time of the *Britains*, nor in the time of the *Saxons*. *Eleutherius*, the pope, within leſs than 200 years after Chriſt writes to *Lucius*, the *Britiſh* king, and calls him God's vicar within his kingdom: which title he would not have given to that king, if himſelf, under pretence of being God's vicar-general on earth, had claimed juriſdiction over all Chriſtian kingdoms.

Pelagius the monk of *Bangor*, about the year 400, being cited to *Rome*, refuſed to appear upon the pope's citation, affirming that *Britain* was neither within his dioceſe nor his province.

After that, about the year 600, *Auguſtine* the monk was ſent by *Gregory* the Great into *England*, to convert the *Saxons* to the Chriſtian religion. The *Britiſh* biſhops then remaining in *Wales* regarded not his commiſſion nor his doctrine, as not owing any duty, nor having any dependency on the court of *Rome*; but ſtill retained their ceremonies and traditions which they received from the eaſt church, upon the firſt plantation of the faith in that iſland, being divers and contrary to thoſe of the church of *Rome*, which *Auguſtine* did endeavour to impoſe upon them.

The like doth *Beda* write of the *Iriſh* prieſts and biſhops. For in the year 660, he reporteth, that a convocation of the clergy being called by king *Oſwif*, there roſe a diſputation between *Colman*, one of our *Iriſh* ſaints, then preſent in that ſynod, and *Wilfrid* a *Saxon* prieſt, touching the obſervation of *Eaſter*, wherein the *Britiſh* and *Iriſh* churches did then differ from the church of *Rome*. *Colman*, for the celebration of *Eaſter* uſed in *Ireland*, affirmed it was the ſame, *quod beatus evangeliſta* Johannes, *diſcipulus ſpecialiter à Domino dilectus, in omnibus quibus præerat eccleſiis celebrâſſe legitur*. On the other part *Wilfrid* alledged, that all the churches of Chriſtendom did then celebrate *Eaſter* after the *Roman* manner, except the churches of the *Britains* and *Picts*, *qui contra totum orbem* (ſaith he) *ſtulto labore pugnant*. Whereunto *Colman* replied, *miror quare ſtultum laborem appellas, in quo tanti apoſtoli, qui ſuper pectus Domini recumbere dignus fuit, exempla ſectamur. Numquid reverendiſſimum patrem noſtrum* Columbam *&* *ejus ſucceſſores, viros à Deo dilectos, divinis paginis contraria ſapuiſſe aut egiſſe credendum eſt?* In this diſputation or dialogue two things may be obſerved: firſt, that at this time the authority of the biſhop of *Rome* was of no eſtimation in theſe iſlands: next, that the primitive churches of *Britany* and *Ireland* were inſtituted according to the form and diſcipline of the eaſt churches, and not of the weſt, and planted by the diſciples of *John*, and not of *Peter*. Thus much for the time of the *Britains*. For the *Saxons*, though king *Ina* gave the *Peter-pence* to the pope, partly as alms, and partly in recompence of a houſe erected in *Rome* for entertainment of *Engliſh* pilgrims; yet it is certain, that *Alfred* and *Athelſtane*, *Edgar* and *Edmund*, *Canutus* and *Edward* the Confeſſor, and divers other kings of the *Saxon* race, did give all the biſhopricks in *England per annulum & baculum*, without any other ceremony, as the emperor and *French* king and other Chriſtian princes were wont to do. They made alſo ſeveral laws for the government of the church. Among others, St. *Edward* begins his laws with this proteſtation, that it is his princely charge, *ut populum domini, & ſuper omnia ſanctam eccleſiam, regat & gubernet*. And king *Edgar*, in his oration to his *Engliſh* clergy, *ego* (ſaith he) Conſtantini, *vos* Petri *gladium habetis: jungamus dextras, & gladium gladio copulemus, ut ejiciantur extra caſtra leproſi, & purgetur ſanctuarium Domini*. So as the kings of *England* with their own clergy did govern the church, and therein ſought no aid of the court of *Rome*. And the truth is, that though the pope had then long hands, yet he did not extend them ſo far as *England*; becauſe they were full of buſineſs nearer home in drawing the emperor and the *French* king under his yoke. But upon the conqueſt made by the *Norman*, he apprehended the firſt occaſion to uſurp upon the liberties of the crown of *England*. For the Conqueror came in with the pope's banner, and under it won the battle which got him the garland; and therefore the pope preſumed he might boldly pluck ſome flowers from it, being partly gained by his countenance and bleſſing. Hereupon he ſent two legates into *England*, which were admitted and received by the Conqueror. With them he called a ſynod of the clergy, and depoſed old *Stigand*, archbiſhop of *Canterbury*, becauſe he had not purchaſed his pall in the court of *Rome*. He diſplaced many biſhops and abbots, to place his *Normans* in their rooms. And amongſt the reſt it is to be noted, that the king having earneſtly moved *Wolſtan* biſhop of *Worceſter*, being then very aged, to give up his ſtaff; his anſwer was, that he would give up his ſtaff only to him of whom he firſt received the ſame. And ſo the old man went to St. *Edward*'s tomb, and there offered up his ſtaff and ring, with theſe words: *Of thee, O holy* Edward, *I received my ſtaff and my ring, and to thee I do now ſurrender the ſame again*. Which proves, that before the *Norman* Conqueſt the king did inveſt his biſhops *per annulum & baculum*, as I ſaid before.

The firſt uſurpation of the pope upon the crown began in the time of king *William* the Conqueror.

By ſending legates into *England*.

Thus we ſee, by the admiſſion of the pope's legates, the firſt ſtep or entry made into his uſurped juriſdiction in *England*. Albeit, the king ſtill retained the abſolute power of inveſting biſhops, and ſeemed only to uſe the advice and aſſiſtance of the legates in eccleſiaſtical matters; for that no decree paſſed or was put in execution without his royal aſſent thereunto. Beſides, how far forth he ſubmitted himſelf to the pope, it appeareth by a ſhort epiſtle he wrote to *Gregory* 7. in this form. *Excellentiſſimo ſanctæ eccleſiæ paſtori*, Gregorio, *gratiâ Dei* Anglorum *rex & dux* Normanorum Willielmus *ſalutem cum amicitia*. Hubertus *legatus tuus, religioſe pater, ad me veniens ex tua parte, me admonuit, ut tibi & ſucceſſoribus tuis fidelitatem facerem, & de pecunia, quam anteceſſores mei ad* Romanam *eccleſiam mittere ſolebant, melius cogitarem. Unum admiſi, alterum non admiſi. Fidelitatem facere nolui, nec volo; quia nec ego promiſi, nec anteceſſores meos anteceſſoribus tuis id feciſſe comperio. Pecunia, tribus ferè annis, in* Galliis *me agente, negligenter collecta eſt. Nunc vero divinâ miſericordiâ me in regnum meum reverſo, quod collectum eſt per præfatum legatum mittetur; & quod reliquum eſt, per legatos* Lanfranci *archiepiſcopi fidelis noſtri, cum opportunum fuerit, tranſmittetur, &c.*

In the time of *Wil. Rufus* the pope attempted to draw appeals to *Rome*, but prevailed not.

But in the time of his next ſucceſſor, king *William Rufus*, they attempted to paſs one degree farther, that is, to draw appeals to the court of *Rome*. For *Anſelme* being made archbiſhop of *Canterbury*, and being at ſome difference with the king, beſought his leave to go to *Rome*, under pretence of fetching his pall. The king, knowing he would appeal to the pope, denied him leave to go, and withal told him that none of his biſhops ought to be ſubject to the pope, but the pope himſelf ought to be ſubject to the emperor; and that the king of *England* had the ſame abſolute liberties in his dominions as the emperor had in the empire; and that it was an ancient cuſtom and law in *England*, uſed time out of mind before the Conqueſt, that none might appeal to the pope without the king's leave; and that he that breaketh this law or cuſtom doth violate the crown and dignity royal, and he that violates my crown (ſaith he) is mine enemy, and a traitor. How anſwer you this, quoth the king? Chriſt himſelf anſwers you, ſaith the archbiſhop, *tu es* Petrus, *& ſuper hanc petram, &c.* wherewith the king was nothing ſatisfied. And thereupon *Anſelme* departing out of the realm without licence, the king ſeized his temporalities, and became ſo exaſperate and implacable towards the biſhop, as he kept him in perpetual exile during his reign; albeit great interceſſion were made for his return, as well by the pope as the king of *France*.

In the time of king *Hen*. the firſt the pope uſurpeth the donation of biſhopricks, &c.

In the time of the next king, *Hen*. 1. though he were a learned and a prudent prince, yet they ſought to gain a farther point upon him, and to pluck a flower from his crown of greater value, namely, the patronage and donation of biſhopricks and all other benefices eccleſiaſtical. For *Anſelme* being revoked and re-eſtabliſhed in the ſee of *Canterbury*, the biſhopricks of *Saliſbury* and *Hereford* fell void, which the king beſtowed on two of his chaplains. But *Anſelme* their metropolitan did refuſe to conſecrate them, ſo as the archbiſhop of *York* was fain to perform that office, who with the chief of the *Engliſh* clergy ſtood with the king, and withſtood *Anſelme*. Hereupon the king requires him to do his homage; the biſhop denies it. The king demands of him whether the patronage and inveſtiture of all biſhopricks were not his rightful inheritance. The biſhop ſaid it was not his right; becauſe pope *Urban* had lately made a decree, that no lay perſon ſhould give any eccleſiaſtical benefice. This was the firſt queſtion, that ever was made, touching the king of *England*'s right of patronage and donation of biſhopricks within his dominions. This new queſtion cauſed many meſſages and embaſſages to *Rome*. At laſt the king writes plainly to the pope, *notum habeat ſanctitas veſtra,*

Hiſtor. Jornalenſis M. S. in Archiv. Rob. Cotton *Eq. Aur.*

quod me vivente (Deo auxiliante) dignitates & uſus regni noſtri non minuentur; *& ſi ego (quod abſit) in tanta me directione ponerem, magnates mei, imo totius* Angliæ *populus, id nullo modo pateretur.* Beſides, *William de Warrenaſt*, the king's procurator in the court of *Rome*, told the pope, that the king would rather loſe his kingdom than he would loſe the donation of biſhopricks. The pope anſwered, Know you preciſely, ſir, I ſpeak it before God, that for the redemption of my head I would not ſuffer him to enjoy it.

After this *Anſelme* being received into the king's favour, in a ſynod of the *Engliſh* clergy holden at *London* in the year 1107, a decree was made, *cui annuit rex* Henricus, ſaith *Matth. Paris*, that from thenceforth, *nunquam per donationem baculi paſtoralis vel annuli quiſquam de epiſcopatu vel abbathia per regem, vel quamlibet laicam manum, inveſtiretur in* Angliæ. In recompence whereof the pope yielded this favour to the king, that thenceforth no legate ſhould be ſent from the pope's ſide into *England*, unleſs the king required it; and that the archbiſhop of *Canterbury* for the time being ſhould be for ever *legatus natus*; and *Anſelme*, for the honour of his ſee, obtained, that the archbiſhop of *Canterbury* ſhould in all general councils ſit at the pope's foot, *tanquam alterius orbis papa.* Notwithſtanding, as the ſucceeding popes kept not their promiſe touching the ſending of legates, ſo this ſelf-ſame king, after the death of *Anſelme*, broke the decree touching the inveſtiture of the biſhops. For he gave the archbiſhoprick of *Canterbury* to *Rodolph* biſhop of *London*, ſaith *Matth. Paris*, *et illum per annulum & paſtoralem baculum inveſtivit*; as before he had inveſted *Willielmum Gifford* in the biſhoprick of *Wincheſter*, *contra novi concilii ſtatuta*, as the ſame author reporteth.

In the time of king *Stephen* the pope gained appeals to the court of *Rome.*

The times of the next ſucceeding king *Stephen* were full of civil diſſentions, which made the land well-nigh waſte, ſo as St. *Peter*'s ſucceſſor could not take any fiſh in ſuch troubled waters. Yet during this king's reign they won that point of juriſdiction, which they attempted to get, but failed thereof, in the time of king *William Rufus*; namely, that appeals might be made to the court of *Rome*. For in a ſynod at *London* ſummoned by *Henry* biſhop of *Wincheſter*, the pope's legate, it was decreed, that appeals ſhould be made from provincial councils to the pope. Before that time *appellationes in uſu non erant*, ſaith a monk of that time, *donec* Henricus Winton. *Epiſcopus malo ſuo, dum legatus eſſet, crudeliter intruſit.* Thus did the pope uſurp three main points of juriſdiction upon three ſeveral kings after the Conqueſt, (for of *William Rufus* he could win nothing) namely, upon the Conqueror, the ſending of legates or commiſſioners to hear and determine eccleſiaſtical cauſes; upon *Hen.* 1. the donation and inveſtitures of biſhopricks and other benefices; upon king *Stephen*, the appeals to the court of *Rome.*

In the time of king *Hen.* 2. the pope claimed exemption of clerks from the ſecular power.

A brief of *Tho. Becket*'s troubles, or rather treaſons.

Now are we come to king *Henry* 2. in whoſe time they made a farther encroachment upon the crown, whereby they endeavoured to make him but half a king, and to take away half his ſubjects, by exempting all clerks from ſecular power. Hereupon roſe that long and great contention between *Henry* 2. and *Thomas Becket*, which on *Becket*'s behalf may be rightly termed rebellion and treaſon; the juſt cauſe and ground whereof was the ſame that made the late difference between the pope and the *Venetians.* For a prieſt had committed a foul murder; and being thereof indicted and convicted, prayed the benefit of his clergy; which being allowed unto him, he was delivered to the biſhop of *Saliſbury*, being his ordinary, to make his purgation; which the murderer failing to do ſhould by the law have been degraded, and delivered back to the ſecular power. But the biſhop, contemning the law of the land, to enlarge the liberties of the church, ſent his priſoner to *Thomas Becket* then archbiſhop of *Canterbury*, who ſhifted him into an abbey, and ſo reſcued him from the capital puniſhment he had juſtly deſerved.

This gap of impunity being once opened, the clergy grew ſo outrageous, as the king was informed of a hundred murders committed by clerks, and yet not one of them executed for the ſame; for that the archbiſhop had protected them all after the ſame manner. For this the king was juſtly incenſed againſt the archbiſhop, who juſtified his doing herein. Whereupon a common council as well of the biſhops as of the nobility was called, wherein they did revive and re-eſtabliſh the ancient laws and cuſtoms of the kingdom for the government of the clergy, and ordering of cauſes eccleſiaſtical, whereof theſe were the principal heads or articles.

The conſtitutions of *Claringdon.*

1. That no biſhop nor clerk ſhould depart the realm without the king's licence; and that ſuch as obtained licence ſhould give ſecurities, that they ſhould procure no hurt or damage to the king or realm during their abſence in foreign parts.

2. That all biſhopricks and abbeys being void ſhould remain in the king's hands as his own demeſnes, until he had choſen and appointed a prelate thereunto; and that every ſuch prelate ſhould do his homage to the king before he were admitted into the place.

3. That appeals ſhould be made in cauſes eccleſiaſtical in this manner; from the archdeacon to the ordinary, from the ordinary to the metropolitan, from the metropolitan to the king, and no farther.

4. That *Peter-pence* ſhould be paid no more to the pope, but to the king.

5. That if any clerk ſhould commit felony, he ſhould be hanged; if treaſon, he ſhould be drawn and quartered.

6. That it ſhould be adjudged high-treaſon to bring in bulls of excommunication, whereby the realm ſhould be curſed.

7. That no decree ſhould be brought from the pope to be executed in *England*, upon pain of impriſonment and confiſcation of goods.

To theſe and other conſtitutions of the like nature made at *Claringdon*, all the reſt of the biſhops and great men did ſubſcribe, and bound themſelves by oath to obſerve the ſame abſolutely. Only the archbiſhop would not ſubſcribe, and ſwear, but with a ſaving, *ſalvo ſuo ordine & honore ſanctæ eccleſiæ.* Yet at laſt he was content to make the like abſolute ſubſcription and oath as the reſt had done; but preſently he repented, and to ſhew his repentance ſuſpended himſelf from celebrating maſs, till he had received abſolution from the pope. Then he began to maintain and juſtify the exemption of clerks again; whereat the king's diſpleaſure was kindled anew; and then the archbiſhop once again promiſed abſolute obedience to the king's laws. (See the fickleneſs and mutability of your conſtant martyr.) The king, to bind faſt this ſlippery *Proteus*, called a parliament of the biſhops and barons; and ſending for the roll of thoſe laws, required all the biſhops to ſet their ſeals thereunto. They all aſſented but the archbiſhop, who proteſted he would not ſet his ſeal, nor give allowance to thoſe laws. The king, being highly offended with his rebellious demeanour, required the barons in parliament to give judgment of him, who being his ſubject would not be ruled by his laws; *cito facite mihi juſtitiam de illo, qui homo meus ligeus eſt, & ſtare juri in curia mea recuſat.* Whereupon the barons proceeding againſt him, and being ready to condemn him; I prohibit you (quoth the archbiſhop) in the name of Almighty God to proceed againſt me; for I have appealed to the pope: and ſo departed in contempt of that high court, *omnibus clamantibus*, ſaith *Hoveden*, *quo progrederis proditor? exſpecta & audi judicium tuum.* After this he lurked ſecretly near the ſea-ſhore; and changing his apparel and name (like a Jeſuit of theſe times,) he took ſhipping with a purpoſe to fly to *Rome.* But his paſſage being hindered by contrary winds, he was ſummoned to a parliament at *Northampton*, where he made default wilfully; for which contempt, his temporalities were ſeized, and his body being attached, he was charged with ſo great an account to the king, as that he was found in arrear thirty thouſand marks, and committed to priſon; whence he found means to eſcape ſhortly after, and to paſs out of the realm to *Rome.* He was no ſooner gone, but the king ſends writs to all the ſheriffs in *England* to attach the bodies of all ſuch as made any appeals to the court of *Rome.* Hereupon many meſſages and letters paſſing to and fro, all the ſuffragans of *Canterbury* join in a letter to the pope, wherein they condemn the fugitive archbiſhop, and juſtify the king's proceedings. Upon this the pope ſends two legates to the king, being then in *Normandy*, to mediate for the archbiſhop. They, with the mediation of the *French* king, prevailed ſo far with king *Henry*, as that he was pleaſed to accept his ſubmiſſion once again, and promiſed the king of *France*, that if he would be obedient to his laws, he ſhould enjoy as ample liberties as any archbiſhop of *Canterbury* ever had; and ſo ſent him into *England* with recommendation unto the young king his ſon, then lately crowned; who, hearing of his coming, commanded him to forbear to come to his preſence, until he had abſolved the archbiſhop of *York* and others, whom he had excommunicated for performing their duties at his coronation. The archbiſhop returned anſwer, that they had done him wrong in uſurping his office; yet if they would take a ſolemn oath to become obedient to the pope's commandment in all things concerning the church, he would abſolve them. The biſhops, underſtanding this, proteſted they would never take that oath, unleſs the king willed them ſo to do. King *Henry* the father, being hereof advertiſed into *France*, did riſe into great paſſion and choler, and in the hearing of his ſervants uttered words to this effect; *Will no man revenge me of mine enemies?* Whereupon the four gentlemen named in the ſtories of that time paſſed into *England*, and firſt moving the archbiſhop to abſolve the biſhops whom he had excommunicated for performing their duties at the young king's coronation, and receiving a peremptory anſwer of denial from the archbiſhop, they laid violent hands upon him, and ſlew him; for which the king was fain not only to ſuffer corporal penance, but in token of his humiliation to kiſs the knee of the pope's legate. And this is the abridgment of *Becket*'s troubles, or rather treaſons, for which he was celebrated for ſo famous a martyr.—And thus you ſee by what degrees the court of *Rome* did within the ſpace of 100 and odd years uſurp upon the crown of *England* four points of juriſdiction, *viz.* Firſt, ſending out of legates into *England.* Secondly, drawing of appeals to the court of *Rome.* Thirdly, donation of biſhopricks and other eccleſiaſtical benefices. And fourthly, exemption of clerks from the ſecular power. And you ſee withal how our kings and parliaments have from time to time oppoſed and withſtood this unjuſt uſurpation.

Four points of juriſdiction uſurped upon the crown of *England* by the pope before the reign of king *John.*

Now then the biſhop of *Rome* having claimed and well nigh recovered full and ſole juriſdiction in all cauſes eccleſiaſtical, and over all perſons eccleſiaſtical, with power to diſpoſe of all eccleſiaſtical benefices in *England*, whereby he had upon the matter made an abſolute conqueſt of more than half the kingdom, (for every one that could read the pſalm of *Miſerere* was a clerk, and the clergy poſſeſſed the moiety of all temporal poſſeſſions) there remained now nothing to make him owner and proprietor of all, but to get a ſurrender of the crown, and to make the king his farmer, and the people his villains, which he fully accompliſhed and brought to paſs in the times of king *John* and of *Henry* 3.

The cauſe of the quarrel between king *John* and the pope.

The quarrel between the pope and king *John*, which wreſted the ſcepter out of his hand, and in the end brake his heart, began about the election of the archbiſhop of *Canterbury.* I call it election, and not donation or inveſtiture; for the manner of inveſting of biſhops by the ſtaff and ring after the time of king *Hen.* 1. was not any more uſed, but by the king's licenſe they were canonically elected, and being elected, the king gave his royal aſſent to their election, and by reſtitution of their temporalities did fully inveſt them. And though this courſe of election began to be in uſe in the time of *Rich.* 1. and *Hen.* 2. yet I find it not confirmed by any conſtitution or charter before the time of king *John*, who by his charter dated the 15th of *January*, in the ſixteenth year of his reign, granted this privilege to the church of *England* in theſe words, *viz.* *Quod qualiſcunque conſuetudo temporibus prædeceſſorum noſtrorum hactenus in eccleſia* Anglicana *fuerit obſervata, & quicquid juris nobis hactenus vindicaverimus, de cætero in univerſis & ſingulis eccleſiis & monaſteriis, cathedralibus & conventualibus, totius regni* Angliæ, *liberæ ſint in perpetuum electiones quorumcumque prælatorum, majorum & minorum: ſalvâ nobis & hæredibus noſtris cuſtodiâ eccleſiarum & monaſteriorum vacantium quæ ad nos pertinent. Promittimus etiam, quod nec impediemus nec impediri permittemus per miniſtros noſtros, nec procurabimus, quin in univerſis & ſingulis monaſteriis & eccleſiis, poſtquam vacuerint prælaturæ, quemcumque voluerint libere ſibi præficiant electores paſ-*

When canonical election began firſt in *England.*

torum, petitâ tamen à nobis priùs & hæredibus noſtris licentiâ eligendi, quam non denegabimus nec differemus. Et ſimiliter, poſt celebratam electionem, noſter requiratur aſſenſus, quem non denegabimus, niſi adverſus eandem rationale propoſuerimus, & legitimè probaverimus propter quod non debemus conſentire, &c.

But to return to the cauſe of his great quarrel with the pope. The ſee of *Canterbury* being void, the monks of *Canterbury* ſuddenly and ſecretly without the king's licenſe elected one *Reignold* their ſub-prior to be archbiſhop, who immediately poſted away to be confirmed by the pope. But when he came there, the pope rejected him, becauſe he came not recommended from the king. Hereupon the monks made ſuit to the king to nominate ſome fit perſon to whoſe election they might proceed. The king commends *John Gray* biſhop of *Norwich*, his principal counſellor, who was afterwards lord juſtice of this kingdom, who with a full conſent was elected by them, and afterwards admitted and fully inveſted by the king. Theſe two elections bred ſuch a controverſie as none might determine but the pope, who gave a ſhort rule in the caſe; for he pronounced both elections void, and cauſed ſome of the monks of *Canterbury*, who were then preſent in the court of *Rome*, to proceed to the election of *Stephen Langton*, lately made cardinal at the motion and ſuit of the *French* king: who being ſo elected was forthwith confirmed and conſecrated by the pope, and recommended to the king of *England* with a flattering letter, and a preſent of four rings ſet with precious ſtones, which were of great value and eſtimation in thoſe days. Howbeit, the king more eſteeming this jewel of the crown, namely, the patronage of biſhopricks, returned a round and kingly anſwer to the pope, that inconſiderately and raſhly he had caſſed and made void the election of the biſhop of *Norwich*, and had cauſed one *Langton*, a man to him unknown, and bred up and nouriſhed amongſt his mortal enemies, to be conſecrated archbiſhop, without any due form of election, and without his royal aſſent, which was moſt of all requiſite by the antient laws and cuſtoms of his realm. That he marvelled much, that the pope himſelf and the whole court of *Rome* did not conſider what a precious account they ought to make of the king of *England*'s friendſhip, in regard that his one kingdom did yield them more profit and revenue than all the other countries on this ſide the *Alps*. To conclude, he would maintain the liberties of his crown to the death, he would reſtrain all his ſubjects from going to *Rome*. And ſince the archbiſhops, biſhops and other prelates within his dominions, were as learned and religious as any other in Chriſtendom, his ſubjects ſhould be judged by them in eccleſiaſtical matters, and ſhould not need to run out of their own country *to beg juſtice at the hands of ſtrangers.*

King *John*'s round and kingly letter to the pope.

But what followed upon this? The pope, after a ſharp reply, ſendeth forth a bull of malediction againſt the king, and of interdiction againſt the realm, whereby all the churches in *England* were ſhut up, the prieſts and religious perſons were forbidden to uſe any liturgies or divine ſervice, to marry, to bury, or to perform any Chriſtian duty among the people. This put the king into ſuch a rage, that he on the other part ſeiſed the temporalities of all biſhops and abbots, and confiſcated the goods of all the clergy. Then doth the pope by a ſolemn ſentence at *Rome* depoſe the king, and by a bull ſent into *England* diſchargeth his ſubjects of their allegeance, and by a legate ſent to the king of *France* gave the kingdom of *England* to him and his ſucceſſours for ever.

The pope curſeth the king, and interdicteth the realm.

Theſe things brought ſuch confuſion and miſery to all eſtates and degrees of people in *England*, as the king became odious to all his ſubjects, as well to the laiety as to the clergy. For as the biſhops and religious people curſed him abroad; ſo the barons took arms againſt him at home, till with much bloodſhed they forced him, by granting the *great charter*, to reſtore king *Edward*'s laws, containing the ancient liberties of the ſubjects of *England*. The pope being a ſpectator of this tragedy, and ſeeing the king in ſo weak and deſperate eſtate, ſent a legate to comfort him, and to make a reaſonable motion unto him; to wit, that he ſhould ſurrender and give up his crown and kingdom to the pope, which ſhould be regranted unto him again to hold in fee-farm and vaſſalage of the church of *Rome:* and that thereupon the pope would bleſs him and his realm again, and curſe his rebells and enemies in ſuch ſort, as he ſhould be better eſtabliſhed in his kingdom then he was before. In a word, this motion was preſently embraced by that miſerable king, ſo as with his own hands he gave up the crown to the pope's legate, and by an inſtrument or charter ſealed with a bull or ſeal of gold he granted to God and the church of *Rome*, the apoſtles *Peter* and *Paul*, and to pope *Innocent* the third and his ſucceſſors, the whole kingdom of *England*, and the whole kingdom of *Ireland*; and took back an eſtate thereof by an inſtrument ſealed with lead, yielding yearly to the church of *Rome* over and above the *Peter-pence* a thouſand marks ſterling, *viz.* ſeven hundred marks for *England*, and three hundred marks for *Ireland*, with a flattering ſaving of all his liberties and royalties. The pope had no ſooner gotten this conveyance, though it were void in law, but he excommunicateth the barons, and repeals the *great charter*, affirming that it contained liberties too great for his ſubjects; calls the king his vaſſal, and theſe kingdoms St. *Peter*'s patrimony; grants a general bull of proviſion for the beſtowing of all eccleſiaſtical benefices, and takes upon him to be abſolute and immediate lord of all. And thus, under colour of exerciſing juriſdiction within theſe kingdoms, the pope, by degrees, got the very kingdoms themſelves. And ſo would he do at this day, if the king would give way to his juriſdiction.

But what uſe did the pope make of this grant and ſurrender of the crown unto him? What did he gain by it, if our kings retained the profits of their kingdoms to their own uſe? Indeed we do not find, that the fee-farm of a thouſand marks was ever paid, but that it is all run in arrear till this preſent day. For the truth is, the court of *Rome* did ſcorn to accept ſo poor a revenue as a thouſand marks *per annum* out of two kingdoms. But after the death of king *John*, during all the reign of *Hen.* 3. his ſon, the pope did not claim a ſeigniory or a rent out of *England* and *Ireland*, but did endeavour to convert all the profits of both lands to his own uſe, as if he had been ſeized of all in demeſne. For whoſoever will read *Matt. Paris* his ſtory of the time of king *Hen.* 3. will ſay theſe things ſpoken of before were but the *beginnings of evils.* For the exactions and oppreſſions of the court of *Rome* were ſo continual and intolerable, as that poor monk, who lived in thoſe times, though otherwiſe he adored the pope, doth call *England Balaam*'s aſs loaden, beaten, and enforced to ſpeak; doth call the court of *Rome Charybdis* and *Barathrum avaritiæ*, the pope's collectors harpys, and the pope himſelf a ſtepfather, and the church of *Rome* a ſtepmother. He ſheweth, that two third parts of the land being then in the hands of church-men, the entire profits thereof were exported to enrich the pope and the court of *Rome:* which was done for the moſt part by theſe two ways and means. Firſt, by conferring the beſt eccleſiaſtical benefices upon *Italians*, and other ſtrangers reſident in that court, whoſe farmers and factors in *England* took the profits, turned them into money, and returned the money to *Rome*. Secondly, by impoſing continual taxes and tallages, (worſe then *Iriſh* cuttings) being ſometimes the tenth, ſometimes the fifteenth, ſometimes the third, ſometimes the moiety of all the goods both of the clergy and laiety, under colour of maintaining the pope's holy wars againſt the emperor and the *Greek* church, who were then ſaid to be in rebellion againſt their lady and miſtreſs the church of *Rome*. Beſides, for the ſpeedy levying and ſafe return of theſe moneys, the pope had his *Lombards* and other *Italian* bankers and uſurers reſident in *London* and other parts of the realm, who offered to lend and diſburſe the moneys taxed, and return the ſame by exchange to *Rome*, taking ſuch penal bonds, the form whereof is ſet down by *Matt. Paris*, and ſuch exceſſive uſury, as the poor religious houſes were fain to ſell their chalices and copes, and the reſt of the clergy and laiety had their backs bowed and their eſtates broken under the burthen. Beſides, the pope took for perquiſites and caſualties the goods of all clerks that died inteſtate, the goods of all uſurers, and all goods given to charitable uſes. Moreover he had a ſwarm of friars, (the firſt corrupters of religion in *England)* who perſwaded the nobility and gentry to put on the ſign of the croſs, and to vow themſelves to the holy wars; which they had no ſooner done, but they were again perſwaded to receive diſpenſations of their vows, and to give money for the ſame to the church of *Rome*. I omit divers other policies then uſed by the pope's collectors to exhauſt the wealth of the realm, which they affirmed they might take with as good a conſcience as the *Hebrews* took the jewels of the *Egyptians*. Briefly, whereas the king had ſcarce means to maintain his royal family, they received out of *England* ſeventy thouſand pounds ſterling at leaſt yearly, which amounteth to two hundred and ten thouſand pounds ſterling of the monies current at this day. Beſides, they exported ſix thouſand marks out of *Ireland* at one time, which the emperor *Frederick* intercepted. Laſtly, the king himſelf was ſo much dejected, as at a royal feaſt he placed the pope's legate in his own chair of eſtate, himſelf ſitting on his right hand, and the biſhop of *York* on his left, *non ſine multorum obliquantibus oculis*, ſaith *Matt. Paris.*

Thus we ſee the effect of the pope's pretended juriſdiction within the dominions of the king of *England*. We ſee to what calamity and ſervitude it then reduced both the prince and people. Was it not therefore high time to meet and oppoſe thoſe inconveniences? Aſſuredly if king *Edward* 1. who was the ſon and heir of *Hen.* 3. had inherited the weakneſs of his father, and had not reſiſted this uſurpation and inſolency of the court of *Rome*, the pope had been proprietor of both theſe iſlands, and there had been no king of *England* at this day.

But king *Edward* 1. may well be ſtiled *vindex* Anglicæ *libertatis*, the *Moſes* that delivered his people from ſlavery and oppreſſion: and as he was a brave and victorious prince, ſo was he the beſt *pater patriæ* that ever reigned in *England* ſince the *Norman* Conqueſt, till the coronation of our gracious ſovereign. At the time of the death of his father he was abſent in the war of the holy land, being a principal commander of the Chriſtian army there, ſo as he returned not before the ſecond year of his reign. But he was no ſooner returned and crowned, but the firſt work he did was to ſhake off the yoke of the biſhop of *Rome*. For the pope having then ſummoned a general council, before he would licenſe his biſhops to repair to it, he took of them a ſolemn oath, that they ſhould not receive the pope's bleſſing. Again, the pope forbids the king to war againſt *Scotland*; the king regards not his prohibition: he demands the firſt-fruits of eccleſiaſtical livings; the king forbids the payment thereof unto him. The pope ſendeth forth a general bull prohibiting the clergy to pay ſubſidies or tributes to temporal princes: a tenth was granted to the king in parliament, the clergy refuſed to pay it: the king ſeizeth their temporalties for their contempt, and got payment notwithſtanding the pope's bull. After this he made the ſtatute of *Mortmain*, whereby he brake the pope's chief net, which within an age or two more would have drawn to the church all the temporal poſſeſſions of the kingdom, &c. Again, one of the king's ſubjects brought a bull of excommunication againſt another: the king commandeth he ſhould be executed as a traitor, according to the ancient law. But becauſe that law had not of long time been put in execution, the chancellor and treaſurer kneeled before the king, and obtained grace for him, ſo as he was onely baniſhed out of the realm. And as he judged it treaſon to bring in bulls of excommunication; ſo he held it a high contempt againſt the crown to bring in bulls of proviſion or briefs of citation; and accordingly the law was ſo declared in parliament 25 *Ed.* 1. which was the firſt ſtatute made againſt proviſors: the execution of which law, during the life of king *Ed.* 1. did wellnigh aboliſh the uſurped juriſdiction of the court of *Rome*, and did revive and reſtore again the ancient and abſolute ſovereignty of the king and crown of *England*.

King *Ed.* 1. oppoſeth the pope's uſurpation.

His ſucceſſor, king *Edward* 2. being but a weak prince, the pope attempted to uſurp upon him again: but the peers and people withſtood his uſurpation. And when that unhappy king was to be depoſed, amongſt many articles framed againſt him

E. 2. ſuffereth the pope to uſurp again.

him by his enemies, this was one of the moſt hainous, that he had given allowance to the pope's bulls.

E. 3. reſiſteth the uſurpation of the pope.

King *Rich.* 2.

Again, during the minority of king *Ed.* 3. and after that in the heat of the wars in *France*, the pope ſent many briefs and bulls into *England*; and at laſt preſumed ſo far, as that he gave an *Italian* the title of a cardinal in *England*, and withal by his bull gave him power to beſtow all eccleſiaſtical promotions as they ſhould fall void from time to time. This moved the king and the nobility to write to the pope to this effect. 'We and our anceſtors 'have richly endowed the church of *England*, and have founded abbeys 'and other religious houſes for the juriſdiction of our people, for maintenance of hoſpitality, and for the advancement of our countrymen and 'kinſmen. Now you provide and place ſtrangers in our benefices, that 'come not to keep reſidence thereupon; and if they come, underſtand 'not our language; and ſome of them are ſubjects to our mortal enemies; 'by reaſon whereof our people are not inſtructed, hoſpitality is not kept, 'our ſcholars are unpreferred, and the treaſure of the realm is exported.' The pope returneth anſwer, that the emperor had lately ſubmitted himſelf to the church of *Rome* in all points, and was become the pope's great friend; and in menacing manner adviſed the king of *England* to do the like. The king replies, that if the emperor and *French* king both ſhould take his part, he was ready to give battle to both in defence of the liberties of his crown. Hereupon the ſeveral ſtatutes againſt proviſors before recited were put in execution ſo ſeverely, as the king and his ſubjects enjoyed their right of patronage clearly: and their exemption of clerks took no place at all; for that the abbot of *Waltham* and biſhop of *Wincheſter* were both attainted of high contempts, and the biſhop of *Ely* of a capital offence, as appeareth in the records of this king's reign. Yet during the nonage of *Rich.* 2. they began once again to encroach upon the crown, by ſending legates and bulls and briefs into *England*, whereof the people were ſo ſenſible and impatient, as that at their ſpecial prayer, this law of 16 *Rich.* 2. (whereupon our indictment is framed) was enacted, being more ſharp and penal than all the former ſtatutes againſt proviſors. And yet againſt this king, as againſt *Ed.* 2. it was objected at the time of his deprivation, that he had allowed the pope's bulls, to the enthralling of the crown.

After this in the weak time of king *Hen.* 6. they made one attempt more to revive their uſurped juriſdiction by this policy. The commons had denied the king a ſubſidy when he ſtood in great want of moneys. The archbiſhop of *Canterbury* and the reſt of the biſhops offered the king a large ſupply of his wants, if he would conſent that all the laws againſt proviſors, and eſpecially this law of 16 *Rich.* 2. might be repealed. But *Humphry* duke of *Glouceſter*, who had lately before caſt the pope's bull into the fire, did likewiſe cauſe this motion to be rejected. So as by ſpecial providence theſe laws have ſtood in force even till this day in both theſe kingdoms.

The evidence againſt *Lalor*.

Then the attorney-general deſcended to the evidence, whereby he proved fully all the parts of the indictment. Firſt, it was proved by *Lalor*'s own confeſſion, upon ſeveral examinations taken before the lord-deputy and lord-chancellor, and others, that he had accepted the office and title of vicar-general in the dioceſes of *Dublin*, *Kildare* and *Fernes*, by virtue of the pope's bull. Secondly, it appeared by the copies of ſundry letters found among his papers at his apprehenſion, that he ſtiled himſelf the pope's vicar, in this form, *Robertus Dublinien. & Kiſdaren. & Fernen. diœces. vicarius apoſtolicus.* Thirdly, there were produced the copies of divers acts and inſtruments, written for the moſt part with *Lalor*'s own hand, ſome of inſtitutions of popiſh prieſts to benefices, others of diſpenſations with marriage within the degrees, others of divorces, others of diſpenſations for non-payment of tithes. Whereby it was manifeſtly proved that he did execute the pope's bull, in uſurping and exerciſing epiſcopal juriſdiction, as vicar-general of the ſee apoſtolick, within the dioceſes before named.

To this evidence he made a three-fold anſwer. Firſt, that he was no ſuiter for the office of vicar-general, but it was impoſed on him, and he accepted *virtute obedientiæ*, only to obey his ſuperiors. Next, that he did exerciſe the office of vicar-general *in foro conſcientiæ tantùm*, and not *in foro judicii*. And laſtly, that thoſe copies of inſtitutions, diſpenſations and divorces, were many of them written with his man's hand, as precedents of ſuch acts and inſtruments, without his privity or direction. Hereupon ſir *James Ley*, chief juſtice, told him, that he could not well ſay, that he accepted that unlawful office *virtute obedientiæ*, for there was no virtue in that obedience; that he owed an obedience to the law and to the king, who is the true ſuperior and ſovereign over all his ſubjects, and hath no peer within his dominions; and that the ſuperiors whom he meant and intended were but uſurpers upon the king's juriſdiction, and therefore this excuſe did aggravate his contempt, in that it appeared he had vowed obedience to thoſe who were apparent enemies to the king and his crown. And though it were manifeſt that he exerciſed juriſdiction *in foro judicii*, (for every inſtitution is a judgment, and ſo is every ſentence of divorce) yet were his offence nothing diminiſhed if he had executed his office of vicar-general *in foro conſcientiæ tantùm*; for the court of man's conſcience is the higheſt tribunal, and wherein the power of the keys is exerciſed in the higheſt degree.

Lalor's confeſſion publickly read.

Hereunto the attorney-general took occaſion to add thus much, that *Lalor* had committed theſe high offences, not only againſt the law, but againſt his own conſcience, and that he was already condemned *in foro conſcientiæ*. For that he upon his ſecond examination had voluntarily acknowledged himſelf not to be a lawful vicar-general, and that he thought in his conſcience he could not lawfully take upon him the ſaid office. He hath alſo acknowledged our ſovereign lord king *James* to be his lawful, chief and ſupreme governor, in all cauſes, as well eccleſiaſtical as civil; and that he is in conſcience bound to obey him in all the ſaid cauſes, &c. as it is contained in his acknowledgment or confeſſion before ſet down; which being ſhewed forth by the attorney-general, the court cauſed it to be publickly read; and thereupon demanded of *Lalor*, if that were not his free and voluntary confeſſion ſigned with his own hand, and confirmed by his oath before the lord-deputy and council. He was not a little abaſhed at the publiſhing of this acknowledgment and confeſſion in the hearing of ſo many principal gentlemen, to whom he had preached a contrary doctrine; therefore, ſaid he, the ſhewing forth of this confeſſion is altogether impertinent and beſides the matter. Howſoever, he could not deny but that he made it, and ſigned it, and ſwore it, as it was teſtified by the lord-deputy and the reſt.

Then was it demanded of him, whether ſince the making of this confeſſion he had not proteſted to divers of his friends, that he had not acknowledged the king's ſupremacy in *eccleſiaſtical cauſes*. His anſwer was, that indeed he had ſaid to ſome of his friends who viſited him in the *Caſtle* of *Dublin*, that he had not confeſſed or acknowledged that the king was his ſupreme governor in *ſpiritual cauſes*, for that the truth is, in the confeſſion there is no mention made of *ſpiritual cauſes*, but of *eccleſiaſtical.*

This is a ſubtile evaſion indeed, ſaid the attorney-general; I pray you what difference do you make between *eccleſiaſtical cauſes* and *ſpiritual cauſes?* This queſtion, ſaid *Lalor*, is ſudden and unexpected at this time, and therefore you ſhall do well to take another day to diſpute this point. Nay, ſaid the attorney-general, we can never ſpeak of it in a better time or fitter place; and therefore, though you, that bear ſo reverend a title, and hold the reputation of ſo great a clerk, require a farther time, yet ſhall you hear that we laymen that ſerve his majeſty, and by the duty of our places are to maintain the juriſdiction of the crown, are never ſo unprovided, but that we can ſay ſomewhat touching the nature and difference of theſe cauſes.

When the diſtinction of eccleſiaſtical and ſpiritual cauſes from civil and temporal cauſes began in the world.

Firſt then, let us ſee when this diſtinction of *eccleſiaſtical* or *ſpiritual cauſes* from *civil* and *temporal cauſes* did firſt begin in point of juriſdiction. Aſſuredly, for the ſpace of three hundred years after Chriſt, this diſtinction was not known or heard of in the Chriſtian world. For the cauſes of teſtaments, of matrimony, of baſtardy and adultery, and the reſt which are called *eccleſiaſtical* or *ſpiritual cauſes*, were merely *civil*, and determined by the rules of the civil law, and ſubject only to the juriſdiction of the civil magiſtrate, as all civilians will teſtifie with me.

But after that the emperors had received the Chriſtian faith, out of a zeal and deſire they had to grace and honour the learned and godly biſhops of that time, they were pleaſed to ſingle out certain ſpecial cauſes wherein they granted juriſdiction unto the biſhops; namely, in cauſes of tithes, becauſe they were paid to men of the church; in cauſes of matrimony, becauſe marriages were for the moſt part ſolemnized in the church; in cauſes teſtamentary, becauſe teſtaments were many times made *in extremis*, when church-men were preſent, giving ſpiritual comfort to the teſtator, and therefore they were thought the fitteſt perſons to take the probates of ſuch teſtaments. Howbeit theſe biſhops did not proceed in theſe cauſes according to the canons and decrees of the church, (for the canon law was not then hatched or dreamed of) but according to the rules of the imperial law, as the civil magiſtrate did proceed in other cauſes; neither did the emperors, in giving this juriſdiction unto them, give away their own ſupreme and abſolute power, to correct and puniſh theſe judges as well as others, if they performed not their ſeveral duties. This then is moſt certain, that the primitive juriſdiction in all theſe cauſes was in the civil magiſtrate, and ſo in right it remains at this day; and though it be derived from him, it remaineth in him as in the fountain. For every Chriſtian monarch (as well as the godly kings of *Juda*) is *cuſtos utriuſque tabulæ*; and conſequently hath power to puniſh not only treaſon, murder, theft, and all manner of force and fraud, but inceſt, adultery, uſury, perjury, ſimony, ſorcery, idolatry, blaſphemy. Neither are theſe cauſes in reſpect of their own quality and nature to be diſtinguiſhed one from another by the names of *ſpiritual* or *temporal:* for why is adultery a *ſpiritual cauſe*, rather than murder, when they are both offences alike againſt the ſecond table; or idolatry rather than perjury, being both offences likewiſe againſt the firſt table? And indeed if we conſider the natures of theſe cauſes, it will ſeem ſomewhat abſurd, that they are diſtinguiſhed by the name of *ſpiritual* and *temporal*; for, to ſpeak properly, that which is oppoſed to *ſpiritual* ſhould be termed *carnal*; and that which is oppoſed to *temporal* ſhould be called *eternal.* And therefore if things were called by their proper names, adultery ſhould not be called a *ſpiritual* offence, but a *carnal.* But ſhall I expreſs plainly and briefly why theſe cauſes were firſt denominated, ſome *ſpiritual* or *eccleſiaſtical*, and others *temporal* and *civil?*

Truly, they were ſo called, not from the nature of the cauſes, as I ſaid before, but from the quality of the perſons whom the prince had made judges in thoſe cauſes. The clergy did ſtudy *ſpiritual* things, and did profeſs to live *ſecundùm ſpiritum*, and were called *ſpiritual men*; and therefore they called the cauſes wherein princes had given them juriſdiction *ſpiritual cauſes*, after their own name and quality. But becauſe the lay-magiſtrates were ſaid to intend the things of this world, which are *temporal* and tranſitory, the clergy called them *ſecular* or *temporal* men, and the cauſes wherein they were judges *temporal cauſes.* This diſtinction began firſt in the court of *Rome*, where the clergy having by this juriſdiction gotten great wealth, their wealth begot pride, their pride begot ingratitude towards princes, who firſt gave them their juriſdiction; and then, according to the nature of all ungrateful perſons, they went about to extinguiſh the memory of the benefit. For whereas their juriſdiction was firſt derived from *Cæſar*, in the execution whereof they were *Cæſar*'s judges, ſo as both their courts and cauſes ought ſtill to have born *Cæſar*'s image and ſuperſcription, as belonging unto *Cæſar*; they blotted *Cæſar*'s name out of the ſtile of their courts, and called them *courts Chriſtian*, as if the courts holden by other magiſtrates had been in compariſon but courts of *Ethnicks*; and the cauſes which in their nature were merely *civil*, they called *ſpiritual* and *eccleſiaſtical.* So as if the emperor ſhould challenge his courts and cauſes again, and ſay, *reddite* Cæſari *quæ ſunt* Cæſaris, they would all cry out on the contrary part and ſay, *date Deo quæ ſunt Dei*; our courts bear the name and title of Chriſt, the ſuperſcription of *Cæſar* is quite worn out, and not to be found upon them. And this point of their policy is worth the obſerving, that when they found their juriſdiction in matrimonial cauſes to be the moſt ſweet and gainful of all other, (for of *matrimony* they made *matter of money* indeed) to the end that *Cæſar* might never reſume ſo rich a perquiſite of their ſpiritual juriſdiction, they reduced matrimony into the number of the ſeven ſacraments: after which time it had been ſacrilege, if the civil magiſtrate had intermeddled with the leaſt matter that had relation to matrimony, or any dependency thereupon. So then it appeareth, that all cauſes, whereof eccleſiaſtical or ſpiritual perſons have cognizance or juriſdiction by the grants or permiſſion of princes, are called *eccleſiaſtical or ſpiritual cauſes.* And as all their courts are called *ſpiritual courts*, ſo all cauſes determinable in thoſe courts are called *ſpiritual cauſes.* And therefore where M. *Lalor* hath acknowledged the king's majeſty to be ſupreme governor in all *eccleſiaſtical cauſes*, he hath therein acknowledged the king's ſupremacy in all *ſpiritual cauſes*; wherein he hath but rendered to *Cæſar* that which is *Cæſar*'s, and hath given unto his majeſty no more than all the biſhops of *England* have yielded to his predeceſſors, not only in this latter age, but alſo in former times both before and ſince the Conqueſt, as hath been before at large expreſſed.

Here the day being far ſpent, the court demanded of the priſoner if he had any more to ſay for himſelf. His anſwer was, that he did willingly renounce his office of vicar-general, and did humbly crave his majeſty's grace and pardon. And to that end, he deſired the court to move the lord-deputy to be favourable unto him. Then the jury departed from the bar, and returning within half an hour, found the priſoner guilty of the contempts whereof he was indicted. Whereupon the ſolicitor-general moved the court to proceed to judgement. And ſir *Dominick Sarsfield*, knight, one of the juſtices of his majeſty's chief place, gave judgment according to the form of the ſtatute whereupon the indictment was framed.

[*The encroachments of the church of* Rome, *on the king's eccleſiaſtical juriſdiction, are the ſubject of other caſes beſides the preceding one of* præmunire. *In particular they are hiſtorically diſcuſſed in lord* Coke*'s* Caſe of the King's Eccleſiaſtical Law, *in the 5th* Report. *The publication of this latter caſe, with the active zeal of lord* Coke *as attorney-general, in the proſecution of the conſpirators in the gunpowder-plot, gave occaſion to a volume of animadverſions by the famous Jeſuit father* Parſons, *which was publiſhed in* 1606, *by the title of* An Anſwer to Lord Coke's 5th Report, by a Catholick divine. *But the aſperity with which lord* Coke *was treated, did not provoke a reply. All that it drew from him was a ſhort notice of the work in the preface to his 6th* Report, *in which he repreſents the author as a calumniator, and as ſuch diſdained to anſwer him. But the controverſy was afterwards continued by Mr.* Prynne, *who aſſerted the cauſe of the crown againſt the ſee of* Rome, *in a work of prodigious extent in the plan; for though the part publiſhed conſiſts of three large volumes, of more than* 1000 *pages each, yet it reaches only to the end of the reign of* Edward *the firſt. The work we allude to, is Mr.* Prynne*'s* Chronological Vindication of the King's ſupreme Eccleſiaſtical Juriſdiction, *the publication of which commenced four or five years after the Reſtoration. The firſt volume extends to the Conqueſt. The ſecond, which was publiſhed firſt, concludes with the reign of* Henry *the third. The third, being in part a ſupplement to the ſecond, is occupied with the reigns of* Henry *the third*, John, *and our firſt* Edward. *When the author had advanced thus far, death interpoſed, and prevented the completion of the undertaking. What he lived to publiſh is become ſo extremely ſcarce, that twenty guineas are the common price of a compleat copy. The cauſe is the ſmall remnant of copies of the firſt volume, moſt of them having been burnt in the great fire of* London.—*Such as are curious to ſee an account of the Jeſuit* Parſons, *may conſult* Camden's Annals of Elizabeth. *See the tranſlated edition in* 2. Kenn. Compl. Hiſt. *2d ed. p.* 477, 576.]

XVI. *The Caſe of the* Poſtnati, *or of the Union of the Realm of* Scotland *with* England; Trin. 6 James I.

[*From the meeting of the crowns of* England *and* Scotland *in the perſon of the firſt* James, *grew one of the moſt important queſtions of State, which ever engaged the attention of either country. It was, whether the* poſtnati, *or thoſe born in* Scotland *after the acceſſion of* James *to the crown of* England, *were in the latter country to be deemed aliens or natives. As to the* ante-nati, *all ſeem to have agreed, that they remained aliens. But there was a great difference of opinion about the condition of the* poſtnati. *The king, anxious for every thing which tended to conſolidate the iſland into one kingdom, was eager to have it declared as law, that the union of the crowns effected a mutual naturalization of the* poſtnati *in the two countries. His wiſhes were ſoon made known by the proclamation, in which he aſſumed the ſtile of king of* Great Britain, *with an exception however in favor of legal proceſs inſtruments and aſſurances; and words were introduced, importing, that his ſucceſſion to the crown of* England *had made a great change in the law of naturalization.* Rym. Fœd. *v.* 16. *p.* 603. 2. Bac. *laſt 4to. ed.* 144. *The commiſſioners, appointed by the reſpective parliaments of the two countries to treat for an union of government and laws, followed the king in this language; for they reſolved to propound to both parliaments a declaration of the law to that effect. But when the propoſition was made, the* Engliſh *houſe of commons were found averſe to it, notwithſtanding the countenance given by the lords, and an opinion delivered to them by ten out of eleven judges. It was therefore determined to ſettle the point out of parliament in the regular way, by reſorting to the* Engliſh *courts of juſtice. For this purpoſe, two ſuits were inſtituted in the name of* Robert Calvin, *a* poſtnatus *of* Scotland *and an infant; one in the* King's Bench *for the freehold of ſome land; and the other in* Chancery *for detainer of writings concerning the title to the freehold of the ſame eſtate: and in both it was pleaded by the defendants in abatement, that the plaintiff was an alien born in* Scotland *at a time which by the pleading appeared to be ſince the king's acceſſion to the crown of* England. *A demurrer to this plea neceſſarily brought forward the intended queſtion about the* poſtnati; *for if* Calvin *was an alien, he could not maintain either ſuit, aliens being incapable to ſue for the freehold of land. Theſe cauſes were adjourned into the* Exchequer-Chamber, *in order to have the ſolemn opinion of all the judges; and there the buſineſs ended with a reſolution in favour of the* poſtnati, *in which the lord-chancellor and twelve judges out of fourteen concurred. However, very eminent lawyers appear to have entertained a different opinion of the point. In parliament,* Dodridge, Hyde, Brock, Crew, Moore, *and* Hedley, *all ſpoke againſt the* poſtnati. *What the names of the two diſſenting judges were, is not mentioned; except that lord* Elleſmere *alludes to both having the chriſtian name of* Thomas, *the only judges of which name at the time were lord chief juſtice* Fleming, *Mr. juſtice* Walmeſley, *and Mr. juſtice* Foſter. *It is ſuſpected too, that the known inclinations and wiſhes of the king had no little influence in the deciſion. But be this as it may, we are not apprized that the main point of the caſe has been ever diſturbed by any ſubſequent judicial opinion.*

The only regular report we have of this caſe is by lord Coke. *But there is a great deal of matter relative to it in other books. Lord-chancellor* Elleſmere *publiſhed his argument ſeparately. Mr. ſerjeant* Moore *gives the hiſtory of the previous paſſages in parliament on the great point of law, for deciding which the caſe was afterwards made. In lord* Bacon*'s works, there are both his ſpeeches in parliament on the ſubject, and his argument before the judges in the* Exchequer-Chamber, *with ſome other pieces.* 152. 159. 170. 2. Bac. *4to. ed.* 173. 185. 514. Nathaniel Bacon, *in his book on government, examines and controverts the principles, on which lord* Coke *reports the caſe to have been decided.* Bac. on Gov. *part* 2. *page* 76. *The* Parliamentary Hiſtory *relates the proceedings in the* Engliſh *parliament in the* 2 *and* 4 Jam. *on the propoſal for an union between* England *and* Scotland, *and gives a ſhort view of ſome arguments in the commons on the point of naturalization.* 5. Parl. Hiſt. 89. *to* 97. *and* 157. *to* 214. *Archbiſhop* Spotſwood's Hiſtory *of the* Church *and* State *of* Scotland *alſo contains many particulars of the proceedings towards an union.* Spotſw. 479. *See further* Arthur Wilſon's Hiſtory *of* James *the firſt*, 27. 34. Sanderſon's *life of the ſame king*, 318. 338. 2. Winwood's Memorials *of* State, 20. 32½ *to* 38.

We ſhall now lay before the reader, 1. *Mr. ſerjeant* Moore'*s account of the proceedings in parliament about the* poſtnati. 2. *Lord* Bacon'*s ſpeech as counſel for* Calvin, *in the* Exchequer-Chamber. 3. *Lord* Coke'*s report of* Calvin'*s caſe.* 4. *Lord-chancellor* Elleſmere'*s ſpeech in the* Exchequer-Chamber, *as publiſhed by himſelf.*

Caſe of the Union of the realm of Scotland *with* England, *from* Moore's Reports, *page* 790.

1603. BY act of parliament in the firſt ſeſſion *anno primo* Jacobi *regis*, certain commiſſioners of *England* were appointed to meet with commiſſioners of *Scotland*, and to treat for the weale of both kingdoms, and to put their doings in ſchedules tripartite, to be delivered, one to the king, the other to the parliament of *England*, and the third to the parliament of *Scotland*. The commiſſioners of both nations met in the painted chamber at *Weſtminſter*, *anno* 2 Jac. *regis*, and treated long, and in the end made ſchedules, and delivered them according to the act. The ſchedule for the parliament of *England* was preſented by the lord *Elleſmere* lord chancellor of *England*, to whom the commiſſioners had delivered the ſame for that purpoſe, himſelf being one of the commiſſioners, the firſt day of the ſeſſion of parliament holden *anno* 3 Jac. *R.* the king himſelf, the lords ſpiritual and temporal and the commons being all aſſembled in the upper houſe of parliament. But the conſideration of that ſchedule was by another act made in that ſeſſions of *an'* 3 Jac. *R.* deferred untill the then next ſeſſion.

The next ſeſſion being this inſtant of *an'* 4 Jacobi *regis*, the ſchedule was conſidered of devidedly by the lords and commons: the material parts conſiſting upon 3 heads. The firſt the commiſſioners did propoſe, that all hoſtile lawes of either nation one againſt the other might be abrogated, and did enumerate the ſame lawes. The ſecond, they propoſed a courſe for commerce and merchandizing by merchants of both nations between themſelves and with forreiners. Thirdly, they propoſed that the common law of both nations ſhould be declared to be, that all born in either nation ſithence his majeſty was king of both, were mutually naturalized in both. And further, that an act might be made to naturalize all born before, with certain cautions and reſtrictions for bearing principall offices of the crown, offices of judicature, or having voice in parliament, and with a ſaving of the kings prerogative.

Upon the two firſt articles, the lords and commons had ſundry conferences in the painted chamber, and in effect agreed to give way to the ſubſtance of them. But upon the third, the commons could not aſſent to declare the law as was propoſed, and thereupon after long debate amongſt themſelves, they appointed committees to confer with the lords committees, who mett the 25 of *February* 1606, in the painted chamber. At which conference ſir *Francis Bacon* appointed by the houſe to introduce the reſt begun in this manner.

Bacon. That this conference and the ſubject thereof was *non in deliberativo*, but *in judiciali*, not *de bono* but *de vero*, not to conſult of a law to be made, but to declare the law already planted, whereto the commons were drawn, by inſatisfaction of their judgments, not indiſpoſition of their minds to the happy union intended, to oppoſe the propoſition of the commiſſioners. And whereas his majeſty had by a proclamation expreſſed the law to be as the commiſſioners had propoſed, the commons did not take themſelves prejudicated by the proclamation; firſt, for that that matter came but *obiter* in the proclamation, and was not the principal part or purpoſe thereof; then, for that the proclamation mentioneth the king to be ſo informed by divers ſages of the law, which is not to be underſtood judges of the law, but ſome learned in the lawes, whoſe opinion may the better be oppoſed: yet the proclamation hath ſo tempered the tongues of the ſpeakers, as it hath kept down all flaſhes of heat, which otherwiſe might have happened in the argument. Howbeit the danger of a declaratory ſtatute, being like *Janus Bifrons* ſtriking both wayes, raiſeth in the commons too much fear to aſſent to the propoſition, leaving the proclamation neverthe leſſe to its own effect. *Pur inducement pur les auters* ſpeakers *apres ceſt induccion*, he ſhewed that it was a ſingular commendation to the lawes of *England*, that it was not inſociable, but contented to hear and be adviſed by other ſciences in matters of dependencie upon them; as in caſes of expoſition of words, by grammarians; in matters of matrimony, deprivation, baſtardy, by civilians; in minerals, by natural philoſophers; in uſes, by moral philoſophers. Upon which conſideration the commons had ſelected out of themſelves divers gentlemen, ſome for inducement, ſome for argument in the point of law. Thoſe for inducement were to ſhew the law of nations, and of reaſon, and the ſtories of other countries and the civil law elſewhere put in uſe upon unions; thoſe for argument were gentlemen of the profeſſion of the common laws of this realm: all which being here ready, he left them to diſcharge their own proper duties.

Sir *Edwyn Sandes.* Sir *Edwyn Sandes* ſhewed that this caſe was proper to be conſulted with the law of nations, which is called *jus gentium*; for there being no preſident for it in the law, *lex deficit*, and *deficiente lege recurritur ad conſuetudinem*, and *deficiente conſuetudine recurritur ad rationem naturalem*, which *ratio naturalis* is the law of nations called *jus gentium*. The queſtion of difference is thus, whether ſubjection to one king make all the people born within the places of that ſubjection to be naturalized over all places of that kings ſubjection, which as he thought if it were to be meaſured by the law of reaſon and nations did not. And therefore ſhewed 7 reaſons for his opinion.

1 That although *ab antiquo*, when people were together in one heap irregularly, having one head, their ſubjection gave to every one equal priviledge in all places of their ſubjection, yet ſithence the world is grown to diſtribution of people into places, and to diſcipline in their government, though their ſubjection ſtill remain in the general to one head; yet the manner of it is locally circumſcribed to the places where they are brought forth, and thoſe of one place do not, nor ſhould partake of the diſcipline, priviledges, and birthright of the other places, but every one left to his own, as acquired for patrimony by their anteceſſors of that place, upon reaſons peradventure now not extant nor to be exactly underſtood.

2. This is in uſe in other nations, who obtain their naturalization by charters, and for ſuch time, and with ſuch cautions, as may be granted unto them, and take it not by the general law of that nation whereto they were united.

3. In the time of the old civil *Romans*, who united unto them divers provinces, they had degrees in naturalizing; for firſt, the party had *jus domicilii*, then *jus civitatis*, next *jus tribus*, and laſtly *jus honoris*; whereas if the law of *England* ſhould be, that ſubjection brought all this together, it were a law overliberal, and more bountiful, then the laws of this civil ſtate grounded upon reaſon and policy.

4. That *Scotland* being governed by the civil law, alloweth not *Engliſh* by bare ſubjection to their king to be naturalized within them; and therefore the law of *England* ſhould be very unequal, if it ſhould allow it to *Scots* here.

5. This caſe may give a dangerous example for mutual naturalizing of all nations that hereafter may fall into the ſubjection of the king, although they be very remote, in that their mutual communalty of priviledges may diſorder the ſettled government of every of the particulars; and how many of them may happen, is uncertaine; for we ſee, that where there were 100 kings, they came after to 11, and are now brought to 6 only within Chriſtendome.

6. The *Scots* ſhall be in better caſe by this law of naturalizing then the *Engliſh*, in the *Engliſh* nation; for the *Engliſh* pay all impoſitions and taxes for ſervices of the crown, which the *Scots* do not within *England*.

7. All the reaſons given for naturalizing extend aſwell to them before born, as ſithence the king came to the crown of *England*; for the ſubjection is now all one. Therefore, the law that ſhould make a difference is not reaſonable; and becauſe the law is confeſſed to be, that thoſe before born be not naturalized, therefore the law muſt alſo be, if it retain the ſame reaſon, that thoſe born after are not naturalized.

Neverthe leſs he concluded, that he held it in reaſon, that in reſpect of one ſubjection, the *Scots* ſhould not be accounted nor dealt withall by our lawes, as aliens, although not enabled to the full rights of *Engliſhmen* born amongſt us.

Sir *Roger Owen.* Sir *Roger Owen* for ſtories, 1. ſhewed, that in all the preſidents of the *Romans*, and in all their varieties of ariſtocracy or monarchy, there was no naturalizing *ipſo jure*, but by charters of grace or conſtitutions ſpecial, and that by *Naninus* begun and introduced. 2. The preſident of *Spain* and *Caſtile* is not to this point; for *Alaricus* the emperour firſt lord of all *Spain* gave out *Caſtile*, and the coming of *Caſtile* again is rather a reuniting or a remitter, then a new union, and therefore reaſonable they be one naturalized in the other as they were at the firſt. 3. The preſident freſh of *France* and *Scotland* by marriage of the kings mother with *Francis* the ſecond king of *France*, becauſe the ſubjection made no naturalization *ipſo jure*, therefore the *Scots* in *France* and the *French* in *Scotland* were naturalized by acts of parliament and with cautions.

Sir *John Bennet* and Dr. *James.* Sir *John Bennet* doctor of the civil law, he ſhewed that the civil law had no reſolution of this point *in terminis terminantibus*; but of other unions leſſer then kingdoms, there were rules, which he devided into theſe heads; one a maxime, the other a diſtribution; the maxime, *cum duo jura concurrunt in una perſona æquum eſt ac ſi eſſent in diverſis*, as one parſon of two churches, one dean of two deaneries: the cuſtomes of every place remain ſtill diſtinct and devided. And he cited an example, that the earldome of *Flanders* and *Artois* were holden of the king of *France* as ſoveraign by the duke of *Brabant* and *Holland*, who within *Brabant* and *Holland* was a free ſtate: the queſtion was whether this duke having both the dukedome and the earldome, and owing ſubjection to *France* only for the earldome, might make a league with the *Engliſh* for his dukedome, without breaking allegiance with *France*: and this being debated in the parliament of *Paris*, it was adjudged he might, becauſe he held the dukedome and the earldome as diſtinct in his perſon, and owed no ſubjection to *France* for his dukedome. The diſtribution he made was this, upon the difference of *unum* and *unitum*: there was a union ſubordinate, that is, when an inferiour is united to the ſuperiour, as *Ireland* to *England*, in this caſe *privilegia communicantur*. There is an union by incorporation, that is, when two be made *unum*, and not *unitum*, and then *privilegia communicantur*, as *Wales* and *England*. The third is when disjunct kingdomes are united, and that *unicum* is *ſecundum quid*, and *non ſimpliciter*; in which caſe *privilegia non communicantur*; and ſo he concluded that *Scottiſh* men were not naturalized in *England*; and yet he affirmed that it was in the power of the king by the civil law to naturalize them, and give them the priviledges.

The earl of *Saliſbury* here interpoſed, and ſaid, that he was deſirous to underſtand whether the arguments made were upon the point in queſtion; for as he conceived the queſtion now in debate was a legal queſtion of the law of *England*, and therefore time was to be ſpent upon argument and diſcuſſion of the law of *England*, and ſo *ſapiens contentio aut prodeſt aut non obeſt*.

The lord chancellor then ſpake and ſaid, that the firſt man that ſpake by introduction and inducement of the reſt brought the queſtion to the quick, that is, that it was not a queſtion *de bono* but *de vero*, not what was fit to be done, but what the law already is, which is what the law of *England* is; in which queſtion, if it ſhall be doubtful, it is more then indifferent to declare it as the commiſſioners have propoſed for three cauſes. 1. The kings proclamation having divulged it ſo, it is for his honor to declare it ſo, if it be not clear otherwiſe. 2. The opinion of the commiſſioners whom both houſes truſted. 3. The act of recognition, whereby we have acknowledged the king of both, and that we both live under one imperial crown.

The earl of *Northampton* ſaid, that it appeared by the civilians, that in the civil law there was no preſident *in terminis terminantibus*; and therefore from them we could take no rule for this caſe; nor no ſtories or examples of forraign ſtates, which are appliable and framed to their own particular policies. Nor as this caſe is, can we be meaſured or guided by inconveniences that may be forecaſt; becauſe we are confined to a point of law already received and planted, and are to reaſon and diſcuſs what that law is. Nevertheleſs he deſired leave to uſe a compariſon to them, to be commended to their conſideration, between the union in a body politick and in a body natural. The head in a body natural hath his influence into all the members by ſpirits of life and ſenſe. So hath the head of the body politick, to whom all the members be children in obedience, and brothers one to the other. The ſinews in a body natural are ligaments that binde together the joynts and fleſh. So are lawes in the body politick that tye people in a band of ſubjection and civil life. The blood, that paſſeth in the veins of the body natural by continual motion, doth maintain and refreſh the ſpirits of life. So traffick, commerce, and contracts in a body politick, do ſupport, maintaine and refreſh the common-wealth. But of all theſe there is a ſuperior ſpirit ſent by God, which is the ſoul to the body of man, by which all our bleſſedneſs is infuſed. So may we well ſay, that the kings majeſtie is like the ſoul, a bleſſedneſs ſent from God to dwell in both theſe nations as a continual ſpirit of union amongſt them, to pacifie and temper all bitterneſs, even as the ſoul by inſtinct of reaſon quieteth the natural paſſions of the natural bodies. Wherefore let us conſider how unfit it is to have two ſpirits or ſouls in one body; what their oppoſition may work for diſtemper and diſſolution; what the ſweet harmony of one good vertuous and religious ſoul in every part of the body may do, for conſolidating, ſtrengthning, and continuing in the whole body that proſperous eſtate of life and health that is to be wiſhed: and therefore in the caſe whatſoever may tend to the happy and firm uniting of theſe two kingdomes in reſemblance of lives and fortunes is to be inclined to, and recommended to your grave conſideration.

Dodridge the king's ſollicitor, *Laurence Hyde*, *Brock*, *Crewe*, & *Hedley*, profeſſors of the common law, now begin. And for the common law they urged 9 reaſons or arguments, that thoſe born ſithence his majeſty came to the crown of *England* within *Scotland* ſhould not be naturalized in *England*. Which queſtion ſprang out of two poſitions granted, as a third doubtful between, and this third is *oculus quæſtionis*. The firſt of theſe two poſitions is, that in the kings perſon there is an union of ſoveraignty over both nations. The ſecond is, that notwithſtanding this union, yet the fundamental lawes of either nation do remaine diſtinct. The third, which is the doubt between both theſe, whether naturalization proceed from the king or the lawes. Out of this one head all the reaſons were derived as followeth.

1 That *lex & ligeancia* came out of one root, and as it is called *lex a ligando*, ſo it is called *legeance*, *a ligatione*; which proveth allegeance to be tied to laws; and conſequently the laws of theſe two nations being ſeveral, notwithſtanding the union of ſoveraignty in the kings perſon, the allegeance of the ſubjects remaineth ſtill ſeveral; and therefore naturalization being meaſured by allegeance muſt ſtill remain ſeveral and diſtinct in either nations, as allegeance and laws do, and cannot be united and made one in both nations. To inforce this they cited the ſtatute of 25 *Ed.* 3. *ſtatute* 2. *de natis ultra mare.* In many places where it mentioneth legeance, is added 'out of the legeance of *England*, or 'within the ſame legeance of *England*;' which doth infer, that legeance is tyed to the kingdome, and not to the perſon of the king.

2 Reaſon, that *poſtnati* in *Scotland* are not ſubject to the laws of *England*, and therefore ſhould not have benefit of the laws of *England*.

3 Reaſon, that every nation hath a precinct wherein the laws have operation; and naturalization is an act or operation of law; therefore it cannot extend to places out of the precinct for the laws. Which being granted, it followeth, that as *Engliſh* laws extend not into *Scotland*, ſo to be naturalized by the laws of *England*, extends not into *Scotland* nor to thoſe born in *Scotland*.

The 4 and 5 Reaſon, that the great ſeal of *England*, which is the organ by which the law is conveyed, is not powerful nor binding in *Scotland*; therefore thoſe born in *Scotland* not inheritable to the laws of *England*, nor to be born ſubjects of *England*, when they cannot be commanded by the great ſeal of *England*.

6 Reaſon, that in ſubordinate kingdomes, dukedomes, or ſeignories, as *Ireland*, *Gaſcoigne*, *Aquitane*, *Angois*, the great ſeal of *England* is paſſable, and the parliament of *England* hath power; as is proved by that a writ of error may be brought in the *Kings Bench* of a judgment in *Ireland*, and the parliament of *England* may make a ſtatute to bind in *Ireland*, if *Ireland* be ſpecially named, but without ſpecial nameing it doth not bind. So 27 *E.* 3. *cap.* 7. a ſtatute was made to authoriſe the ſteward of *Gaſcoigne* to arreſt the bodies of ſuch as bargaine for wines elſewhere, then in the portes of *Burdeaux* and *Bayon*, and to ſend them to the *Tower* of *London*. An *habeas corpus* hath been directed under the great ſeal of *England* into *Gaſcoigne*, as appeareth by records of the *Kings Bench*. And the iſlanders do ſend petitions and make proctors to the parliament of *England*, as is ſtill put in uſe to this day. By which it appeareth, that the caſe is not like between *England* and theſe kingdomes and dukedomes ſubordinate to *England*, as it is between *England* and *Scotland*; *Scotland* being a diſtinct kingdom not ſubordinate, and as ancient as *England* it ſelf. And therefore whereas ſome have conceived, that when *Gaſcoigne* was by marriage united to *England*, thoſe of *Gaſcoigne* were not aliens to *England*, and inforce this expoſition out of the prior *Shels* caſe, 27 *E.* 3. *pla.* 48. in the book of Aſſizes, in that the prior having his lands ſeiſed in time of war, for that he was born in *Gaſcoigne* under the kings allegeance, and thereupon the matter being found true, he had reſtitution; to that, it may be confeſſed; and yet it matcheth not our caſe for *Scotland*, a diſtinct kingdome, and the reaſon of that reſtitution may be the ceaſing of the wars aſwell as being born in *Gaſcoigne*; for thoſe of *Gaſcoigne* were in thoſe times accompted aliens in *England*, as may appear by the ſtatute of 38 *E.* 3. *cap.* 11. where it is enacted, that the *Gaſcoignes* and other aliens ſhould come into *England* with their wines; which proveth, that thoſe of *Gaſcoigne* could not bring their wines into *England*, and they were then aliens to *England*, by the words of *Gaſcoignes* and other aliens.

7 Reaſon, that *regnum* and *rex* were relatives, and therefore diſtinct kingdoms, diſtinct kings as to the kingdoms; and the perſon of the king poſſeſſing both kingdoms poſſeſſeth the people and the laws of them diſtinct, as the kingdoms are themſelves. Therefore the ſubjection of every people is diſtinguiſhed to the ſeveral kingdoms, and one not ſubject to the other, nor naturalized within the other. And this is proved by the ſtatute of 14 *E.* 3. whereby it is declared, that notwithſtanding the king of *England* were king of *France*, yet the people of *England* were not ſubject unto him as king of *France*, but only as king of *England*.

8 Reaſon, that no man can be born a ſubject of two allegeances, nor by birth natural of two diſtinct kingdoms, therefore *Scots* born in *Scotland* cannot be naturalized in *England*.

9 Inconvenience would enſue in honors privileges and things of value, which would be confounded without order, if this commixtion ſhould be planted in both nations without diſcipline or rules.

The time being thus ſpent the 25 day of *February*, the next day was appointed to proceed with the conference, at which time the lords committees deſired the judges there attending to deliver their advice and opinions concerning the point of law: for which the lord chief juſtice *Popham* had the night before prayed reſpite until this time. Whereupon the ſaid lord chief juſtice, and ſir *Edward Cook* chief juſtice of the *Common Pleas*, and ſir *Thomas Flemming* chief baron, did openly deliver their opinions and their reaſons, the ſaid lord chief juſtice *Popham* making theſe three inducements in commendation of the laws of *England*. 1 That they had continued as a rock without alteration in all the varieties of people that had poſſeſſed this land, namely the *Romans*, *Brittons*, *Danes*, *Saxons*, *Normans*, and *Engliſh*, which he imputed to the integrity and juſtice of theſe laws, every people taking a liking to them, and deſirous to continue them and live by them, for which he cited *Forteſcues* book of the laws of *England*.

2 Commendation, the price that thoſe laws did coſt, which was no leſſe then blood; not laws of blood or bloody laws, but laws bought and purchaſed by the blood of our anteceſſors, as appeareth by *magna charta*, planted in king *H.* 3. time, after long and bloody wars between the kings and barons of this realm, the ſtories whereof do yet live freſh in every chronicle.

3 Commendation is the proceedings of the law, which he devided into 3 parts. 1 Judgments. 2 Trials. 3 Teſtimonies. The judgments ſo even and ſo impartial, as they give way to no mans affection, nor impute blame to any man; but to ſay the law requireth ſuch judgment, is an excuſe ſatisfactory to all men, for the king, and the judges. And therefore the ſaid lord chief juſtice cited a reſolution in parliament when himſelf ſerved as ſpeaker: That whereas it was propoſed to have a law made, that the judges might uſe their diſcretion in appointing trials in forraine counties, in reſpect the meaner ſort of people were overweighed with the power of great men in ſome ſhires that were parties to the ſuites; it was upon grave advice and conſultation denied, with this anſwer, that it were better to live under a certain known law, though hard ſometimes in a few caſes, then to be ſubject to the alterable diſcretion of any judges. The trials of the law for the moſt part ſo equal by the oaths of 12, as he proteſted that he never knew of the multitude that had paſſed before himſelf, ſcarce two of a hundred paſſe otherwiſe then himſelf ſhould have paſſed, if he had been in their caſe. For the teſtimonies being *viva voce* before the judges in open face of the world, he ſaid was much to be preferred before written depoſitions by private examiners or commiſſioners. Firſt, for that the judge and jurors diſcerne often by the countenance of a witneſſe whether he come prepared, and by his readineſs and ſlackneſs, whether he be ill affected or well affected, and by ſhort queſtions may draw out circumſtances to approve or diſcredit his teſtimony, and one witneſs may conteſt with another where they are *viva voce*. All which are taken away by written depoſitions in a corner.

For argument the ſaid judges anſwered with one aſſent, to the firſt reaſon of the commons, that allegeance and laws were not of equiparation for 6 cauſes. 1. Allegiance was before laws. 2. Allegiance is after laws. 3. Allegiance is where the laws are not. 4. Between ſoveraignty and allegiance laws are begotten. 5. Allegiance extends as far as defence, which is beyond the circuit of laws. 6. Allegiance followeth the natural perſon, not the politick. To prove this, it was ſaid, if a heap of people meet together ſo near, that they appoint a king, there allegiance is before they have laws proclaimed or preſcribed: wherefore allegiance is before laws. If the king be expelled by force and another uſurps, yet the allegiance is not taken away, though the law be taken away. If the king go out of *England* with a company of his ſervants, allegiance remaineth amongſt his ſubjects and ſervants, although he be out of his own realm, whereto his laws are confined, as is proved by a caſe in *Fleta*, who wrote in *Ed.* 2 time, which is thus. King *Ed.* 1. went in perſon into *France*, to a marriage; one of his ſervants in *France* ſtole 2 ſilver diſhes, for which he was apprehended by the *French*: the king required to have him redelivered, being his ſubject and of his traine; and upon diſpute in the parliament of *Paris*, he was ſent to the king of *England* to do his own juſtice upon him, whereupon he was tried before the ſteward and marſhal of the kings houſe, and executed in *France* in a meadow called St. *Jermins* meadow. Which proveth that the kings law followeth his allegiance out of the local limit of the laws of *England*. And even ſo it is, where the king of *England* ſendeth a lieutenant or general with an army royal out of the realm, the army is to be guided by the martial law of *England*, as the lord *Cook* affirmed, who alſo cited the caſe of *Fleta*. If there were not a ſoveraign to preſcribe laws, and people of allegiance to obey them, there could be no laws made nor executed. By which it appeareth, that between ſoveraignty and allegiance laws are begotten; and therefore in nations conquered there are no laws, yet is there preſent allegiance; and after allegiance gotten, it is ſecondary for the king to deliver laws to the people of his allegiance. And to prove the allegiance to be tyed to the body natural of the king, not to the body politick, the lord *Cook* cited the phraſes of divers ſtatutes mentioning the king our natural liege ſoveraign, and theſe words natural ſubjects in acts of recognition uſual and familiar. And to prove that allegiance extended further then the laws national, they ſhewed, that every king of divers kingdoms or dukedomes is to command every people to defend any of his kingdomes without reſpect of that nation where he is born; as if the king of *Spain* be invaded in *Portugal*, he may levy for deſence of *Portugal* armies out of *Spain*, *Naples*, *Caſtile*, *Millan*, *Flanders*, and the like, as a thing incident to the allegiance of all his ſubjects to joyn together in defence of any one of his territories without reſpect of extent of the laws of that nation where he was born: whereby it manifeſtly appeareth, that allegiance followeth the natural perſon of the king, and is not tyed to the body politick reſpectively in every kingdom. And therefore, whereas the rule for aliens is this, that thoſe born within the kings allegiance are ſubjects, and thoſe born out of his allegiance are aliens, it is manifeſt, that *Scots* born in *Scotland*, ſince the king of *England* was king of *England* and *Scotland* both, are not born out of the kings allegiance, and ſo not aliens, but ſubjects, and ſo to be accounted in *England*. For further proof of this, the lord *Cook* ſhewed ſtatutes, bookcaſes and pleadings.

For ſtatutes *prerogativa regis cap.* 12. which was made in the 17 year of king *Edward* the ſecond, and is a declaration of the prerogative before, wherein it is declared, that the king was to have the eſcheats of the lands of the *Normands*, and all others born in parts beyond ſeas, whoſe anteceſſors were of the faith or loyalty of the king of *France*, and not of the king of *England*; as it happened of the barony of *Monumeta*, after the death of *John D. Monumeta*, whoſe heirs were of *Brittain* and elſewhere. By which declaration the judges did infer, that out of the allegiance, and within the allegiance of the king (*fides* being to be underſtood allegiance) maketh the oddes between an alien and a denizen, and not the place of birth in *England*, or without *England*; for it is declared, that the king ſhould have the eſcheats of ſuch as were born in parts beyond ſeas, and whoſe parents were of the allegiance of the king of *France*, and not of the allegiance of the king of *England*. So that although his birth were out of the bounds of the kingdome of *England* and out of the reach and extent of the laws of *England*, yet if it were within the allegiance of the kings of *England*, the king was not to have his eſcheat as an alien, as at this time divers places that were within the limits of *France* were in ſubjection to the kings of *England*. And for the inſtance of the barony of *Monumeta*, they ſhewed that king *H.* 2. had four ſons, *Henry*, *Richard*, *Jeffrey*, and *John*, that *Jeffrey* was married to the heire of *Brittain*, and was murthered by *John*, in which time the caſe of *Monumeta* happened, *Brittain* being not within the allegiance of the king of *England*, by that marriage of the kings third ſon. They ſhewed that it was not material, whether a kingdome or dukedome came to the allegiance of the king of *England*, nor whether by marriage or conqueſt; for many dukedoms were ſometimes kingdoms, and kingdoms were but dukedoms, as *Caſtile* at the firſt but an earldom, now a kingdom; little *Brittain* once a kingdom, then after and now a dukedom; *Ireland* a dukedom, now a kingdom. But the matter of difference is, whether they be free and divided ſtates in their laws and government, and ſo were both theſe dukedoms of *Aquitane*, *Gaſcoigne*, *Guyen*, *&c.* which have been ſo much inſiſted upon, and ſo is *Scotland*, and yet all under one allegiance and faith to one king: which unity and allegiance to one king, taketh away the rule of alien born from them all, howſoever they were united, be it by marriage or conqueſt. And yet for *Gaſcoigne* and *Aquitane*, it came by marriage and deſcent, as *Scotland*. The next ſtatute is the ſtatute of 42 *E.* 3. *cap.* 10. that the commons deſired in parliament that children born beyond ſeas, within the ſeigniories of *Calice* and elſewhere within the lands and ſeignories that pertaine to the king beyond ſeas, might inherite in *England*. Whereto the anſwer is, it is accorded, that the common law and the ſtatute upon the ſame point another time may be holden. The judges, examining what ſtatute that was, found it was the ſtatute of 25 *E.* 3. *ſtat.* 2. *de natis ultra mare*. Which ſtatute contains a preamble, and 3 ordinances. The preamble is a recital of a doubt, whether children ſhould inherite in *England*, that were born beyond ſeas out of the legiance of *England*. The 1 ordinance is a declaration of the law, that the kings children whereſoever born are inheritable in *England*. The 2 is a conſtitution particular for ſome named, and which the king ſhall name, which were born beyond ſeas, out of the legiance of *England*, to inherit in *England*. The 3 is a new law, that children from henceforth born out of the legiance of the king, whoſe fathers and mothers at the time of their birth be and ſhall be at the faith and of the allegiance of the king of *England*, ſhall inherite in *England*, &c. Out of this they did infer, that the third ordinance only did touch the point now in queſtion; which ordinance neverthleſs came not to the queſtion propoſed; for the ordinance is for perſons born beyond ſeas, and out of the kings legiance, whoſe parents are *Engliſh*; whereas our queſtion is for perſons born in *Scotland*, which is within the faith and allegiance of the king, and ſo much the odds is, as the words import, *viz.* out of the allegiance and within the allegiance. So as that ſtatute directs not this controverſy; and therefore it muſt be the common law that doth it, whereto the ſtatute of 42 *E.* 3. doth referr concerning thoſe born at *Callis*, and other ſegniories beyond ſeas, that pertain to the king: which perſons having been ever expounded to inherit in *England*, it muſt needs be taken, that they inherit by the common law, and not by ſtatute. 28 *H.* 6. *cap.* 5. againſt extortions uſed by ſearchers amongſt merchants, the merchants of *Gaſcoigne*, *Guyen*, *Ireland* and the Iſles, are called the kings liege people.

The books and judgments cited by the judges, were firſt 27 *E.* 3. in the book of Aſſizes the 48 plea, the caſe of the prior of *Shels*, who being a prior alien, and his temporalties being ſeiſed in time of war, ſhewed that he was not an alien, for that he was born in *Gaſcoigne*, within the legiance of the king; which plea was found true by verdict, and thereupon his temporalties were reſtored. And then the ſame caſe came again in queſtion in the common place in a *quare impedit*, becauſe in his reſtitution he had no ſpecial words of advowſons, whether the king might not preſent to the advowſons of the priory notwithſtanding the reſtitution, for that alſo the reſtitution was, that the king of his grace did reſtore, *&c.* So it was of grace, not of right. But the book is, that the king ſhould not preſent; and the reaſon alleadged, becauſe the ſeaſure was by wrong, the prior being no alien, and ſo a reſtitution in that caſe, by which the king doth not give but do right, needs not contain ſpecial mention of advowſons; neither the recital of the kings grace could eſcape the juſtice of the court examining the cauſe, to ſay it was not of right. For concurrence with this book, they cited the caſe of 11 *H.* 4. *fo.* 26. that two huſbands and their wives parceners brought an aſſize, and then were ſummoned and ſevered: the tenant pleaded to her that was ſevered, that her huſband was an alien, and born out of the realm, and all the legiance, and not made denizen: but in the end in reſpect of the ſeverance, and that the plea was in diſablement of him that was ſevered, the writt was awarded good. Yet the note ſpecial of the caſe is the manner of the plea, *viz.* alien born out of the realm, and all the allegiance; whereof it is inferred that allegiance is further then the realm, and not confined to the circuit of the laws of the realm. 14 *H.* 4. *fo.* 19. *b.* one challenged a juror for that he was an alien, and the manner of his challenge is, that he was not a liege to the king, becauſe he was born out of his legiance, and ſhewed that he was a *Flemming*; and the triers found that he was born in *Flanders*, but had lived of a child in *England*, and was ſworn to the king in a leet: neverthleſſe the court would not allow him to be ſworn. But the note of the caſe is, the manner of the challenge, *viz.* not a liege to the king, becauſe he was born out of his legiance. So *Littleton* in his chapter of villenage ſheweth him to be an alien that is born out of the kings allegiance. And this diſtinction of allegiance *quatenus* king of *England*, and *quatenus* king of *Scotland*, or *quatenus* duke of *Ireland*, *Aquitane*, *Gaſcoigne*, *&c.* is never heard of in the books of our law.

For pleadings they ſhewed the preſident in the book of Entries, to be, that he that diſableth an alien muſt alledge affirmatively, that he is an alien; and yet that ſufficeth not, but he muſt alledge further that he was born *extra obedientiam domini regis*; and not that alone, but alſo he muſt aſſigne a place where he was born, *infra obedientiam* of ſome other king. As in 9 *E.* 4. *fo.* 7. in the aſſize by *Bagot* of the office of clerk of the crown in the *Chancery*, the tenant pleaded, that *Bagot* was an alien in this manner, *dicit quod idem* Johannes Bagot *eſt alienigena genitus extra ligeanciam domini regis* Angliæ, viz. *apud* Pontoys *infra regnum* Franciæ *ſub obedientia* Caroli *nuncupantis ſe regem* Franciæ, *adverſarii & magni inimici domini regis* Angliæ. Which courſe of pleading cannot be held with thoſe of *Scotland*; for that *Scotland* is not out of the kings allegiance, neither is the king of *Scots* enemy to the king of *England*, but he is alſo king of *England*, whereof both nations do and muſt take notice.

And whereas it hath been urged that the trial of an alien muſt be within *England*, ſo that he which will deſtroy the plea of an alien againſt himſelf muſt aſſigne a place in *England* of his birth, and cannot aſſigne a place in *Scotland*; this is eaſily anſwered, and proveth nothing on the other part; for ſo if a deed be made in *Ireland* or in *Gaſcoigne*, or in the Iſles, you muſt aſſigne the making of it in ſome county of *England*, to the end a trial may be had by jury, which is not but in *England*; neverthleſſe you may give in evidence the making of it in *Ireland* or the Iſles. So is the caſe of 13 *H.* 4. *pla.* 10. for an obligation made in *Gaſcoigne*. And ſo is 32 *H.* 6. *fo.* 26. in debt upon a bond made in the biſhoprick of *Durham* being a county palatine; and there the reaſon of this caſe debated, and *Brown* citeth it to be adjudged, that if the defendant alledge that the plaintif is a *Scot* born at St. *Johns* town in *Scotland*, out of the legiance, this is a trial where the writ is brought; but if the plaintif will reply, that he was born at *London* within the allegiance, the defendant muſt rejoyn, that the plaintif was born at St. *Johns* town in *Scotland*, without that, that he was born in *London*, and the iſſue ſhall be tried in *London*. So are affirmative iſſues allowed for neceſſity of trial; but evidence of his birth in any place within the kings dominions is ſufficient to maintain the iſſue, although for form of pleading it be laid to be at *London*. In which caſe of 13 *H.* 4. it was put by *Ireby*, that a liegman of *England* was killed by another liegman of *England* in *Scotland*, and his wife brought her appeal in *England* in the court of the lord conſtable of *England*.

13 *H.* 4.
Fitz. trial
pla. 92.

Then the judges examined what ſhould be given to the *Scots*, if they ſhould be naturalized. Firſt, they being not enemies, if they be aliens, are to be protected in their bodies and goods, and may bring perſonal actions. But if they buy land, the king if he will, may ſeize it. But for dignities of honor, or voices in parliament as barons, *Scotchmen* cannot have in *England*, ſo long as the laws ſtand diſtinct. And therefore they cited the caſe of 11 *E.* 3. *titulo briefe* 473. where the writ was brought againſt the earl of *Richmond*, who alleadged, that he was duke of *Brittaine*, and not ſo named in the writ, and prayed that the writ might abate; but the judges allowed not his plea, becauſe the dukedom of *Brittaine* is a forraigne dignity, of which we take no notice in *England*. Yet *Edmond Baliol* aſſigning the ſame cauſe in abatement of a writ, for that he was not named king of *Scots*, the exception was held good; for that a king is in notice of all countries, and ſo is a knight, but not barons, earldoms, dukedoms and the like. Neverthleſſe 39 *E.* 3. *fo.* 35. *en title de briefe* 517. a writ was abated for not naming the defendant earle of *Angus*, although it be a dignity in *Scotland*: but the reaſon is ſhewed to be, for that he had alway a writ to attend at the parliament of *England*. And by this, the judges ſaid, that the 9th objection being matter of inconvenience in places of honour was anſwered with this addition, that no naturalizing could make them barons of parliament of *England* for their dignities in *Scotland*, neither did naturalizing give any man a place in parliament, except he were choſen, or gave him any lands or goods except he could purchaſe them.

For the matter of the great ſeal the judges ſhewed, that the ſeal was alterable by the king at his pleaſure, and he might make one ſeal for both kingdoms, for ſeals, coyn, and leagues are of abſolute prerogative to the king without parliament, not reſtrained to any aſſent of the people. But for further reſolution of this point, how far the great ſeal doth command out of *England*, they made this diſtinction, that the great ſeal was current for remedials which groweth upon complaint of the ſubjects, and thereupon writs are addreſſed under the great ſeal of *England*, which writs are limited their precinct to be within the places of the juriſdiction of the courts that muſt give the redreſſe of the wrong. And therefore writs are not to go into *Ireland*, nor the Iſles, nor *Wales*, nor the counties palatine; becauſe the kings courts here have not power to hold plea of lands or things there. But the great ſeal hath a power preceptory to the perſon, which power extendeth to any place where the perſon may be found. And for this the lord *Cook* cited *Nicholas Ludlowes* caſe in 4 *E.* 3. in the *Tower* record *rotulo clauſo numero* 21. that *Ludlow* being at *Rome*, a commandment under the great ſeal was ſent to him to return. So *Berties* caſe in queen *Maries* time, and ſir *Franc. Inglefields* in queen *Elizabeths* time, the privy ſeal went to command them to return into the realm, and for not coming their lands were ſeized, as appeareth by my lord *Diers* report of both thoſe caſes. So the caſe before of 39 *E.* 3. *fo.* 35. a parliament writ was current into *Scotland*, to the earle of *Angus*; and 14 *H.* 8. a *habeas corpus* into the *Iſle* of *Man*; which *habeas corpus* is a preceptory writ to have the body of his ſubject, and may be directed into *Scotland*, or any place where the king hath miniſters, otherwiſe how ſhall the king come by the perſon of his ſubject whom he would command. So as where remedial writs run not, yet preceptories under the great ſeal do; and therefore the poſition of the great ſeal not to be current in *Scotland* holdeth for remedials, not for preceptories: and this doth anſwer the objection, that the great ſeal is current in ſubordinate kingdoms, or dukedoms, and not in all places of the kings dominions in diſtinct kingdoms.

And as to the rule taken by the civilians, *cum duo jura concurrunt in una perſona, æquum eſt ac ſi eſſent in diverſis*, that holdeth not in things perſonal but real: and therefore a marqueſſe, that is a baron and an earle, can by the ſtatute of 21 *H.* 8. have no more chaplains then his beſt dignity alloweth, and not for every dignity.

And as to the objection that none can be born a natural ſubject of two kingdoms, they denied that abſolutely; for although locally he can be born but in one, yet effectually the allegiance of the king extending to both, his birthright ſhall extend to both.

And as to the objection that *rex & regnum* be relatives, and therefore the allegiance of a king can extend but to that kingdom; they anſwered, that *rex* and *regna* were relatives, but *rex & regnum* be not ſo relatives, as a king can be king but of one kingdom, for that were *proprium quarto modo*, viz. *omni*, *ſoli & ſemper*, which clearly holdeth not, but that his kingly power extending to divers nations and kingdoms, all owe him equal ſubjection, and are equally born to the benefit of his protection. And although he is to govern them by their diſtinct laws, yet any one of the people coming into the other is to have the benefit of the laws whereſoever he cometh, and is to bear the burthens and taxes of the place where he cometh; but living in one, or for his livelyhood in one, he is not to be taxed in the other, becauſe laws ordain taxes impoſitions and charges, as a diſcipline of ſubjection particularized to every particular nation.

And ſo theſe 3 judges delivered their opinions openly, and the reſt were ready and did affirme the ſame to be all their opinions, but only juſtice *Walmeſly* who differed in the main point, the reſt were *Warburton* and *Daniel*, of the *Common Place*, *Fenner*, *Williams*, and *Tanfield*, of the *Kings Bench*, *Snigg* and *Altham*, barons of the *Exchequer*.

Speech of lord Bacon, *as counſel for* Calvin *in the* Exchequer-Chamber. *From the laſt 4to. ed. of his works, vol. 2. p. 514.*

May it pleaſe your Lordſhips,

THIS caſe your lordſhips do well perceive to be of exceeding great conſequence. For whether you do meaſure that by place, that reacheth not only to the realm of *England*, but to the whole iſland of *Great Britain*; or whether you meaſure that by time, that extendeth not only to the preſent time, but much more to future generations,

Et nati natorum, et qui naſcentur ab illis.

And therefore as that is to receive at the bar a full and free debate, ſo I doubt not but that ſhall receive from your lordſhips a ſound and juſt reſolution according to law, and according to truth. For, my lords, though he were thought to have ſaid well, that ſaid that for his word, *rex fortiſſimus*; yet he was thought to have ſaid better, even in the opinion of a king himſelf, that ſaid, *veritas fortiſſima, et prævalet:* and I do much rejoice to obſerve ſuch a concurrence in the whole carriage of this cauſe to this end, that truth may prevail.

The caſe no feigned or framed caſe; but a true caſe between true parties.

The title handled formerly in ſome of the king's courts, and free-hold upon it; uſed indeed by his majeſty in his high wiſdom to give an end to this great queſtion, but not raiſed; *occaſio*, as the ſchoolmen ſay, *arrepta, non porrecta.*

The caſe argued in the *King's Bench* by Mr. *Walter* with great liberty, and yet with good approbation of the court: the perſons aſſigned to be of counſel on that ſide, inferior to none of their quality and degree in learning; and ſome of them moſt converſant and exerciſed in the queſtion.

The judges in the *King's Bench* have adjourned it to this place for conference with the reſt of their brethren. Your lordſhip, my lord chancellor, though you be abſolute judge in the court where you ſit, and might have called to you ſuch aſſiſtance of judges as to you had ſeemed good; yet would not forerun or lead in this caſe by any opinion there to be given; but have choſen rather to come yourſelf to this aſſembly; all tending, as I ſaid, to this end, whereunto I for my part do heartily ſubſcribe, *ut vincat veritas*, that truth may firſt appear, and then prevail. And I do firmly hold, and doubt not but I ſhall well maintain, that this is the truth, that *Calvin* the plaintiff is *ipſo jure* by the law of *England* a natural born ſubject, to purchaſe free-hold, and to bring real actions within *England*. In this caſe I muſt ſo conſider the time, as I muſt much more conſider the matter. And therefore though it may draw my ſpeech into farther length; yet I dare not handle a caſe of this nature confuſedly, but purpoſe to obſerve the ancient and exact form of pleadings; which is,

First, to explain or induce.
Then, to confute, or anſwer objections.
And laſtly, to prove, or confirm.

And firſt for explanation. The outward queſtion in this caſe is no more, but whether a child, born in *Scotland* ſince his majeſty's happy coming to the crown of *England*, be naturalized in *England*, or no. But the inward queſtion or ſtate of the queſtion evermore beginneth, where that which is confeſſed on both ſides doth leave.

It is confeſſed, that if theſe two realms of *England* and *Scotland* were united under one law and one parliament, and thereby incorporated and made as one kingdom, that the *poſt-natus* of ſuch an union ſhould be naturalized.

It is confeſſed, that both realms are united in the perſon of our ſovereign; or, becauſe I will gain nothing by ſurreption, in the putting of the queſtion, that one and the ſame natural perſon is king of both realms.

It is confeſſed, that the laws and parliaments are ſeveral. So then, whether this privilege and benefit of naturalization be an acceſſory or dependency upon that which is one and joint, or upon that which is ſeveral, hath been, and muſt be the depth of this queſtion. And therefore your lordſhips do ſee the ſtate of this queſtion doth evidently lead me by way of inducement to ſpeak of three things: the king, the law, and the privilege of naturalization. For if you well underſtand the nature of the two principals, and again the nature of the acceſſory; then ſhall you diſcern to whether principal the acceſſory doth properly refer, as a ſhadow to a body, or iron to an adamant.

And therefore your lordſhips will give me leave in a caſe of this quality, firſt to viſit and open the foundations and fountains of reaſon, and not begin with the poſitions and eruditions of a municipal law; for ſo was that done in the great caſe of Mines; and ſo ought that to be done in all caſes of like nature. And this doth not at all detract from the ſufficiency of our laws, as incompetent to decide their own caſes, but rather addeth a dignity unto them, when their reaſon appearing as well as their authority doth ſhew them to be as fine moneys, which are current not only by the ſtamp, becauſe they are ſo received, but by the natural metal, that is, the reaſon and wiſdom of them.

And maſter *Littleton* himſelf in his whole book doth commend but two things to the profeſſors of the law by the name of his ſons; the one, the inquiring and ſearching out the reaſons of the law; and the other, the obſerving of the forms of pleadings. And never was there any caſe that came in judgment that required more, that *Littleton*'s advice ſhould be followed in thoſe two points, than doth the preſent caſe in queſtion. And firſt of the king.

It is evident that all other commonwealths, monarchies only excepted, do ſubſiſt by a law precedent. For where authority is divided amongſt many officers, and they not perpetual, but annual or temporary, and not to receive their authority but by election, and certain perſons to have voice only to that election, and the like; theſe are buſy and curious frames, which of neceſſity do pre-ſuppoſe a law precedent, written or unwritten, to guide and direct them. But in monarchies, eſpecially hereditary, that is, when ſeveral families or lineages of people do ſubmit themſelves to one line, imperial or royal, the ſubmiſſion is more natural and ſimple, which afterwards by laws ſubſequent is perfected and made more formal; but that is grounded upon nature. That this is ſo, it appeareth notably in two things; the one the platforms and patterns which are found in nature of monarchies; the original ſubmiſſions, and their motives and occaſions. The platforms are three:

The firſt is that of a father, or chief of a family; who governing over his wife by prerogative of ſex, over his children by prerogative of age and becauſe he is author unto them of being, and over his ſervants by prerogative of virtue and providence (for he that is able of body, and improvident of mind, is *natura ſervus)* that is a very model of a king. So is the opinion of *Ariſtotle*, *lib.* iii. *Pol. cap.* 14. where he ſaith, *verum autem regnum eſt, cum penes unum eſt rerum ſumma poteſtas: quod regnum procurationem familiæ imitatur.* And therefore *Lycurgus*, when one counſelled him to diſſolve the kingdom, and to eſtabliſh another form of eſtate, anſwered, ‘ Sir, begin to do that which you adviſe firſt at home in your own houſe:’ noting, that the chief of a family is as a king; and that thoſe, that can leaſt endure kings abroad, can be content to be kings at home. And this is the firſt platform, which we ſee is merely natural.

The ſecond is that of a ſhepherd and his flock, which *Xenophon* ſaith, *Cyrus* had ever in his mouth. For ſhepherds are not owners of the ſheep; but their office is to feed and govern. No more are kings proprietaries or owners of the people; for God is ſole owner of people. *The nations*, as the ſcripture ſaith, *are his inheritance:* but the office of kings is to govern, maintain, and protect people. And that is not without a myſtery, that the firſt king that was inſtituted by God, *David*, for *Saul* was but an untimely fruit, was tranſlated from a ſhepherd, as you have it in Pſalm lxxviii. *Et elegit* David *ſervum ſuum, de gregibus ovium ſuſtulit eum,—paſcere* Jacob *ſervum ſuum, et* Iſrael *hæreditatem ſuam.* This is the ſecond platform; a work likewiſe of nature.

The third platform is the government of God himſelf over the world, whereof lawful monarchies are a ſhadow. And therefore both amongſt the Heathen, and amongſt the Chriſtians, the word, *ſacred*, hath been attributed unto kings, becauſe of the conformity of a monarchy with a divine majeſty; never to a ſenate or people. And ſo you find it twice in the lord *Coke*'s reports; once in the ſecond book, the biſhop of *Wincheſter*'s caſe; and his fifth book, *Cawdrie*'s caſe. And more anciently in the 10 of *H.* VII. *fol.* 18. *rex eſt perſona mixta cum ſacerdote*; an attribute, which the ſenate of *Venice*, or a canton of *Swiſſes*, can never challenge. So, we ſee, there be precedents or platforms of monarchies, both in nature, and above nature; even from the monarch of heaven and earth to the king, if you will, in an hive of bees. And therefore other ſtates are the creatures of law; and this ſtate only ſubſiſteth by nature.

For the original ſubmiſſions, they are four in number. I will briefly touch them.

The firſt is paternity or patriarchy, which was when a family growing ſo great as it could not contain itſelf within one habitation, ſome branches of the deſcendants were forced to plant themſelves into new families; which ſecond families could not by a natural inſtinct and inclination but bear a reverence, and yield an obeiſance, to the eldeſt line of the ancient family from which they were derived.

The ſecond is the admiration of virtue, or gratitude towards merit, which is likewiſe naturally infuſed into all men. Of this *Ariſtotle* putteth the caſe well, when it was the fortune of ſome one man, either to invent ſome arts of excellent uſe towards man's life, or to congregate people that dwelt ſcattered into one place where they might cohabit with more comfort, or to guide them from a more barren land to a more fruitful, or the like: upon theſe deſerts, and the admiration and recompenſe of them, people ſubmitted themſelves.

The third, which was the moſt uſual of all, was conduct in war, which even in nature induceth as great an obligation as paternity. For as men owe their life and being to their parents in regard of generation, ſo they owe that alſo to ſaviours in the wars in regard of preſervation. And therefore we find in chap. xviii. of the book of *Judges*, ver. xxii. *dixerunt omnes viri ad* Gideon, *dominare noſtri*, *tu et filii tui*, *quoniam ſervaſti nos de manu* Madian. And ſo we read when it was brought to the ears of *Saul*, that the people ſung in the ſtreets, Saul *hath killed his thouſand*, *and* David *his ten thouſand* of enemies, he ſaid ſtraightways: *quid ei ſupereſt niſi ipſum regnum?* For whoſoever hath the military dependence, wants little of being king.

The fourth is an inforced ſubmiſſion, which is conqueſt, whereof it ſeemed *Nimrod* was the firſt precedent, of whom it is ſaid; *ipſe cœpit potens eſſe in terra*, *et erat robuſtus venator coram Domino.* And this likewiſe is upon the ſame root, which is the ſaving or gift as it were of life and being; for the conqueror hath power of life and death over his captives; and therefore where he giveth them themſelves, he may reſerve upon ſuch a gift what ſervice and ſubjection he will.

All theſe four ſubmiſſions are evident to be natural and more ancient than law.

To ſpeak therefore of law, which is the ſecond part of that which is to be ſpoken of by way of inducement. Law no doubt is the great organ by which the ſovereign power doth move, and may be truly compared to the ſinews in a natural body, as the ſovereignty may be compared to the ſpirits: for if the ſinews be without the ſpirits, they are dead and without motion; if the ſpirits move in weak ſinews, it cauſeth trembling: ſo the laws, without the king's power, are dead; the king's power, except the laws be corroborated, will never move conſtantly, but be full of ſtaggering and trepidation. But towards the king himſelf the law doth a double office or operation. The firſt is to intitle the king, or deſign him; and in that ſenſe *Bracton* ſaith well, *lib.* 1. *fol.* 5. and *lib.* 3. *fol.* 107. *lex facit quod ipſe ſit rex*; that is, it defines his title; as in our law, that the kingdom ſhall go to the iſſue female; that it ſhall not be departable amongſt daughters; that the half-blood ſhall be reſpected, and other points differing from the rules of common inheritance. The ſecond is, that whereof we need not fear to ſpeak in good and happy times, ſuch as theſe are, to make the ordinary power of the king more definite or regular; for it was well ſaid by a father, *plenitudo poteſtatis eſt plenitudo tempeſtatis.* And although the king, in his perſon, be *ſolutus legibus*, yet his acts and grants are limited by law, and we argue them every day.

But I demand, do theſe offices or operations of law evacuate or fruſtrate the original ſubmiſſion, which was natural; or ſhall it be ſaid that all allegiance is by law? No more than it can be ſaid, that *poteſtas patris*, the power of the father over the child, is by law: and yet no doubt laws do diverſly define of that alſo; the law of ſome nations having given fathers power to put their children to death; others, to ſell them thrice; others, to diſinherit them by teſtament at pleaſure, and the like. Yet no man will affirm, that the obedience of the child is by law, though laws in ſome points do make it more poſitive: and even ſo it is of allegiance of ſubjects to hereditary monarchs, which is corroborated and confirmed by law, but is the work of the law of nature. And therefore you ſhall find the obſervation true, and almoſt general in all ſtates, that their lawgivers were long after their firſt kings, who governed for a time by natural equity without law. So was *Theſeus* long before *Solon* in *Athens*: ſo was *Eurytion* and *Sous* long before *Lycurgus* in *Sparta*: ſo was *Romulus* long before the *Decemviri.* And even amongſt ourſelves there were more ancient kings of the *Saxons*; and yet the laws ran under the name of *Edgar*'s laws. And in the refounding of the kingdom in the perſon of *William* the Conqueror, when the laws were in ſome confuſion for a time, a man may truly ſay, that king *Edward* I. was the firſt lawgiver, who enacting ſome laws, and collecting others, brought the law to ſome perfection. And therefore I will conclude this point with the ſtile, which divers acts of parliaments do give unto the king; which term him very effectually and truly, 'our natural ſovereign liege lord.' And as it was ſaid by a principal judge here preſent when he ſerved in another place, and queſtion was moved by ſome occaſion of the title of *Bullein*'s lands, that he would never allow, that queen *Elizabeth* (I remember it for the efficacy of the phraſe) ſhould be a ſtatute queen, but a common-law queen: ſo ſurely I ſhall hardly conſent, that the king ſhall be eſteemed or called only our rightful ſovereign, or our lawful ſovereign, but our natural liege ſovereign; as acts of parliament ſpeak: for as the common law is more worthy than the ſtatute law; ſo the law of nature is more worthy than them both.

Having ſpoken now of the king and the law, it remaineth to ſpeak of the privilege and benefit of naturalization itſelf; and that according to the rules of the law of *England.*

Naturalization is beſt diſcerned in the degrees whereby the law doth mount and aſcend thereunto. For it ſeemeth admirable unto me, to conſider, with what a meaſured hand, and with how true proportions, our law doth impart and confer the ſeveral degrees of this benefit. The degrees are four.

The firſt degree of perſons, as to this purpoſe, that the law takes knowledge of, is an alien enemy; that is, ſuch a one as is born under the obeiſance of a prince or ſtate that is in hoſtility with the king of *England.* To this perſon the law giveth no benefit or protection at all; but if he come into the realm after war proclaimed, or war in fact, he comes at his own peril, he may be uſed as an enemy: for the law accounts of him but, as the ſcripture ſaith, as of a ſpy that comes to ſee the weakneſs of the land. And ſo it is in 2 *Rich.* III. *fol.* 2. Nevertheleſs, this admitteth a diſtinction. For if he come with ſafe-conduct otherwiſe it is: for then he may not be violated, either in perſon or goods. But yet he muſt fetch his juſtice at the fountain-head, for none of the conduit pipes are open to him; he can have no remedy in any of the king's courts; but he muſt complain himſelf before the king's privy council: there he ſhall have a proceeding ſummary from hour to hour, the cauſe ſhall be determined by natural equity, and not by rules of law; and the decree of the council ſhall be executed by aid of the *Chancery*, as in 13 *Ed.* IV. And this is the firſt degree.

The ſecond perſon is an alien friend, that is, ſuch a one as is born under the obeiſance of ſuch a king or ſtate as is confederate with the king of *England*, or at leaſt not in war with him. To this perſon the law allotteth this benefit, that as the law accounts, that the hold it hath over him, is but a tranſitory hold, for he may be an enemy; ſo the law doth indue him but with a tranſitory benefit, that is, of moveable goods and perſonal actions. But for free-hold, or leaſe, or actions real or mixt, he is not enabled, except it be in *autre droit.* And ſo it is 9 *Ed.* IV. *fol.* 7. 19 *Ed.* IV. *fol.* 6. 5 *Mar.* and divers other books.

The third perſon is a denizen, uſing the word properly, for ſometimes it is confounded with a natural born ſubject. This is one that is but *ſubditus inſitivus*, or *adoptivus*, and is never by birth, but only by the king's charter, and by no other mean, come he never ſo young into the realm, or ſtay he never ſo long. Manſion or habitation will not indenize him, no, nor ſwearing obedience to the king in a leet, which doth in-law the ſubject; but only, as I ſaid, the king's grace and gift. To this perſon the law giveth an ability and capacity abridged, not in matter, but in time. And as there was a time when he was not ſubject, ſo the law doth not acknowledge him before that time. For if he purchaſe free-hold after his denization, he may take it; but if he have purchaſed any before, he ſhall not hold it: ſo if he have children after, they ſhall inherit; but if he have any before, they ſhall not inherit. So as he is but privileged *à parte poſt*, as the ſchoolmen ſay, and not *à parte ante.*

The fourth and laſt degree is a natural born ſubject, which is evermore by birth, or by act of parliament; and he is complete and entire. For in the law of *England* there is *nil ultra*, there is no more ſubdiviſion or more ſubtile diviſion beyond theſe. And therein it ſeemeth to me, that the wiſdom of the law, as I ſaid, is to be admired both ways, both becauſe it diſtinguiſheth ſo far, and becauſe it doth not diſtinguiſh farther. For I know that other laws do admit more curious diſtinction of this privilege; for the *Romans* had, beſides *jus civitatis*, which anſwereth to naturalization, *jus ſuffragii.* For although a man were naturalized to take lands and inheritance, yet he was not enabled to have a voice at paſſing of laws, or at election of officers. And yet farther they have *jus petitionis*, or *jus honorum.* For though a man had voice, yet he was not capable of honour and office. But theſe be the devices commonly of popular or free eſtates, which are jealous whom they take into their number, and are unfit for monarchies. But by the law of *England* the ſubject, that is natural born, hath a capacity or ability to all benefits whatſoever; I ſay capacity or ability: but to reduce *potentiam in actum*, is another caſe. For an earl of *Ireland*, though he be naturalized in *England*, yet hath no voice in the parliament of *England*, except he have either a call by writ, or creation by patent; but he is capable of either.

But upon this quadripartite diviſion of the ability of perſons, I do obſerve to your lordſhips three things, being all effectually pertinent to the queſtion in hand.

The firſt is, that if any man conceive that the reaſons for the *poſt-nati* might ſerve as well for the *ante-nati*, he may by the diſtribution which we have made, plainly perceive his error. For the law looketh not back; and therefore cannot, by any matter *ex poſt facto*, after birth, alter the ſtate of the birth; wherein no doubt the law hath a grave and profound reaſon; which is this, in few words, *nemo ſubito fingitur*; *aliud eſt naſci*, *aliud fieri.* We indeed more reſpect and affect thoſe worthy gentlemen of *Scotland*, whoſe merits and converſations we know; but the law, that proceeds upon general reaſon, and looks upon no mens faces, affecteth and privilegeth thoſe which drew their firſt breath under the obeiſance of the king of *England.*

The ſecond point is, that by the former diſtribution it appeareth that there be but two conditions by birth, either alien, or natural born; *nam tertium penitus ignoramus.* It is manifeſt then, that if the *poſt-nati* of *Scotland* be not natural born, they are alien born, and in no better degree at all than *Flemings*, *French*, *Italians*, *Spaniſh*, *Germans*, and others, which are all at this time alien friends, by reaſon his majeſty is in peace with all the world.

The third point ſeemeth to me very worthy the conſideration, which is, that in all the diſtributions of perſons, and the degrees of abilities or capacities, the king's act is all in all, without any manner of reſpect to law or parliament. For it is the king that makes an alien enemy, by proclaiming a war, wherewith the law or parliament intermeddles not. So the king only grants ſafe-conducts, wherewith law and parliament intermeddle not. It is the king likewiſe that maketh an alien friend, by concluding a peace, wherewith law and parliament intermeddle not. It is the king that makes a denizen by his charter, abſolutely of his prerogative and power, wherewith law and parliament intermeddle not. And therefore it is ſtrongly to be inferred, that as all theſe degrees depend wholly upon the king's act, and no ways upon law or parliament; ſo the fourth, although it comes not by the king's patent, but by operation of law, yet that the law, in that operation, reſpecteth only the king's perſon, without reſpect of ſubjection to law or parliament. And thus much by way of explanation and inducement: which being all matter in effect confeſſed, is the ſtrongeſt ground-work to that which is contradicted or controverted.

There followeth the confutation of the arguments on the contrary ſide.

That which hath been materially objected, may be reduced to four heads.

The firſt is, that the privilege of naturalization followeth allegiance, and that allegiance followeth the kingdom.

The ſecond is drawn from that common ground, *cum duo jura concurrunt in una perſona, æquum eſt ac ſi eſſent in duobus*; a rule, the words whereof are taken from the civil law; but the matter of it is received in all laws; being a very line or rule of reaſon, to avoid confuſion.

The third conſiſteth of certain inconveniencies conceived to enſue of this general naturalization, *ipſo jure*.

The fourth is not properly an objection, but a pre-occupation of an objection or proof on our part, by a diſtinction deviſed between countries devolute by deſcent, and acquired by conqueſt.

For the firſt, it is not amiſs to obſerve that thoſe who maintain this new opinion, whereof there is *altum ſilentium* in our books of law, are not well agreed in what form to utter and expreſs that: for ſome ſaid that allegiance hath reſpect to the law, ſome to the crown, ſome to the kingdom, ſome to the body politic of the king: ſo there is confuſion of tongues amongſt them, as it commonly cometh to paſs in opinions that have their foundations in ſubtilty and imagination of man's wit, and not in the ground of nature. But to leave their words, and to come to their proofs: they endeavour to prove this conceit by three manner of proofs: firſt, by reaſon; then, by certain inferences out of ſtatutes; and laſtly, by certain book-caſes, mentioning and reciting the forms of pleadings.

The reaſon they bring is this; that naturalization is an operation of the law of *England*; and ſo indeed it is, that may be the true *genus* of it.

Then they add, that granted, that the law of *England* is of force only within the kingdom and dominions of *England*, and cannot operate but where it is in force. But the law is not in force in *Scotland*, therefore that cannot endure this benefit of naturalization by a birth in *Scotland*.

This reaſon is plauſible and ſenſible, but extremely erroneous. For the law of *England*, for matters of benefit or forfeitures in *England*, operateth over the world. And becauſe it is truly ſaid that *reſpublica continetur pœna et præmio*, I will put a caſe or two of either.

It is plain that if a ſubject of *England* had conſpired the death of the king in foreign parts, it was by the common law of *England* treaſon. How prove I that? By the ſtatute of 35 *H.* VIII. *cap.* 2. wherein you ſhall find no words at all of making any new caſe of treaſon which was not treaſon before, but only of ordaining a form of trial; *ergo*, it was treaſon before: and if ſo, then the law of *England* works in foreign parts. So of contempts, if the king ſend his privy ſeal to any ſubject beyond the ſeas, commanding him to return, and he diſobey, no man will doubt but there is a contempt, and yet the fact enduring the contempt was committed in foreign parts.

Therefore the law of *England* doth extend to acts or matters done in foreign parts. So of reward, privilege or benefit, we need ſeek no other inſtance than the inſtance in queſtion; for I will put you a caſe that no man ſhall deny, where the law of *England* doth work and confer the benefit of naturalization upon a birth neither within the dominions of the kingdom, nor king of *England*. By the ſtatute of 25 *E.* III. which, if you will believe *Huſſey*, is but a declaration of the common law, all children born in any parts of the world, if they be of *Engliſh* parents continuing at that time as liege ſubjects to the king, and having done no act to forfeit the benefit of their allegiance, are *ipſo facto* naturalized. Nay, if a man look narrowly into the law in this point, he ſhall find a conſequence that may ſeem at the firſt ſtrange, but yet cannot be well avoided; which is, that if divers families of *Engliſh* men and women plant themſelves at *Middleborough*, or at *Roan*, or at *Liſbon*, and have iſſue, and their deſcendents do intermarry amongſt themſelves, without any intermixture of foreign blood; ſuch deſcendents are naturalized to all generations: for every generation is ſtill of liege parents, and therefore naturalized; ſo as you may have whole tribes and lineages of *Engliſh* in foreign countries.

And therefore it is utterly untrue that the law of *England* cannot operate or confer naturalization, but only within the bounds of the dominions of *England*.

To come now to their inferences upon ſtatutes.

The firſt is out of this ſtatute which I laſt recited. In which ſtatute it is ſaid, that in four ſeveral places there are theſe words, 'born 'within the allegiance of *England*;' or again, 'born without the 'allegiance of *England*;' which, ſay they, applies the allegiance to the kingdom, and not to the perſon of the king. To this the anſwer is eaſy; for there is no trope of ſpeech more familiar than to uſe the place of addition for the perſon. So we ſay commonly, the line of *York*, or the line of *Lancaſter*, for the lines of the duke of *York*, or the duke of *Lancaſter*. So we ſay the poſſeſſions of *Somerſet* or *Warwick*, intending the poſſeſſions of the dukes of *Somerſet* or earls of *Warwick*. So we ſee earls ſign, *Saliſbury*, *Northampton*, for the earls of *Saliſbury* or *Northampton*. And in the very ſame manner the ſtatute ſpeaks, allegiance of *England*, for allegiance of the king of *England*. Nay more, if there had been no variety in the penning of that ſtatute, this collection had had a little more force; for thoſe words might have been thought to have been uſed of purpoſe and in propriety; but you may find in three other ſeveral places of the ſame ſtatute, allegiance and obeiſance of the king of *England*, and eſpecially in the material and concluding place, that is to ſay, children whoſe parents were at the time of their birth at the faith and obeiſance of the king of *England*. So that it is manifeſt by this indifferent and promiſcuous uſe of both phraſes, the one proper, the other improper, that no man can ground any inference upon theſe words, without danger of cavillation.

The ſecond ſtatute, out of which they infer, is a ſtatute made in 32 *Hen.* VIII. touching the policy of ſtrangers tradeſmen within this realm. For the parliament finding that they did eat the *Engliſhmen* out of trade, and that they entertained no apprentices but of their own nation, did prohibit that they ſhould receive any apprentice but the king's ſubjects. In which ſtatute is ſaid, that in nine ſeveral places there is to be found this context of words, 'aliens born out of the king's obe'dience;' which is pregnant, ſay they, and doth imply that there be aliens born within the king's obedience. Touching this inference, I have heard it ſaid, *qui hæret in litera, hæret in cortice*; but this is not worthy the name of *cortex*, it is but *muſcus corticis*, the moſs of the bark. For it is evident that the ſtatute meant to ſpeak clearly and without equivocation, and to a common underſtanding. Now then there are aliens in common reputation, and aliens in preciſe conſtruction of law; the ſtatute then meaning not to comprehend *Iriſhmen*, or *Jerſeymen*, or *Calaiſmen*, for explanation ſake, leſt the word alien might be extended to them in a vulgar acceptance, added thoſe further words, 'born out of 'the king's obedience.' Nay, what if we ſhould ſay, that thoſe words, according to the received laws of ſpeech, are no words of difference or limitation, but of declaration or deſcription of an alien, as if it had been ſaid with a *videlicet*, aliens; that is, ſuch as are born out of the king's obedience? They cannot put us from that conſtruction. But ſure I am, if the bark make for them, the pith makes for us; for the privilege of liberty which the ſtatute means to deny to aliens of entertaining apprentices, is denied to none born within the king's obedience, call them aliens or what you will. And therefore by their reaſon, a *poſt-natus* of *Scotland* ſhall by that ſtatute keep what ſtranger apprentices he will, and ſo is put in the degree of an *Engliſh*.

The third ſtatute, out of which inference is made, is the ſtatute of 14 *E.* III. *cap. ſolo*, which hath been ſaid to be our very caſe; and I am of that opinion too, but directly the other way. Therefore to open the ſcope and purpoſe of that ſtatute: after that the title to the crown of *France* was devolute to king *E.* III. and that he had changed his ſtile, changed his arms, changed his ſeal, as his majeſty hath done, the ſubjects of *England*, ſaith the ſtatute, conceived a fear that the realm of *England* might become ſubject to the realm of *France*, or to the king as king of *France*. And I will give you the reaſons of the double fear, that it ſhould become ſubject to the realm of *France*. They had this reaſon of fear. *Normandy* had conquered *England*; *Normandy* was feudal of *France*. Therefore becauſe the ſuperior ſeigniory of *France* was now united in right with the tenancy of *Normandy*, and that *England*, in regard of the Conqueſt, might be taken as a perquiſite to *Normandy*, they had probable reaſon to fear, that the kingdom of *England* might be drawn to be ſubject to the realm of *France*. The other fear, that *England* might become ſubject to the king as king of *France*, grew no doubt of this foreſight, that the kings of *England* might be like to make their manſion and ſeat of their eſtate in *France*, in regard of the climate, wealth, and glory of that kingdom; and thereby the kingdom of *England* might be governed by the king's mandates and precepts iſſuing as from the king of *France*. But they will ſay, whatſoever the occaſion was, here you have the difference authoriſed of ſubjection to a king generally, and ſubjection to a king as king of a certain kingdom. But to this I give an anſwer three-fold.

Firſt, it preſſeth not the queſtion; for doth any man ſay that a *poſt-natus* of *Scotland* is naturalized in *England*, becauſe he is a ſubject of the king as king of *England*? No, but generally becauſe he is the king's ſubject.

Secondly, the ſcope of this law is to make a diſtinction between crown and crown; but the ſcope of their argument is to make a difference between crown and perſon.

Laſtly, this ſtatute, as I ſaid, is our very caſe retorted againſt them; for this is a direct ſtatute of ſeparation, which preſuppoſeth, that the common law had made an union of the crowns in ſome degree, by virtue of the union in the king's perſon, if this ſtatute had not been made to ſtop and croſs the courſe of the common law in that point; as if *Scotland* now ſhould be ſuitors to the king, that an act might paſs to like effect, and upon like fear. And therefore if you will make good your diſtinction in this preſent caſe, ſhew us a ſtatute for that. But I hope you can ſhew no ſtatute of ſeparation between *England* and *Scotland*. And if any man ſay that this was a ſtatute declaratory of the common law, he doth not mark how that is penned: for after a kind of hiſtorical declaration in the preamble, that *England* was never ſubject to *France*, the body of the act is penned thus: 'The king doth grant and eſtabliſh;' which are words merely introductive *novæ legis*, as if the king gave a charter of franchiſe, and did inveſt, by a donative, the ſubjects of *England* with a new privilege or exemption, which by the common law they had not.

To come now to the book-caſes which they put; which I will couple together, becauſe they receive one joint anſwer.

The firſt is 42 *E.* III. *fol.* where the book ſaith, exception was taken, that the plaintiff was born in *Scotland* at *Roſs* out of the allegiance of *England*.

The next is 22 *H.* VI. *fol.* 38. *Adrian*'s caſe; where it is pleaded, that a woman was born at *Bruges* out of the allegiance of *England*.

The third is 13 *Eliz. Dyer*, *fol.* 300. where the caſe begins thus: *Doctor* Story *qui notorie dignoſcitur eſſe ſubditus regni* Angliæ. In all theſe three, ſay they, that is pleaded, that the party is ſubject of the kingdom of *England*, and not of the king of *England*.

To theſe books I give this anſwer, that they be not the pleas at large, but the words of the reporter, who ſpeaks compendiouſly and narratively, and not according to the ſolemn words of the pleading. If you find a caſe put, that it is pleaded a man was ſeiſed in fee-ſimple, you will not infer upon that, that the words of the pleading were *in feodo ſimplici*, but *ſibi et hæredibus ſuis*. But ſhew me ſome precedent of a pleading at large, of *natus ſub ligeantia regni* Angliæ; for whereas Mr. *Walter* ſaid that pleadings are variable in this point, he would fain bring it to that; but there is no ſuch matter; for the pleadings are conſtant and uniform in this point. They may vary in the word *fides*, or *ligeantia*, or *obedientia*, and ſome other circumſtances. But in the form of *regni* and *regis* they vary not: neither can there, as I am perſuaded, be any one inſtance ſhewed forth to the contrary. See 9 *Eliz.* 4 *Baggot's Aſſize*, *fol.* 7. where the pleading at large is entered in the book. There you have *alienigena natus extra ligeantiam domini regis* Angliæ. See the precedents in the book of Entries, *pl.* 7. and two other places; for there be no more: and there you ſhall find ſtill *ſub ligeantia domini regis*, or *extra ligeantiam domini regis*. And therefore the forms of pleading, which are things ſo reverend, and are indeed towards the reaſons of the law, as *palma* and *pugnus*, containing the reaſon of the law, opened or unfolded, or diſplayed, they make all for us. And for the very words of reporters in books, you muſt acknowledge and ſay, *ilicet obruimur numero*. For you have 22 *Aſſ. pl.* 25. 27 *Aſſ.* the prior of *Shells* caſe, *pl.* 48. 14 *H.* IV. *fol.* 19. 3 *H.* VI. *fol.* 35. 6 *H.* VIII. in my lord *Dyer*, *fol.* 2. In all theſe books, the very words of the reporters have 'the allegiance of the king,' and not, the allegiance of *England*. And the book in the 24 *Edw.* III. which is your beſt book, although while it is toſſed at the bar, you have ſometimes the words 'allegiance 'of *England*,' yet when it comes to *Thorp*, chief juſtice, to give the rule, he ſaith, 'we will be certified by the roll, whether *Scotland* be 'within the allegiance of the king.' Nay, that farther form of pleading beateth down your opinion, that it ſufficeth not to ſay that he is born out of the allegiance of the king, and ſtay there, but he muſt ſhew in the affirmative, under the allegiance of what king or ſtate he was born. The reaſon whereof cannot be, becauſe it may appear whether he be a friend or an enemy, for that in a real action is all one. Nor it cannot be becauſe iſſue ſhall be taken thereupon; for the iſſue muſt ariſe on the other ſide upon *indigena* pleaded and traverſed. And therefore it can have no other reaſon, but to apprize the court more certainly, that the country of the birth is none of thoſe that are ſubject to the king.

As for the trial, that it ſhould be impoſſible to be tried, I hold it not worth the anſwering; for the *venire facias* ſhall go either where the natural birth is laid, although it be but by fiction, or if it be laid according to the truth, it ſhall be tried where the action is brought, otherwiſe you fall upon a main rock, that breaketh your argument in pieces; for how ſhould the birth of an *Iriſhman* be tried, or of a *Jerſeyman*? Nay, how ſhould the birth of a ſubject be tried, that is born of *Engliſh* parents in *Spain* or *Florence*, or any part of world? For to all theſe the like objection of trial may be made, becauſe they are within no counties: and this receives no anſwer. And therefore I will now paſs on to the ſecond main argument.

It is a rule of the civil law, ſay they, *cum duo jura*, &c. when two rights do meet in one perſon, there is no confuſion of them, but they remain ſtill in the eye of law diſtinct, as if they were in ſeveral perſons: and they bring examples of one man biſhop of two ſees, or one parſon that is rector of two churches. They ſay this unity in the biſhop or the rector doth not create any privity between the pariſhioners or dioceſeners, more than if there were ſeveral biſhops, or ſeveral parſons. This rule I allow, as was ſaid, to be a rule not of the civil law only but of common reaſon, but receiveth no forced or coined but a true and ſound diſtinction or limitation; which is, that it evermore faileth and deceiveth in caſes where there is any vigour or operation of the natural perſon; for generally in corporations the natural body is but *ſuffulcimentum corporis corporati*, it is but as a ſtock to uphold and bear out the corporate body; but otherwiſe it is in the caſe of the crown, as ſhall be manifeſtly proved in due place. But to ſhew that this rule receiveth this diſtinction, I will put but two caſes. The ſtatute of 21 *H.* VIII. ordaineth that a marquis may retain ſix chaplains qualified, a lord treaſurer of *England* four, a privy-counſellor three. The lord treaſurer *Paulet* was marquis of *Wincheſter*, lord treaſurer of *England*, and privy-counſellor, all at once. The queſtion was, whether he ſhould qualify thirteen chaplains? Now by the rule *cum duo jura* he ſhould; but adjudged, he ſhould not. And the reaſon was, becauſe the attendance of chaplains concerned and reſpected his natural perſon; he had but one ſoul, though he had three offices. The other caſe which I will put is the caſe of homage. A man doth homage to his lord for a tenancy held of the manor of *Dale*; there deſcendeth unto him afterwards a tenancy held of the manor of *Sale*, which manor of *Sale* is likewiſe in the hands of the ſame lord. Now by the rule *cum duo jura*, he ſhould do homage again, two tenancies and two ſeigniories, though but one tenant and one lord, *aquum eſt ac ſi eſſet in duobus*. But ruled that he ſhould not do homage again. Nay in the caſe of the king he ſhall not pay a ſecond reſpect of homage, as upon grave and deliberate conſideration it was reſolved, 24 *H.* VIII. and *uſus ſcaccarii*, as there is ſaid, accordingly. And the reaſon is no other, but becauſe when a man is ſworn to his lord, he cannot be ſworn over again: he hath but one conſcience, and the obligation of this oath trencheth between the natural perſon of the tenant and the natural perſon of the lord. And certainly the caſe of homage and tenure, and of homage liege, which is one caſe, are things of a near nature, ſave that the one is much inferior to the other; but it is good to behold theſe great matters of ſtate in caſes of lower element, as the eclipſe of the ſun is uſed to be in a pail of water.

The third main argument containeth certain ſuppoſed inconveniences, which may enſue of a general naturalization *ipſo jure*, of which kind three have been ſpecially remembred.

The firſt is the loſs of profit to the king upon letters of denization and purchaſes of aliens.

The ſecond is the concourſe of *Scotſmen* into this kingdom, to the infeebling of that realm of *Scotland* in people, and the impoveriſhing of this realm of *England* in wealth.

The third is, that the reaſon of this caſe ſtayeth not within the compaſs of the preſent caſe; for although it were ſome reaſon that *Scotſmen* were naturalized, being people of the ſame iſland and language, yet the reaſon which we urge, which is, that they are ſubject to the ſame king, may be applied to perſons every way more eſtranged from us than they are; as if in future time, in the king's deſcendents, there ſhould be a match with *Spain*, and the dominions of *Spain* ſhould be united with the crown of *England*, by one reaſon, ſay they, all the *Weſt-Indies* ſhould be naturalized; which are people not only *alterius ſoli* but *alterius cœli*.

To theſe conceits of inconvenience, how eaſy it is to give anſwer, and how weak they are in themſelves, I think no man that doth attentively ponder them can doubt. For how ſmall revenue can ariſe of ſuch denizations; and how honourable were it for the king to take eſcheats of his ſubjects, as if they were foreigners, for ſeizure of aliens lands are in regard the king hath no hold or command of their perſons and ſervices; every one may perceive. And for the confluence of *Scotſmen*, I think, we all conceive the ſpring-tide is paſt at the king's firſt coming in. And yet we ſee very few families of them throughout the cities and boroughs of *England*. And for the naturalizing of the *Indies*, we can readily help that, when the caſe comes; for we can make an act of parliament of ſeparation, if we like not their conſort. But theſe being reaſons politic, and not legal, and we are not now in parliament, but before a judgment-ſeat, I will not meddle with them, eſpecially ſince I have one anſwer which avoids and confounds all their objections in law; which is, that the very ſelf-ſame objections do hold in countries purchaſed by conqueſt. For in ſubjects obtained by conqueſt, it were more profit to indenizate by the poll; in ſubjects obtained by conqueſt, they may come in too faſt. And if king *Henry* VII. had accepted the offer of *Chriſtopher Columbus*, whereby the crown of *England* had obtained the *Indies* by conqueſt or occupation, all the *Indies* had been naturalized by the confeſſion of the adverſe part. And therefore ſince it is confeſſed, that ſubjects obtained by conqueſt are naturalized, and that all theſe objections are common and indifferent, as well to caſe of conqueſt as caſe of deſcent, theſe objections are in themſelves deſtroyed.

And therefore, to proceed now to overthrow that diſtinction of deſcent and conqueſt. *Plato* ſaith well, the ſtrongeſt of all authorities is, if a man can alledge the authority of his adverſary againſt himſelf. We do urge the confeſſion of the other ſide, that they confeſſed the *Iriſh* are naturalized; that they confeſs the ſubjects of the iſles of *Jerſey* and *Guernſey*, and *Berwick*, to be naturalized; and the ſubjects of *Calais* and *Tournay*, when they were *Engliſh*, were naturalized; as you may find in the 5 *Eliz.* in *Dyer*, upon the queſtion put to the judges by ſir *Nicholas Bacon* lord keeper.

To avoid this, they fly to a difference, which is new-coined, and is—I ſpeak not to the diſadvantage of the perſons that uſe it, for they are driven to it *tanquam ad ultimum refugium*, but the difference itſelf—it is, I ſay, full of ignorance and error. And therefore, to take a view of the ſupports of this difference, they alledge four reaſons.

The firſt is, that countries of conqueſt are made parcel of *England*, becauſe they are acquired by the arms and treaſure of *England*. To this I anſwer, that it were a very ſtrange argument, that if I wax rich upon the manor of *Dale*, and upon the revenue thereof purchaſe a cloſe by it, that it ſhould make that parcel of the manor of *Dale*. But I will ſet this new learning on ground with a queſtion or caſe put. For I oppoſe them that hold this opinion with this queſtion, if the king ſhould conquer any foreign country by an army compounded of *Engliſhmen* and *Scotſmen*, as it is like whenſoever wars are ſo it will be, I demand, whether this country conquered ſhall be naturalized both in *England* and *Scotland*, becauſe it was purchaſed by the joint arms of both? And if yea, whether any man will think it reaſonable, that ſuch ſubjects be naturalized in both kingdoms; the one kingdom not being naturalized towards the other? Theſe are the intricate conſequences of conceits.

A ſecond reaſon they alledge is, that countries won by conqueſt become ſubject to the laws of *England*, which countries patrimonial are not; and that the law doth draw the allegiance, and allegiance naturalization.

But to the major propoſition of that argument, touching the dependency of allegiance upon law, ſomewhat hath been already ſpoken, and full anſwer ſhall be given when we come to it. But in this place it ſhall ſuffice to ſay, that the minor propoſition is falſe; that is, that the laws of *England* are not ſuperinduced upon any country by conqueſt; but that the old laws remain until the king by his proclamation or letters patent declare other laws; and then if he will he may declare laws which be utterly repugnant, and differing from the laws of *England*. And hereof many ancient precedents and records may be ſhewed, that the reaſon why *Ireland* is ſubject to the laws of *England* is not *ipſo jure* upon conqueſt, but grew by a charter of king *John*; and that extended but to ſo much as was then in the king's poſſeſſion; for there are records in the time of king *E.* I. and II. of divers particular grants to ſundry ſubjects of *Ireland* and their heirs, that they might uſe and obſerve the laws of *England*.

The third reaſon is, that there is a politic neceſſity of intermixture of people in caſe of ſubjection by conqueſt, to remove alienations of mind, and to ſecure the ſtate; which holdeth not in caſe of deſcent. Here I perceive Mr. *Walter* hath read ſomewhat in matter of ſtate; and ſo have I likewiſe; though we may both quickly loſe ourſelves in cauſes of this nature. I find by the beſt opinions, that there be two means to aſſure and retain in obedience countries conquered, both very differing, almoſt in extremes, the one towards the other.

The one is by colonies, and intermixture of people, and tranſplantation of families, which Mr. *Walter* ſpoke of; and it was indeed the *Roman* manner; but this is like an old relick, much reverenced and almoſt never uſed. But the other, which is the modern manner, and almoſt wholly in practice and uſe, is by garriſons and citadels, and liſts or companies of men of war, and other like matters of terror and bridle.

To the firſt of theſe, which is little uſed, it is true that naturalization doth conduce; but to the latter it is utterly oppoſite, as putting too great pride and means to do hurt in thoſe that are meant to be kept ſhort and low. And yet in the very firſt caſe, of the *Roman* proceeding, naturalization did never follow by conqueſt, during all the growth of the *Roman* empire; but was ever conferred by charters, or donations, ſometimes to cities and towns, ſometimes to particular perſons, and ſometimes to nations, until the time of *Adrian* the emperor, and the law *in orbe* Romano *(a)*: and that law or conſtitution is not referred to title of conqueſt and arms only, but to all other titles; as by the donation and teſtament of kings, by ſubmiſſion and dedition of ſtates, or the like: ſo as this difference was as ſtrange to them as to us. And certainly I ſuppoſe it will ſound ſtrangely in the hearing of foreign nations, that the law of *England* ſhould *ipſo facto* naturalize ſubjects of conqueſts, and ſhould not naturalize ſubjects which grow unto the king by deſcent; that is, that it ſhould confer the benefit and privilege of naturalization upon ſuch as cannot at the firſt but bear hatred and rancour to the ſtate of *England*, and have had their hands in the blood of the ſubjects of *England*, and ſhould deny the like benefit to thoſe that are conjoined with them by a more amiable mean; and that the law of *England* ſhould confer naturalization upon ſlaves and vaſſals, for people conquered are no better in the beginning, and ſhould deny it to freemen: I ſay, it will be marvelled at abroad, of what complexion the laws of *England* be made, that breedeth ſuch differences. But there is little danger of ſuch ſcandals; for this is a difference that the law of *England* never knew.

The fourth reaſon of this difference is, that in caſe of conqueſt the territory united can never be ſeparated again. But in caſe of deſcent, there is a poſſibility. If his majeſty's line ſhould fail, the kingdoms may ſever again to their reſpective heirs; as in the caſe of 8 *Henry* VI. where it is ſaid, that if land deſcend to a man from the anceſtor on the part of his father, and a rent iſſuing out of it from an anceſtor on the part of the mother; if the party die without iſſue, the rent is revived. As to this reaſon, I know well the continuance of the king's line is no leſs dear to thoſe that alledge the reaſon, than to us that confute it. So as I do not blame the preſſing of the reaſon. But it is anſwered with no great difficulty. For, firſt, the law doth never reſpect remote and foreign poſſibilities, as notably appeared in the great caſe between ſir *Hugh Cholmley* and *Houlford* in the *Exchequer*, where one in the remainder, to the end to bridle tenant in tail from ſuffering a common recovery, granted his remainder to the king; and becauſe he would be ſure to have it out again without charge or trouble when his turn was ſerved, he limited *it* to the king during the life of tenant in tail. Queſtion grew, whether this grant of remainder were good, yea or no. And it was ſaid to be frivolous and void, becauſe it could never by any poſſibility execute; for tenant in tail cannot ſurrender; and if he died, the remainder likewiſe ceaſed. To which it was anſwered, that there was a poſſibility that it might execute, which was thus: put caſe, the tenant in tail ſhould enter into religion, having no iſſue; then the remainder ſhould execute, and the king ſhould hold the land during the natural life of tenant in tail, notwithſtanding his civil death. But the court *una voce* exploded this reaſon, and ſaid, that monaſteries were down, and entries into religion gone, and they muſt be up again ere this could be; and that the law did not reſpect ſuch remote and foreign poſſibilities. And ſo we may hold this for the like: for I think we all hope, that neither of thoſe days ſhall ever come, either for monaſteries to be reſtored, or for the king's line to fail. But the true anſwer is, that the poſſibility ſubſequent, remote or not remote, doth not alter the operation of law for the preſent. For that ſhould be, as if in caſe of the rent which you put, you ſhould ſay, that in regard that the rent may be ſevered, it ſhould be ſaid to be *in eſſe* in the mean time, and ſhould be grantable; which is clearly otherwiſe. And ſo in the principal caſe, if that ſhould be, which God of his goodneſs forbid, *ceſſante cauſa ceſſat effectus*, the benefit of naturalization for the time to come is diſſolved. But that altereth not the operation of the law; *rebus ſic ſtantibus*. And therefore I conclude, that this difference is but a device full of weakneſs and ignorance; and that there is one and the ſame reaſon of naturalizing ſubjects by deſcent, and ſubjects by conqueſt; and that is the union in the perſon of the king; and therefore that the caſe of *Scotland* is as clear as that of *Ireland*, and they that grant the one cannot deny the other. And ſo I conclude the ſecond part, touching confutation.

To proceed therefore to the proofs of our part, your lordſhips cannot but know many of them muſt be already ſpent in the anſwer which we have made to the objections. For *corruptio unius*, *generatio alterius*, holds as well in arguments, as in nature: the deſtruction of an objection begets a proof. But nevertheleſs I will avoid all iteration, leſt I ſhould ſeem either to diſtract your memories, or to abuſe your patience; but will hold myſelf only to theſe proofs which ſtand ſubſtantially of themſelves, and are not intermixed with matter of confutation. I will therefore prove unto your lordſhips that the *poſt-natus* of *Scotland* is by the law of *England* natural, and ought ſo to be adjudged, by three courſes of proof.

1. Firſt, upon point of favour of law.
2. Secondly, upon reaſons and authorities of law.
3. And laſtly, upon former precedents and examples.

1. Favour of law. What mean I by that? The law is equal, and favoureth not. It is true, not perſons; but things or matters it doth favour. Is it not a common principle, that the law favoureth three things, life, liberty, and dower? And what is the reaſon of this favour? This, becauſe our law is grounded upon the law of nature. And theſe three things do flow from the law of nature, preſervation of life natural; liberty, which every beaſt or bird ſeeketh and affecteth naturally; the ſociety of man and wife, whereof dower is the reward natural. It is well, doth the law favour liberty ſo highly, as a man ſhall enfranchiſe his bondman when he thinketh not of it, by granting to him lands or goods; and is the reaſon of it *quia naturâ omnes homines erant liberi*; and that ſervitude or villenage doth croſs and abridge the law of nature? And doth not the ſelf-ſame reaſon hold in the preſent caſe? For, my lords, by the law of nature all men in the world are naturalized one towards another; they were all made of one lump of earth, of one breath of God; they had the ſame common parents: nay, at the firſt they were, as the ſcripture ſheweth, *unius labii*, of one language, until the curſe; which curſe, thanks be to God, our preſent caſe is exempted from. It was civil and national laws that brought in theſe words and differences of *civis* and *exterus*, alien and native. And therefore becauſe they tend to abridge the law of nature, the law favoureth not them, but takes them ſtrictly; even as our law hath an excellent rule, that cuſtoms of towns and boroughs ſhall be taken and conſtrued ſtrictly and preciſely, becauſe they do abridge and derogate from the law of the land. So by the ſame reaſon all national laws whatſoever are to be taken ſtrictly and hardly in any point wherein they abridge and derogate from the law of nature. Whereupon I conclude, that your lordſhips cannot judge the law for the other ſide, except the caſe be *luce clarius*. And if it appear to you but doubtful, as I think no man in his right ſenſes but will yield it to be at leaſt doubtful, then ought your lordſhips, under your correction be it ſpoken, to pronounce for us becauſe of the favour of the law. Furthermore, as the law of *England* muſt favour naturalization as a branch of the law of nature, ſo it appears manifeſtly, that it doth favour it accordingly. For is it not much to make a ſubject naturalized? By the law of *England*, it ſhould ſuffice, either place or parents. If he be born in *England*, it is no matter though his parents be *Spaniards*, or what you will. On the other ſide, if he be born of *Engliſh* parents, it ſkilleth not though he be born in *Spain*, or in any other place of the world. In ſuch ſort doth the law of *England* open her lap to receive in people to be naturalized; which indeed ſheweth the wiſdom and excellent compoſition of our law, and that it is the law of a warlike and magnanimous nation fit for empire. For look, and you ſhall find that ſuch kind of eſtates have been ever liberal in point of naturalization: whereas merchant-like and envious eſtates have been otherwiſe.

For the reaſons of law joined with authorities, I do firſt obſerve to your lordſhips, that our aſſertion or affirmation is ſimple and plain: that it ſufficeth to naturalization, that there be one king, and that the party be *natus ad fidem regis*, agreeable to the definition of *Littleton*, which is: alien is he which is born out of the allegiance of our lord the king. They of the other ſide ſpeak of reſpects, and *quoad*, and *quatenus*, and ſuch ſubtilties and diſtinctions. To maintain therefore our aſſertion, I will uſe three kinds of proofs.

The firſt is, that allegiance cannot be applied to the law or kingdom, but to the perſon of the king; becauſe the allegiance of the ſubject is more large and ſpacious, and hath a greater latitude and comprehenſion than the law or the kingdom. And therefore it cannot be a dependency of that without the which it may of itſelf ſubſiſt.

The ſecond proof which I will uſe is, that the natural body of the king hath an operation and influence into his body politic, as well as his body politick hath upon his body natural; and therefore, that although his body politic of king of *England*, and his body politic of king of *Scotland*, be ſeveral and diſtinct, yet nevertheleſs his natural perſon, which is one, hath an operation upon both, and createth a privity between them.

And the third proof is the binding text of five ſeveral ſtatutes.

For the firſt of theſe, I ſhall make it manifeſt, that the allegiance is of a greater extent and dimenſion than laws or kingdom, and cannot conſiſt by the laws merely; becauſe it began before laws, it continueth after laws, and it is in vigour where laws are ſuſpended and have not their force.

That it is more ancient than law, appeareth by that which was ſpoken in the beginning by way of inducement, where I did endeavour to demonſtrate, that the original age of kingdoms was governed by natural equity, that kings were more ancient than lawgivers, that the firſt ſubmiſſions were ſimple, and upon confidence to the perſon of kings, and that the allegiance of ſubjects to hereditary monarchies can no more be ſaid to conſiſt by laws, than the obedience of children to parents.

That allegiance continueth after laws, I will only put the caſe, which was remembered by two great judges in a great aſſembly, the one of them now with God: which was; that if a king of *England* ſhould be expulſed his kingdom, and ſome particular ſubjects ſhould follow him in flight or exile in foreign parts, and any of them there ſhould conſpire his death, upon his recovery of his kingdom, ſuch a ſubject might by the law of *England* be proceeded with for treaſon committed and perpetrated at what time he had no kingdom, and in place where the law did not bind.

That allegiance is in vigour and force where the power of law hath a ceſſation, appeareth notably in time of wars; for *ſilent leges inter arma*. And yet the ſovereignty and imperial power of the king is ſo far from being then extinguiſhed or ſuſpended, as contrariwiſe it is raiſed and made more abſolute; for then he may proceed by his ſupreme authority and martial law, without obſerving formalities of the laws of his kingdom. And therefore whoſoever ſpeaketh of laws, and the king's power by laws, and the ſubjects obedience or allegiance to laws, ſpeak but of one half of the crown. For *Bracton*, out of *Juſtinian*, doth truly define the crown to conſiſt of laws and arms, power civil and martial, with the latter whereof the law doth not intermeddle: ſo as where it is much ſpoken, that the ſubjects of *England* are under one law, and the ſubjects of *Scotland* are under another law, it is true at *Edinburgh* or *Sterling*, or again in *London* or *York*; but if *Engliſhmen* and *Scotſmen* meet in an army royal before *Calais*, I hope, then they are under one law. So likewiſe not only in time of war, but in time of peregrination. If a king of *England* travel or paſs through foreign territories, yet the allegiance of his ſubjects followeth him; as appeareth in that notable caſe which is reported in *Fleta*, where one of the train of king *Edward* I. as he paſſed through *France* from the *Holy Land*, imbezeled ſome ſilver plate at *Paris*, and juriſdiction was demanded of this crime by the *French* king's counſel at law, *ratione ſoli*, and demanded likewiſe by the officers of king *Edward*, *ratione perſonæ:* and after much ſolemnity, conteſtation, and interpleading, it was ruled and determined for king *Edward*, and the party tried and judged before the knight marſhal of the king's houſe, and hanged after the *Engliſh* law, and execution in St. *Germains* meadows. And ſo much for the firſt proof.

(a) [The law here alluded to by lord *Bacon* is one, by which the emperor *Antoninus Caracalla* communicated the rights of a *Roman* citizen to the whole *Roman* empire. It is noticed in *Juſtinian's Digeſt*, *lib.* 1. *tit.* 5. *l.* 17. and in *Novell.* 79. *c.* 5. *Antoninus Pius* and other emperors have been named as authors of the law. But *Heineccius*, who is very full and ſatisfactory on the point, is clear in opinion, that this extenſion was firſt made by *Caracalla*. *Heinecc. Syntagm. Append. lib.* 1. *ſ.* 15. EDITOR.]

For my ſecond main proof, that is drawn from the true and legal diſtinction of the king's ſeveral capacities; for they that maintain the contrary opinion do in effect deſtroy the whole force of the king's natural capacity, as if it were drowned and ſwallowed up by his politic. And therefore I will firſt prove to your lordſhips, that his two capacities are in no ſort confounded. And ſecondly, that as his capacity politic worketh ſo upon his natural perſon, as it makes it differ from all other the natural perſons of his ſubjects; ſo *è converſo*, his natural body worketh ſo upon his politic, as the corporation of the crown utterly differeth from all other corporations within the realm.

For the firſt, I will vouch you the very words which I find in that notable caſe of the duchy, where the queſtion was, whether the grants of king *Edward* VI. for duchy lands ſhould be avoided in points of nonage. The caſe, as your lordſhips know well, is reported by Mr. *Plowden* as the general reſolution of all the judges of *England*, and the king's learned counſel, *Rouſwell* the ſolicitor only excepted. There I find the ſaid words, *Comment. fol.* 215. ‘There is in the king not a body natural alone, nor a body politic alone, but a body natural and politic together: *corpus corporatum in corpore naturali, et corpus naturale in corpore corporato*.’ The like I find in the great caſe of the lord *Berkley* ſet down by the ſame reporter, *Comment. fol.* 234. ‘Though there be in the king two bodies, and that thoſe two bodies are conjoined, yet are they by no means confounded the one by the other.’

Now then to ſee the mutual and reciprocal intercourſe, as I may term it, or influence or communication of qualities, that theſe bodies have the one upon the other. The body politic of the crown induceth the natural perſon of the king with theſe perfections; that the king in law ſhall never be ſaid to be within age; that his blood ſhall never be corrupted; and that if he were attainted before, the very aſſumption of the crown purgeth it; that the king ſhall not take but by matter of record, although he take in his natural capacity as upon a gift in tail; that his body in law ſhall be ſaid to be as it were immortal; for there is no death of the king in law, but a demiſe, as it is termed: with many other the like privileges and differences from other natural perſons, too long to rehearſe, the rather becauſe the queſtion laboureth not in that part. But on the contrary part let us ſee what operations the king's natural perſon hath upon his crown and body politic. Of which the chiefeſt and greateſt is, that it cauſeth the crown to go by deſcent, which is a thing ſtrange, and contrary to the courſe of all corporations, which evermore take in ſucceſſion, and not by deſcent; for no man can ſhew me in all the corporations of *England*, of what nature ſoever, whether they conſiſt of one perſon, or of many, or whether they be temporal or eccleſiaſtical, any one takes to him and his heirs, but all to him and his ſucceſſors. And therefore here you may ſee what a weak courſe that is, to put caſes of biſhops and parſons, and the like, and to apply them to the crown. For the king takes to him and his heirs in the manner of a natural body, and the word, ſucceſſors, is but ſuperfluous; and where that is uſed, that is ever duly placed after the word, heirs, ‘the king, his heirs, and ſucceſſors.’

Again, no man can deny but *uxor et filius ſunt nomina naturæ*. A corporation can have no wife, nor a corporation can have no ſon. How is it then, that it is treaſon to compaſs the death of the queen or of the prince? There is no part of the body politic of the crown in either of them, but it is intirely in the king. So likewiſe we find in the caſe of the lord *Berkley*, the queſtion was, whether the ſtatute of 35 *Henry* VIII. for that part which concerned queen *Catharine Par*'s jointure, were a public act or no, of which the judges ought to take notice, not being pleaded; and judged a public act. So the like queſtion came before your lordſhip, my lord chancellor, in ſerjeant *Heale*'s caſe; whether the ſtatute of 11 *Edward* III. concerning the intailing of the dukedom of *Cornwall* to the prince, were a public act or no; and ruled likewiſe a public act. Why? No man can affirm but theſe be operations of law, proceeding from the dignity of the natural perſon of the king; for you ſhall never find, that another corporation whatſoever of a biſhop, or maſter of a college, or mayor of *London*, worketh any thing in law upon the wiſe or ſon of the biſhop or the mayor. And to conclude this point, and withal to come near to the caſe in queſtion, I will ſhew you where the natural perſon of the king hath not only an operation in the caſe of his wife and children, but likewiſe in the caſe of his ſubjects, which is the very queſtion in hand. As for example, I put this caſe. Can a *Scotſman*, who is a ſubject to the natural perſon of the king, and not to the crown of *England*; can a *Scotſman*, I ſay, be an enemy by the law to the ſubjects of *England*? Or muſt he not of neceſſity, if he ſhould invade *England*, be a rebel and no enemy, not only as to the king, but as to the ſubject? Or can any letters of mart or repriſal be granted againſt a *Scotſman* that ſhall ſpoil an *Engliſhman*'s goods at ſea? And certainly this caſe doth preſs exceeding near the principal caſe; for it proveth plainly, that the natural perſon of the king hath ſuch a communication of qualities with his body politic, as it makes the ſubjects of either kingdom ſtand in another degree of privity one towards the other, than they did before. And ſo much for the ſecond proof.

For the five acts of parliament which I ſpoke of, which are concluding to this queſtion.

The firſt of them is that concerning the baniſhment of *Hugh Spencer* in the time of king *Edward* II. in which act there is contained the charge and accuſation whereupon his exile proceeded. One article of which charge is ſet down in theſe words: ‘Homage and oath of the ſubject is more by reaſon of the crown than by reaſon of the perſon of the king. So that if the king doth not guide himſelf by reaſon in right of the crown, his lieges are bound by their oath to the crown to remove the king.’ By which act doth plainly appear the perilous conſequence of this diſtinction concerning the perſon of the king and the crown. And yet I do acknowledge juſtly and ingenuouſly a great difference between that aſſertion and this, which is now maintained: for it is one thing to make things diſtinct, another thing to make them ſeparable, *aliud eſt diſtinctio, aliud ſeparatio*; and therefore I aſſure myſelf, that thoſe that now uſe and urge that diſtinction, do as firmly hold, that the ſubjection to the king's perſon and to the crown are inſeparable, though diſtinct, as I do. And it is true that the poiſon of the opinion and aſſertion of *Spencer* is like the poiſon of a ſcorpion, more in the tail than in the body: for it is the inference that they make, which is, that the king may be depoſed or removed, that is the treaſon and diſloyalty of that opinion. But by your leave, the body is never a whit the more wholſom meat for having ſuch a tail belonging to it. Therefore we ſee that is *locus lubricus*, an opinion from which a man may eaſily ſlide into an abſurdity. But upon this act of parliament I will only note one circumſtance more, and ſo leave it, which may add authority unto it in the opinion of the wiſeſt; and that is, that theſe *Spencers* were not ancient nobles or great patriots that were charged and proſecuted by upſtarts and favourites: for then it might be ſaid, that it was but the action of ſome flatterers, who uſe to extol the power of monarchs to be infinite. But it was contrary; a proſecution of thoſe perſons being favourites by the nobility; ſo as the nobility themſelves, which ſeldom do ſubſcribe to the opinion of an infinite power of monarchs, yet even they could not endure, but their blood did riſe to hear that opinion, that ſubjection is owing to the crown rather than to the perſon of the king.

The ſecond act of parliament, which determined this caſe, is the act of recognition in the firſt year of his majeſty, wherein you ſhall find, that in two ſeveral places, the one in the preamble, the other in the body of the act, the parliament doth recogniſe, that theſe two realms of *England* and *Scotland* are under one imperial crown. The parliament doth not ſay under one monarchy or king, which might refer to the perſon, but under one imperial crown, which cannot be applied but to the ſovereign power of regiment comprehending both kingdoms. And the third act of parliament is the act made in the fourth year of his majeſty's reign, for the abolition of hoſtile laws; wherein your lordſhips ſhall find likewiſe in two places, that the parliament doth acknowledge, that there is an union of theſe two kingdoms already begun in his majeſty's perſon: ſo as by the declaration of that act, they have not only one king, but there is an union in inception in the kingdoms themſelves.

Theſe two are judgments in parliament by way of declaration of law, againſt which no man can ſpeak. And certainly theſe are righteous and true judgments to be relied upon; not only for the authority of them, but for the verity of them; for to any that ſhall well and deeply weigh the effects of law upon this conjunction, it cannot but appear, that although *partes integrales* of the kingdom, as the philoſophers ſpeak, ſuch as the laws, the officers, the parliament, are not yet commixed; yet nevertheleſs there is but one and the ſelf-ſame fountain of ſovereign power depending upon the ancient ſubmiſſion, whereof I ſpake in the beginning; and in that ſenſe the crowns and the kingdoms are truly ſaid to be united.

And the force of this truth is ſuch, that a grave and learned gentleman, that defended the contrary opinion, did confeſs thus far: that in ancient times, when monarchies, as he ſaid, were but heaps of people without any exact form of policy; that then naturalization and communication of privileges did follow the perſon of the monarch; but otherwiſe ſince ſtates were reduced to a more exact form: ſo as thus far we did conſent; but ſtill I differ from him in this, that theſe more exact forms, wrought by time and cuſtom and laws, are nevertheleſs ſtill upon the firſt foundation, and do ſerve only to perfect and corroborate the force and bond of the firſt ſubmiſſion, and in no ſort to diſannul or deſtroy it.

And therefore with theſe two acts do I likewiſe couple the act of 14 *Edward* III. which hath been alledged of the other ſide. For by collating of that act with this former two, the truth of that we affirm will the more evidently appear, according unto the rule of reaſon: *oppoſita juxta ſe poſita magis eluceſcunt*. That act of 14 is an act of ſeparation. Theſe two acts formerly recited are acts tending to union. This act is an act that maketh a new law; it is by the words of grant and eſtabliſh. Theſe two acts declare the common law as it is, being by words of recognition and confeſſion.

And therefore upon the difference of theſe laws you may ſubſtantially ground this poſition: that the common law of *England*, upon the adjunction of any kingdom unto the king of *England*, doth make ſome degree of union in the crowns and kingdoms themſelves; except by a ſpecial act of parliament they be diſſevered.

Laſtly, the fifth act of parliament which I promiſed, is the act made in the 42 of *E.* III. *cap.* 10. which is an expreſs deciſion of the point in queſtion. The words are, ‘*item*, (upon the petition put into parliament by the commons) that infants born beyond the ſeas in the ſeigniories of *Calais*, and elſewhere within the lands and ſeigniories that pertain to our ſovereign lord the king beyond the ſeas, be as able and inheritable of their heritage in *England*, as other infants born within the realm of *England*, it is accorded that the common law and the ſtatute formerly made be holden.’

Upon this act I infer thus much; firſt, that ſuch as the petition mentioneth were naturalized, the practice ſhews; then if ſo, it muſt be either by common law or ſtatute, for ſo the words report: not by ſtatute, for there is no other ſtatute but 25 *E.* III. and that extends to the caſe of birth out of the king's obedience, where the parents are *Engliſh*; *ergo* it was by the common law, for that only remains. And ſo by the declaration of this ſtatute at the common law, ‘all infants, born within the lands and ſeigniories (for I give you the very words again) that pertain to our ſovereign lord the king, (it is not ſaid, as are the dominions of *England*) are as able and inheritable of their heritage in *England*, as other infants born within the realm of *England*.’ What can be more plain? And ſo I leave ſtatutes and go to precedents; for though the one do bind more, yet the other ſometimes doth ſatisfy more.

For precedents, in the producing and uſing of that kind of proof, of all others it behoveth them to be faithfully vouched; for the ſuppreſſing or keeping back of a circumſtance, may change the caſe: and therefore I am determined to urge only ſuch precedents, as are without all colour or ſcruple of exception or objection, even of thoſe objections which I have, to my thinking, fully anſwered and confuted. This is now, by the providence of God, the fourth time that the line and kings of *England* have had dominions and ſeigniories united unto them as patrimonies, and by deſcent of blood; four unions, I ſay, there have been, incluſive with this laſt. The firſt was of *Normandy*, in the perſon of *William*, commonly called the Conqueror. The ſecond was of *Gaſcoigne*, and *Guienne*, and *Anjou*, in the perſon of king *Henry* II. in his perſon, I ſay, though by ſeveral titles. The third was of the crown of *France*, in the perſon of king *Edward* III. And the fourth of the kingdom of *Scotland*, in his majeſty. Of theſe I will ſet aſide ſuch as by any cavillation can be excepted unto. Firſt, I will ſet aſide *Normandy*; becauſe it will be ſaid, that the difference of countries accruing by conqueſt, from countries annexed by deſcent, in matter of communication of privileges, holdeth both ways, as well of the part of the conquering kingdom, as the conquered; and therefore that although *Normandy* was not a conqueſt of *England*, yet *England* was a conqueſt of *Normandy*, and ſo a communication of privileges between them. Again, ſet aſide *France*; for that it will be ſaid that although the king had a title in blood and by deſcent, yet that title was executed and recovered by arms, ſo as it is a mixt title of conqueſt and deſcent, and therefore the precedent not ſo clear.

There remains then *Gaſcoigne* and *Anjou*, and that precedent likewiſe I will reduce and abridge to a time, to avoid all queſtion. For it will be ſaid of them alſo, that after they were loſt and recovered in *ore gladii*, that the ancient title of blood was extinct; and that the king was in upon his new title by conqueſt. And Mr. *Walter* hath found a book-caſe in 13 *H.* VI. abridged by Mr. *Fitz-Herbert*, in title of *Protection*, *placito* 56. where a protection was caſt, *quia profecturus in* Gaſconiam with the earl of *Huntingdon*, and challenged becauſe it was not a voyage royal; and the juſtices thereupon required the ſight of the commiſſion, which was brought before them, and purported power to pardon felonies and treaſon, power to coin money, and power to conquer them that reſiſt: whereby Mr. *Walter*, finding the word *conqueſt*, collected that the king's title at that time was reputed to be by conqueſt. Wherein I may not omit to give *obiter* that anſwer which law and truth provide, namely, that when any king obtaineth by war a country whereunto he hath right by birth, that he is ever in upon his ancient right, not upon his purchaſe by conqueſt; and the reaſon is, that there is as well a judgment and recovery by war and arms, as by law and courſe of juſtice. For war is a tribunal-ſeat, wherein God giveth the judgment, and the trial is by battle or duel, as in the caſe of trial of private right: and then it follows, that whoſoever cometh in by eviction, comes in his *remitter*: ſo as there will be no difference in countries whereof the right cometh by deſcent, whether the poſſeſſion be obtained peaceably or by war. But yet nevertheleſs, becauſe I will utterly take away all manner of evaſion and ſubterfuge, I will yet ſet apart that part of time, in and during the which the ſubjects of *Gaſcoigne* and *Guienne* might be thought to be ſubdued by a re-conqueſt. And therefore I will not meddle with the prior of *Shelley*'s caſe, though it be an excellent caſe; becauſe it was in the time of 27 *E.* III. neither will I meddle with any caſes, records, or precedents, in the time of king *H.* V. or king *H.* VI. for the ſame reaſon; but will hold myſelf to a portion of time from the firſt uniting of theſe provinces in the time of king *H.* II. until the time of king *John*, at what time thoſe provinces were loſt; and from that time again unto the ſeventeenth year of the reign of king *E.* II. at what time the ſtatute of *prærogativa regis* was made, which altered the law in the point in hand.

That both in theſe times the ſubjects of *Gaſcoigne*, and *Guienne*, and *Anjou*, were naturalized for inheritance in *England* by the laws of *England*, I ſhall manifeſtly prove; and the proof proceeds, as to the former time, which is our caſe, in a very high degree *à minore ad majus*, and as we ſay, *à multo fortiori*. For if this privilege of naturalization remained unto them when the countries were loſt, and became ſubjects in poſſeſſion to another king, much more did they enjoy it as long as they continued under the king's ſubjection.

Therefore to open the ſtate of this point. After theſe provinces were, through the perturbations of the ſtate in the unfortunate time of king *John*, loſt and ſevered, the principal perſons which did adhere unto the *French*, were attainted of treaſon, and their eſcheats here in *England* taken and ſeized. But the people, that could not reſiſt the tempeſt when their heads and leaders were revolted, continued inheritable to their poſſeſſions in *England*; and reciprocally the people of *England* inherited and ſucceeded to their poſſeſſions in *Gaſcoigne*, and were both accounted *ad fidem utriuſque regis*, until the ſtatute of *prærogativa regis*; wherein the wiſdom and juſtice of the law of *England* is highly to be commended. For of this law there are two grounds of reaſon, the one of equity, the other of policy. That of equity was, becauſe the common people were in no fault, but, as the ſcripture ſaith in a like caſe, *quid fecerunt oves iſtæ?* It was the cowardiſe and diſloyalty of their governors that deſerved puniſhment, but *what had theſe ſheep done?* And therefore to have puniſhed them, and deprived them of their lands and fortunes, had been unjuſt. That of policy was, becauſe if the law had forthwith, upon the loſs of the countries by an accident of time, pronounced the people for aliens, it had been a kind of acceſſion of their right, and a diſclaimer in them, and ſo a greater difficulty to recover them. And therefore we ſee the ſtatute, which altered the law in this point, was made in the time of a weak king, that, as it ſeemed, deſpaired ever to recover his right, and therefore thought better to have a little preſent profit by eſcheats, than the continuance of his claim, and the countenance of his right, by the admitting of them to enjoy their inheritance as they did before.

The ſtate therefore of this point being thus opened, it reſteth to prove our aſſertion, that they were naturalized; for the clearing whereof I ſhall need but to read the authorities, they be ſo direct and pregnant. The firſt is the very text of the ſtatute of *prærogativa regis. Rex habebit eſcaetas de terris* Normannorum, *cujuſcunque feodi fuerint, ſalvo ſervitio, quod pertinet ad capitales dominos feodi illius: et hoc ſimiliter intelligendum eſt, ſi aliqua hæreditas deſcendat alicui nato in partibus tranſmarinis, et cujus anteceſſores fuerunt ad fidem regis* Franciæ, *ut tempore regis* Johannis, *et non ad fidem regis* Angliæ, *ſicut contigit de baronia* Monumetæ, &c.

By which ſtatute it appears plainly, that before the time of king *John* there was no colour of any eſcheat, becauſe they were the king's ſubjects in poſſeſſion, as *Scotland* now is; but only it determines the law from that time forward.

This ſtatute, if it had in it any obſcurity, it is taken away by two lights; the one placed before it, and the other placed after it; both authors of great credit, the one for ancient, the other for late times.

The former is *Bracton*, in his *cap. de exceptionibus, lib.* 5. *fol.* 427. and his words are theſe: *eſt etiam et alia exceptio, quæ tenenti competit ex perſona petentis, propter defectum nationis, quæ dilatoria eſt, et non perimit actionem; ut ſi quis alienigena, qui fuerit ad fidem regis* Franciæ, *et actionem inſtituat verſus aliquem, qui fuerit ad fidem regis* Angliæ, *tali non reſpondeatur, ſaltem donec terræ fuerint communes.* By theſe words it appeareth, that after the loſs of the provinces beyond the ſeas, the naturalization of the ſubjects of thoſe provinces was in no ſort extinguiſhed, but only was in ſuſpence during the time of war, and no longer; for he ſaith plainly, that the exception, which we call plea, to the perſon of an alien, was not peremptory, but only dilatory; that is to ſay, during the time of war, and until there were peace concluded, which he terms by theſe words, *donec terræ fuerint communes:* which, though the phraſe ſeem ſomewhat obſcure, is expounded by *Bracton* himſelf in his fourth book, *fol.* 297. to be of peace made and concluded, whereby the inhabitants of *England* and thoſe provinces might enjoy the profits and fruits of their lands in either place *communiter*, that is, reſpectively, or as well the one as the other. So as it is clear they were no aliens in right, but only interrupted and debarred of ſuits in the king's courts in time of war.

The authority after the ſtatute is that of Mr. *Stamford*, the beſt expoſitor of a ſtatute that hath been in our law; a man of reverend judgment and excellent order in his writings. His words are in his expoſition upon the branch of the ſtatute which we read before. 'By this branch it 'ſhould appear, that at this time men of *Normandy*, *Gaſcoigne*, *Guienne*, '*Anjou*, and *Britain*, were inheritable within this realm, as well as *Engliſhmen*; becauſe that they were ſometimes ſubjects to the kings of *England*, and under their dominion, until king *John*'s time, as is aforeſaid: 'and yet after his time, thoſe men, ſaving ſuch whoſe lands were taken 'away for treaſon, were ſtill inheritable within this realm till the making 'of this ſtatute; and in the time of peace between the two kings of '*England* and *France*, they were anſwerable within this realm, if they 'had brought any action for their lands and tenements.'

So as by theſe three authorities, every one ſo plainly purſuing the other, we conclude that the ſubjects of *Gaſcoigne*, *Guienne*, *Anjou*, and the reſt, from their firſt union by deſcent, until the making of the ſtatute of *prærogativa regis*, were inheritable in *England*, and to be anſwered in the king's courts in all actions, except it were in time of war. Nay more, which is *de abundanti*, that when the provinces were loſt, and diſannexed, and that the king was but king *de jure* over them, and not *de facto*, yet nevertheleſs the privilege of naturalization continued.

There reſteth yet one objection, rather plauſible to a popular underſtanding than any ways forcible in law or learning, which is a difference taken between the kingdom of *Scotland* and theſe duchies; for that the one is a kingdom, and the other was not ſo; and therefore that thoſe provinces, being of an inferior nature, did acknowledge our laws, and ſeals, and parliament, which the kingdom of *Scotland* doth not.

This difference was well given over by Mr. *Walter*; for it is plain that a kingdom and abſolute dukedom, or any other ſovereign eſtate, do differ *honore*, and not *poteſtate*: for divers duchies and countries, that are now, were ſometimes kingdoms; and divers kingdoms, that are now, were ſometimes duchies, or of other inferior ſtile: wherein we need not travel abroad, ſince we have in our own ſtate ſo notorious an inſtance of the country of *Ireland*, whereof king *H.* VIII. of late time was the firſt that writ himſelf king, the former ſtile being lord of *Ireland*, and no more; and yet kings had the ſame authority before, that they have had ſince, and the ſame nation the ſame marks of a ſovereign ſtate, as their parliaments, their arms, their coins, as they now have: ſo as this is too ſuperficial an allegation to labour upon.

And if any do conceive that *Gaſcoigne* and *Guienne* were governed by the laws of *England*: firſt, that cannot be in reaſon; for it is a true ground, that whereſoever any prince's title unto any country is by law, he can never change the laws, for that they create his title: and therefore no doubt thoſe duchies retained their own laws; which if they did, then they could not be ſubject to the laws of *England*. And next, again, the fact or practice was otherwiſe, as appeareth by all conſent of ſtory and record: for thoſe duchies continued governed by the civil law, their trials by witneſſes, and not by jury, their lands teſtamentary, and the like.

Now for the colours that ſome have endeavoured to give, that they ſhould have been ſubordinate to the government of *England*; they were partly weak, and partly ſuch as make ſtrongly againſt them: for as to that, that writs of *habeas corpus* under the great ſeal of *England* have gone to *Gaſcoigne*, it is no manner of proof; for that the king's writs, which are mandatory, and not writs of ordinary juſtice, may go to his ſubjects into any foreign parts whatſoever, and under what ſeal it pleaſeth him to uſe. And as to that, that ſome acts of parliament have been cited, wherein the parliaments of *England* have taken upon them to order matters of *Gaſcoigne*; if thoſe ſtatutes be well looked into, nothing doth more plainly convince the contrary; for they intermeddle with nothing but that that concerneth either the *Engliſh* ſubjects perſonally, or the territories of *England* locally, and never the ſubjects of *Gaſcoigne*. For look upon the ſtatute of 27 *E.* III. *cap.* 5. there it is ſaid, that there ſhall be no foreſtalling of wines. But by whom? Only by *Engliſh* merchants; not a word of the ſubjects of *Gaſcoigne*; and yet no doubt they might be offenders in the ſame kind. So in the ſixth chapter it is ſaid, that all merchants *Gaſcoignes* may ſafely bring wines into what part it ſhall pleaſe them. Here now are the perſons of *Gaſcoignes*. But then the place whither? Into the realm of *England*. And in the ſeventh chapter, that erects the ports of *Bourdeaux* and *Bayonne* for the ſtaple towns of wine; the ſtatute ordains, 'that if any,' but who? '*Engliſh* merchant, or his 'ſervants, ſhall buy or bargain other where, his body ſhall be arreſted by 'the ſteward of *Gaſcoigne*, or the conſtable of *Bourdeaux*.' True, for the officers of *England* could not catch him in *Gaſcoigne*. But what ſhall become of him, ſhall he be proceeded with within *Gaſcoigne*? No, but he ſhall be ſent over into *England* into the *Tower* of *London*.

And this doth notably diſcloſe the reaſon of that cuſtom which ſome have ſought to wreſt the other way: that cuſtom, I ſay, whereof a form doth yet remain, that in every parliament the king doth appoint certain committees in the upper-houſe to receive the petitions of *Normandy*, *Guienne*, and the reſt; which, as by the former ſtatute doth appear, could not be for the ordering of the governments there, but for the liberties and good uſage of the ſubjects of thoſe parts when they came hither; or *vice verſa*, for the reſtraining of the abuſes and miſdemeanors of our ſubjects when they went thither.

Wherefore I am now at an end. For us to ſpeak of the miſchiefs, I hold it not fit for this place, leſt we ſhould ſeem to bend the laws to policy, and not to take them in their true and natural ſenſe. It is enough that every man knows, that it is true of theſe two kingdoms, which a good father ſaid of the churches of Chriſt: *ſi inſeparabiles inſuperabiles*. Some things I may have forgot, and ſome things perhaps I may forget willingly; for I will not preſs any opinion or declaration of late time which may prejudice the liberty of this debate; but *ex dictis, et ex non dictis*, upon the whole matter I pray judgement for the plaintiff.

Lord Coke's *report of* Calvin's * *caſe. From the 7th part of his* Reports.

[*The following report is printed from ſerjeant* Wilſon's *edition of lord* Coke's Reports. *All the references not in the body of the report are by Mr.* Chilton *and the editors of the editions ſince the one by him. The caſe is dated by lord* Coke, Trin. 6. Jam. 1.]

The writ of aſſiſe.

JAMES, by the grace of God of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to the ſheriff of *Middleſex*, greeting: *Robert Calvin*, gent. hath complained to us, that *Richard Smith*, and *Nicholas Smith*, unjuſtly, and without judgment, have diſſeiſed him of his freehold in *Haggard*, otherwiſe *Haggerſton*, otherwiſe *Aggerſton*, in the pariſh of St. *Leonard*, in *Shoreditch*, within 30 years now laſt paſt; and therefore we command you, that if the ſaid *Robert* ſhall ſecure you to proſecute his claim, then that you cauſe the ſaid tenement to be reſeiſed with the chattels, which within it were taken, and the ſaid tenement with the chattels, to be in peace until *Thurſday* next after 15 days of St. *Martin* next coming; and in the mean time, cauſe 12 free and lawful men of that neighbourhood to view the ſaid tenement, and the names of them to be inbreviated; and ſummon them by good ſummoners, that they be then before us wherever we ſhall then be in *England*, ready thereof to make recognition; and put by ſureties, and ſafe pledges, the aforeſaid *Richard* and *Nicholas* or their bailiffs (if they cannot be found,) that they be then there, to hear the recognition; and have there the ſummoners, the names of the pledges, and this writ. Witneſs our ſelf at *Weſtminſter*, the 3d day of *November*, in the fifth year of our reign of *England*, *France*, and *Ireland*, and of *Scotland* the one and fortieth.

For 40s. paid in the hanper,

Kindeſley.

Middleſex, ſſ.

The Count.

THE aſſiſe cometh to recognize, if *Rich. Smith*, and *Nich. Smith*, unjuſtly, and without judgment, did diſſeiſe *Rob. Calvin*, gent. of his freehold in *Haggard*, otherwiſe *Haggerſton*, otherwiſe *Aggerſton*, in the pariſh of St. *Leonard* in *Shoreditch*, within thirty years now laſt paſt: and whereupon, the ſaid *Robert*, who is within the age of twenty-one years, by *John Parkinſon* and *William Parkinſon*, his guardians, by the court of the ſaid king here to this being jointly and ſeverally ſpecially admitted, complaineth; that they diſſeiſed him of one meſſuage with the appurtenances, &c.

Alien née pleaded in bar.

And the ſaid *Richard* and *Nicholas*, by *William Edwards*, their attorney, come and ſay, that the ſaid *Robert* ought not to be anſwered to his writ aforeſaid, becauſe they ſay, that the ſaid *Robert* is an alien, born on the 5th day of *November*, in the 3d year of the reign of the K. that now is, of *England*, *France*, and *Ireland*, and of *Scotland* the thirty-ninth, at *Edinburgh*, within his kingdom of *Scotland*, aforeſaid, and within the allegiance of the ſaid lord the king of the ſaid kingdom of *Scotland*, and out of the allegiance of the ſaid lord the king of his kingdom of *England*; and at the time of the birth of the ſaid *Robert Calvin*, and long before, and continually afterwards, the aforeſaid kingdom of *Scotland*, by the proper rights, laws, and ſtatutes of the ſame kingdom, and not by the rights, laws, or ſtatutes of this kingdom of *England*, was and yet is ruled and governed. And this he is ready to verify, and thereupon prayeth judgment, if the ſaid *Robert*, to his ſaid writ aforeſaid, ought to be anſwered, &c.

Demurrer.

And the aforeſaid *Robert Calvin* ſaith, that the aforeſaid plea, by the aforeſaid *Richard* and *Nicholas* above pleaded, is inſufficient in law, to bar him the ſaid *Robert* from having an anſwer to his writ aforeſaid; and that the ſaid *Robert*, to the ſaid plea in manner and form aforeſaid pleaded, needeth not, nor by the law of the land is bound to anſwer; and this he is ready to verify, and hereof prayeth judgment; and that the ſaid *Richard* and *Nicholas*, to the aforeſaid writ of the ſaid *Robert*, may anſwer.

Joinder.

And the ſaid *Richard* and *Nicholas*, foraſmuch as they have above alledged ſufficient matter in law to bar him the ſaid *Robert* from having an anſwer to his ſaid writ, which they are ready to verify; which matter the aforeſaid *Robert* doth not gainſay, nor to the ſame doth in any ways anſwer, but the ſaid averment altogether refuſeth to admit as before; pray judgment, if the aforeſaid *Robert* ought to be anſwered to his ſaid writ, &c.

Continuances.

And becauſe the court of the lord the king here, are not yet adviſed of giving their judgment of and upon the premiſes, day thereof is given to the parties aforeſaid; before the lord the king at *Weſtminſter*, until *Monday* next after 8 days of St. *Hilary*, to hear their judgment thereof, becauſe the court of the lord the king here thereof are not yet, &c. And the aſſiſe aforeſaid remains to be taken before the ſaid lord the king, until the ſame *Monday* there, &c. And the ſheriff to diſtrain the recognitors of the aſſiſe aforeſaid: and in the interim to cauſe a view, &c. At which day, before the lord the king at *Weſtminſter*, come as well the aforeſaid *R. Calvin*, by his guardians aforeſaid, as the aforeſaid *Rich. Smith* and *Nic. Smith*, by their attorney aforeſaid; and becauſe the court of the lord the king here of giving their judgment of and upon the premiſes is not yet adviſed, day thereof is given to the parties aforeſaid before the lord the king at *Weſtminſter*, until *Monday* next after the morrow of the Aſcenſion of our Lord, to hear their judgment; becauſe the court of the lord the king here are not yet, &c. And the aſſiſe aforeſaid remains further to be taken, until the ſame *Monday* there, &c. and the ſheriff as before to diſtrain the recognitors of the aſſiſe aforeſaid, and in the interim to cauſe a view, &c. At which day, before the lord the king at *Weſtminſter*, come as well the aforeſaid *Robert Calvin* by his guardians aforeſaid, as the aforeſaid *Richard Smith* and *Nicholas Smith*, by their attorney aforeſaid, &c. and becauſe the court of the lord the king here, &c.

Curia adverſare vult.

The queſtion.

THE queſtion of this caſe as to matter in law was, whether *Robert Calvin* the plaintiff (being born in *Scotland* ſince the crown of *England* deſcended to his majeſty) be an alien born, and conſequently diſabled to bring any real or perſonal (*a*) action for any lands within the realm of *England*.

How this caſe hath proceeded.

After this caſe had been argued in the court of *King*'s *Bench*, at the bar, by the counſel learned of either party, the judges of that court, upon conference and conſideration of the weight and importance thereof, adjourned the ſame (according to the ancient and ordinary courſe and order of the law) into the (*b*) *Exchequer-Chamber*, to be argued openly there; firſt by the counſel learned of either party, and then by all the judges of *England*; where afterwards the caſe was argued by *Bacon* ſolicitor general, on the part of the plaintiff, and by *Laur. Hide*, for the defendant; and afterward by *Hobart* attorney general, for the plaintiff, and by ſerjeant *Hutton*, for the defendant; and in *Eaſter* term laſt, the caſe was argued by *Heron*, puiſne baron of the *Exchequer*, and *Foſter*, puiſne judge of the court of *Common Pleas*; and on the ſecond day appointed for this caſe, by *Crook*, puiſne judge of the *King's Bench*, and *Altham*, baron of the *Exchequer*; the third day by *Snigge*, baron of the *Exchequer*, and *Williams*, one of the judges of the *King's Bench*; the fourth day by *Daniel*, one of the judges of the court of *Common Pleas*, and by *Yelverton*, one of the judges of the *King's Bench*: and in *Trinity* term following, by *Warburton*, one of the judges of the *Common Pleas*, and *Fenner*, one of the judges of the *King*'s *Bench*; and after by *Walmeſley*, one of the judges of the *Common Pleas*, and *Tanfield*, chief baron; and at two ſeveral days in the ſame term, *Coke*, chief juſtice of the *Common Pleas*, *Fleming*, chief juſtice of the *King's Bench*, and ſir *Thomas Eggerton*, lord *Elleſmere*, lord chancellor of *England*, argued the caſe (the like plea in diſability of *Robert Calvin*'s perſon being pleaded *mutatis mutandis* in the *Chancery* in a ſuit there for evidence concerning lands of inheritance, and by the lord chancellor adjourned alſo into the *Exchequer-Chamber*, to the end that one rule might over-rule both the ſaid caſes.)

The arguments and objections on the part of the defendant.

And firſt (for that I intend to make as ſummary a report as I can) I will at the firſt ſet down ſuch arguments and objections as were made and drawn out of this ſhort record againſt the plaintiff, by thoſe that argued for the defendants. It was obſerved, that in this plea there were four nouns, *quatuor nomina*, which were called, *nomina operativa*, becauſe from them all the ſaid arguments and objections on the part of the defendants were drawn; that is to ſay, 1. *Ligeantia* (which is twice repeated in the plea, for it is ſaid, *infra ligeantiam domini regis regni ſui* Scot', *& extra ligeantiam domini regis regni ſui* Angl'.) 2. *Regnum* (which alſo appeareth to be twice mentioned, *viz. regnum* Angl', and *regnum* Scot'.) 3. *Leges* (which are twice alledged, *viz. leges* Angl', and *leges* Scot', two ſeveral and diſtinct laws.) 4. *Alienigena* (which is the concluſion of all, *viz.* that *Robert Calvin* is *alienigena*).

1. *Ligeantia.* By the firſt it appeareth, that the defendants do make two ligeances, one of *England*, and another of *Scotland*, and from theſe ſeveral ligeances two arguments were framed, which briefly may be concluded thus. 1. Whoſoever is born *infra ligeantiam*, within the ligeance of king *James* of his kingdom of *Scotland*, is *alienigena*, an alien born, as to the kingdom of *England*; but *Robert Calvin* was born at *Edinburgh*, within the ligeance of the king of his kingdom of *Scotland*; therefore *Robert Calvin* is *alienigena*, an alien born, as to the kingdom of *England*. 2. Whoſoever is born *extra ligeantiam*, out of the ligeance of king *James* of his kingdom of *England*, is an alien as to the kingdom of *England*; but the plaintiff was born out of the ligeance of the king of his kingdom of *England*; therefore the plaintiff is an alien, &c. Both theſe arguments are drawn from the very words of the plea, *viz. quod præd'* Robertus *eſt alienigena*, *natus* 5 Nov. *anno regni domini regis nunc* Angl' *&c. tertio apud* Edenburgh *infra regnum* Scot', *ac infra ligeantiam dicti domini regis dicti regni ſui* Scot', *ac extra ligeantiam dicti domini regis regni ſui* Angl'.

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* Vid. *Dy. fo.* 304. 2. Jo. 10. *Vaugh.* 286. 279. 301. 1. *Lev.* 59. *Plowden*'s caſe of the *Dutchy*, *Elleſmere*'s poſtnati, *Bacon* on governm. 2. *pt.* 76. *Atwood*'s ſuperiority. 304. *Salk.* 411, 412. *Skinn.* 134, 172, 198, 335, 442.

(*a*) 1 *Bulſt.* 134. *Yelv.* 198. *Owen* 45. *Co. Lit.* 129. b. 1 and 25. *Moor* 431. 1 *Keb.* 266. Cr. *El.* 142, 683. Cro. *Car.* 9. 4 Inſt. 152.

(*b*) 2 *Bulſt.* 146.

2. *Regna.* From the ſeveral kingdoms, *viz. regnum* Angl' and *regnum* Scot', three arguments were drawn. 1. *Quando (a) duo jura (imo dua regna) concurrunt in una perſona, æquum eſt ac ſi eſſent in diverſis*; but in the king's perſon there concur two diſtinct and ſeveral kingdoms; therefore it is all one as if they were in divers perſons, and conſequently the plaintiff is an alien, as all the *antenati* are, for that they were born under the ligeance of another king. 2. Whatſoever is due to the king's ſeveral politic capacities of the ſeveral kingdoms is ſeveral and divided; but ligeance of each nation is due to the king's ſeveral politic capacities of the ſeveral kingdoms; *ergo*, the ligeance of each nation is ſeveral and divided, and conſequently the plaintiff is an alien, for that they that are born under ſeveral ligeances are aliens one to another. 3. Where the king hath ſeveral kingdoms by ſeveral titles and deſcents, there alſo are the ligeances ſeveral; but the king hath theſe two kingdoms by ſeveral titles and deſcents; therefore the ligeances are ſeveral. Theſe three arguments are collected alſo from the words of the plea before remembered.

3. *Leges.* From the ſeveral and diſtinct laws of either kingdom, they did reaſon thus. 1. Every ſubject, that is born out of the extent and reach of the laws of *England*, cannot by judgment of thoſe laws be a natural ſubject to the king, in reſpect of his kingdom of *England*; but the plaintiff was born at *Edinburgh*, out of the extent and reach of the laws of *England*; therefore the plaintiff, by the judgment of the laws of *England*, cannot be a natural ſubject to the king, as of his kingdom of *England*. 2. That ſubject, that is not at the time and in the place of his birth inheritable to the laws of *England*, cannot be inheritable or partaker of the benefits and privileges given by the laws of *England*; but the plaintiff at the time, and in the place of his birth, was not inheritable to the laws of *England*, but only to the laws of *Scotland*; therefore he is not inheritable or to be partaker of the benefits or privileges of the laws of *England*. 3. Whatſoever appeareth to be out of the juriſdiction of the laws of *England*, cannot be tried by the ſame laws; but the plaintiff's birth at *Edinburgh* is out of the juriſdiction of the laws of *England*; therefore the ſame cannot be tried by the laws of *England*. Which three arguments were drawn from theſe words of the plea, *viz. quodque tempore nativitatis præd'* Roberti Calvin, *ac diu antea, & continuè poſtea, præd' regnum* Scot' *per jura, leges & ſtatuta ejuſdem regni propria, & non per jura, leges, ſeu ſtatuta hujus regni* Angl' *regulat' & gubernat' fuit, & adhuc eſt.*

4. *Alienigena.* From this word *alienigena* they argued thus: every ſubject that is *alien' gentis (i. e.) alien' ligeant', eſt alienigena*; but ſuch a one is the plaintiff; therefore, *&c.*

And to theſe nine arguments all that was ſpoken learnedly and at large by thoſe that argued againſt the plaintiff may be reduced.

But it was reſolved by the lord chancellor and twelve judges, *viz.* the two chief juſtices, the chief baron, juſtice *Fenner*, *Warburton*, *Yelverton*, *Daniel*, *Williams*, baron *Snigge*, baron *Altham*, juſtice *Crooke*, and baron *Heron*, that the plaintiff was no alien, and conſequently that he ought to be anſwered in this aſſiſe by the defendants.

How this caſe was argued by the lord chancellor and the judges.

This caſe was as elaborately, ſubſtantially, and judicially argued by the lord chancellor, and by my brethren the judges, as I ever read or heard of any; and ſo in mine opinion the weight and conſequence of the cauſe, both *in præſenti & perpetuis futuris temporibus* juſtly deſerved; for though it was one of the ſhorteſt and leaſt that ever we argued in this court, yet was it the longeſt and weightieſt that ever was argued in any court, the ſhorteſt in ſyllables, and the longeſt in ſubſtance; the leaſt for the value (and yet not tending to the right of that leaſt) but the weightieſt for the conſequent, both for the preſent, and for all poſterity. And therefore it was ſaid, that thoſe that had written *de foſſilibus* did obſerve, that gold, hidden in the bowels of the earth, was in reſpect of the maſs of the whole earth, *parvum in magno*; but of this ſhort plea it might be truly ſaid (which is more ſtrange) that here was *magnum in parvo.*

Job, 8. 8.

And in the arguments of thoſe that argued for the pl. I ſpecially noted, that albeit they ſpake according to their own heart, yet they ſpake not out of their own head and invention: wherein they followed the counſel given in God's book, *interroga priſtinam generationem* (for out of the old fields muſt come the new corn) *& diligenter inveſtiga patrum memoriam*, and diligently ſearch out the judgments of our forefathers, and that for divers reaſons. Firſt, on our own part, *heſterni enim ſumus & ignoramus, & vita noſtra ſicut umbra ſuper terram*; for we are but of yeſterday, (and therefore had need of the wiſdom of thoſe that were before us) and had been ignorant (if we had not received light and knowledge from our forefathers) and our days upon the earth are but as a ſhadow, in reſpect of the old ancient days and times paſt, wherein the laws have been by the wiſdom of the moſt excellent men, in many ſucceſſions of ages, by long and continual experience (the trial of right and truth) fined and refined, which no one man, (being of ſo ſhort a time) albeit he had in his head the wiſdom of all the men in the world, in any one age could ever have effected or attained unto. And therefore it is *optima regula, qua nulla eſt verior aut firmior in jure, neminem oportet eſſe ſapientiorem legibus*; no man ought to take upon him to be wiſer than the laws. Secondly, in reſpect of our forefathers. *Ipſi* (ſaith the text) *docebunt te, & loquentur tibi, & ex corde ſuo proferunt eloquia*, they ſhall teach thee, and tell thee, and ſhall utter the words of their heart, without all equivocation or mental reſervation; they (I ſay) that cannot be daunted with fear of any power above them, nor be dazzled with the applauſe of the popular about them, nor fretted with any diſcontentment (the matter of oppoſition and contradiction) within them, but ſhall ſpeak the words of their heart, without all affection or infection whatſoever.

Co. Lit. 97. b.

Alſo in their arguments of this cauſe concerning an alien, they told no ſtrange hiſtories, cited no foreign laws, produced no alien precedents; and that for two cauſes: the one, for that the laws of *England* are ſo copious in this point, as, God willing, by the report of this caſe ſhall appear; the other, leſt their arguments, concerning an alien born, ſhould become foreign, ſtrange, and an alien to the ſtate of the queſtion, which, being *quæſtio juris* concerning freehold and inheritance in *England*, is only to be decided by the laws of this realm. And albeit I concurred with thoſe that adjudged the plaintiff to be no alien, yet do I find a mere ſtranger in this caſe, ſuch a one as the eye of the law (our books and book-caſes) never ſaw, as the ears of the law (our reporters) never heard of, nor the mouth of the law (for *judex eſt lex loquens)* the judges our forefathers of the law never taſted: I ſay, ſuch a one, as the ſtomach of the law, our exquiſite and perfect records of pleadings, entries, and judgments (that make equal and true diſtribution of all caſes in queſtion) never digeſted. In a word, this little plea is a great ſtranger to the laws of *England*, as ſhall manifeſtly appear by the reſolution of this caſe.

The method that the reporter doth uſe.

And now that I have taken upon me to make a report of their arguments, I ought to do the ſame as truly, fully, and ſincerely as poſſibly I can; howbeit, ſeeing that almoſt every judge had in the courſe of his argument a peculiar method, and I muſt only hold myſelf to one, I ſhall give no juſt offence to any, if I challenge that which of right is due to every reporter, that is, to reduce the ſum and effect of all to ſuch a method, as, upon conſideration had of all the arguments, the reporter himſelf thinketh to be fitteſt and cleareſt for the right underſtanding of the true reaſons and cauſes of the judgment and reſolution of the caſe in queſtion.

What things did fall into conſideration in this caſe.

In this caſe five things did fall into conſideration. 1. *Ligeantia.* 2. *Leges.* 3. *Regna.* 4. *Alienigena.* 5. What legal inconveniences would enſue on either ſide.

1. Concerning ligeance: 1. It was reſolved what ligeance was. 2. How many kinds of ligeances there were. 3. Where ligeance was due. 4. To whom it was due. And laſt, how it was due.

2. For the laws: 1. That ligeance or obedience of the ſubject to the ſovereign is due by the law of nature. 2. That this law of nature is part of the laws of *England*. 3. That the law of nature was before any judicial or municipal law in the world. 4. That the law of nature is immutable, and cannot be changed.

3. As touching the kingdoms: how far forth by the act of law the union is already made, and wherein the kingdoms do yet remain ſeparate and divided.

4. Of *alienigena*, an alien born: 1. What an alien born is in law. 2. The diviſion and diverſity of aliens. 3. Incidents to every alien. 4. Authorities in law. 5. Demonſtrative concluſions upon the premiſes, that the plaintiff can be no alien.

5. Upon due conſideration had of the conſequent of this caſe: what inconveniences legal ſhould follow on either party.

And theſe ſeveral parts I will in this report purſue in ſuch order as they have been propounded; and firſt *de ligeantia.*

The 1ſt general part, what ligeance is.

1. *(b)* Ligeance is a true and faithful obedience of the ſubject due to his ſovereign. This ligeance and obedience is an incident inſeparable to every ſubject: for as ſoon as he is born, he oweth by birth-right ligeance and obedience to his ſovereign. *Ligeantia eſt vinculum fidei:* and *ligeantia eſt quaſi legis eſſentia. Ligeantia eſt ligamentum, quaſi ligatio mentium*; *quia ſicut ligamentum eſt connexio articulorum & juncturarum, &c.* As the ligatures or ſtrings do knit together the joints of all the parts of the body, ſo doth ligeance join together the ſovereign and all his ſubjects, *quaſi uno ligamine. Glanville*, who wrote in the reign of *H.* 2. *lib.* 9. *cap.* 4. ſpeaking of the connexion which ought to be between the lord and tenant that holdeth by homage, ſaith, that *mutua debet eſſe domini & fidelitatis connexio, ita quod quantum debet domino ex homagio, tantum illi debet dominus ex dominio, præter ſolam reverentiam*, and the lord (ſaith he) ought to defend his tenant. But between the ſovereign and the ſubject there is without compariſon a higher and greater connexion; for as the ſubject oweth to the king his true and faithful ligeance and obedience, ſo the ſovereign is to govern and protect his ſubjects, *regere & protegere ſubditos ſuos*; ſo as between the ſovereign and ſubject there is *duplex & reciprocum ligamen*; *quia ſicut ſubditus regi tenetur ad obedientiam, ita rex ſubdito tenetur ad protectionem: merito igitur ligeantia dicitur a ligando, quia continet in ſe duplex ligamen.* And therefore it is holden in 20 *H.* 7. 8. a. that there is a liege or ligeance between the king and the ſubject. And *Forteſcue*, *cap.* 13. *rex (c) ad tutelam legis corporum & bonorum ſubditorum erectus eſt.* And in the acts of parliament of 10 *R.* 2. *cap.* 5. and 11 *R.* 2. *cap.* 1. 14 *H.* 8. *cap.* 2. *&c.* ſubjects are called liege people; and in the acts of parliament in 34 *H.* 8. *cap.* 1. and 35 *H.* 8. *cap.* 3. *&c.* the king is called the liege lord of his ſubjects. And with this agreeth *M. Skeene* in his book *de expoſitione verborum*, (which book was cited by one of the judges which argued againſt the plaintiff) ligeance is the mutual bond and obligation between the king and his ſubjects, whereby ſubjects are called his liege ſubjects, becauſe they are bound to obey and ſerve him; and he is called their liege lord, becauſe he ſhould maintain and defend them. Whereby it appeareth, that in this point the law of *England* and of *Scotland* is all one. Therefore it is truly ſaid, that *protectio trahit ſubjectionem, & ſubjectio protectionem.* And hereby it plainly appeareth, that ligeance doth not begin by the oath in the leet; for many men owe true ligeance that never were ſworn in a leet, and the ſwearing in a leet maketh no *(d)* denization, as the book is adjudged in 14 *H.* 4. *fol.* 19. b. This word ligeance is well expreſſed by divers ſeveral names or *ſynonyma* which we find in our books. Sometimes it is called the obedience or obeyſance of the ſubject to the king, *obedientia regi*, 9 *E.* 4. 7. b. 9 *E.* 4. 6. *(e)* 2 *R.* 3. 2. a. in the book of Entries, *ejectione firm'* 7. 14 *H.* 8. *cap.* 2. 22 *H.* 8. *cap.* 8. *&c.* Sometimes he is called a natural liege man that is born under the power of the king, *ſub poteſtate regis*, 4 *H.* 3. *(f) tit. Dower. Vide* the ſtat. of 11 *E.* 3. *c.* 2. Sometimes ligeance is called faith, *fides, ad fidem regis, &c. Bracton*, who wrote in the reign of *H.* 3. *lib.* 5. *tractat' de exception'*, *cap.* 24. *fol.* 427. *Eſt etiam alia exceptio quæ competit ex perſonâ quærentis, propter defectum nationis, ut ſi quis alieni-*

(a) *Elleſmere*'s poſtnati 88. poſtea . 4 *Co.* 118. a. *Cawly* 209. *Mocr* 793, 804. *Co. Lit.* 129. a. *Grotius, lib.* 2. *fol.* 160. *Elleſmere*'s poſtnati 13, 14. *Jenk.* Cent. 3.

(b) *Bacon*'s diſcourſe of laws and government, *2d. part. fo.* 46, 47, *&c.*

(c) Cro. Arg. 64.

(d) *Br.* Deniz. 11. poſtea .

(e) *Br.* Deniz. 8.

(f) 4 *Hen.* 3. *Fitz.* Dow. 179.

gena qui fuit ad fidem regis Franc', *&c.* And *Fleta* (which book was made in the reign of *E.* 1.) agreeth therewith; for *l.* 6. *c.* 47. *de except' ex emiſſione participis*, it is ſaid, *vel dicere potuit, quod nihil juris clamare poterit tanquam particeps, eo quod eſt ad fidem regis* Franciæ, *quia alienigenæ repelli debent in* Angl' *ab agendo, donec fuerunt ad fidem reg'* Angl'. *Vide* 25 *E.* 3. *de natis ultra mare*, faith and ligeance of the king of *England*; and *Litt. lib.* 2. *cap. Homage*, *(a)* ſaving the faith that I owe to our ſovereign lord the king; and *Glanv. l.* 9. *c.* 1. *ſalva fide debita dom' regi & hæredibus ſuis.* Sometimes ligeance is called ligealty, 22 *Aſſ. pl.* 25. By all which it evidently appeareth, that they that are born under the obedience, power, faith, ligealty, or ligeance of the king, are natural ſubjects, and no aliens. So, as ſeeing now it doth appear what ligeance is, it followeth in order, that we ſpeak of the ſeveral kinds of ligeance. But herein we need to be very wary, for this caveat the law giveth, *ubi lex non diſtinguit, nec nos diſtinguere debemus*; and certainly *lex non diſtinguit*, but where *omnia membra dividentia* are to be found out and proved by the law itſelf.

How many kinds of ligeances there be.

2. There is found in the law 4 kinds of ligeances; the firſt is, *ligeantia naturalis, abſoluta, pura & indefinita*; and this originally is due by nature and birth-right, and is called *alta ligeantia*, and he that oweth this is called *ſubditus natus.* The ſecond is called *ligeantia acquiſita*, not by nature but by acquiſition or denization, being called a denizen, or rather donaizon, becauſe he is *ſubditus datus.* The third is *ligeantia localis*, wrought by the law, and that is when an alien that is in amity cometh into *England*, becauſe as long as he is within *England* he is within the king's protection; therefore ſo long as he is here, he oweth unto the king a local obedience or ligeance, for that the one (as it hath been ſaid) draweth the other. The fourth is a legal obedience, or ligeance which is called legal, becauſe the municipal laws of this realm have preſcribed the order and form of it; and this to be done upon oath at the torn or leet.

Co.Lit. 129. a.

Ligeantia naturalis.
Co.Lit. 129. a.

The firſt, that is, ligeance natural, *&c.* appeareth by the ſaid acts of parliament, wherein the king is called natural liege lord, and his people natural liege ſubjects. This alſo doth appear in the indictments of treaſon (which of all other things are the moſt curiouſly and certainly indicted and penned) for in the indictment of the lord *Dacre*, in 26 *H.* 8. it is ſaid, *præd' dominus* Dacre *debitum fidei & ligeant' ſuæ, quod præfato domino regi naturaliter & de jure impendere debuit, minime curans, &c.* And *Reginald Pool* was indicted in 30 *H.* 8. for committing treaſon *contra dom' regem ſupremum & naturalem dominum ſuum.* And to this end were cited the indictment of *Edward* duke of *Somerſet* in 5 *E.* 6. and many others both of ancient and later times. But in the indictment of treaſon of *John Detbick* in 2 & 3 *Phil. & Mar.* it is ſaid, *quod præd'* Johannes *machinans, &c. prædict' dominum* Philippum *& dominam* Mariam *ſupremos dominos ſuos*, and omitted *(naturales)* becauſe king *Philip* was not his natural liege lord. And of this point more ſhall be ſaid when we ſpeak of local obedience. The ſecond is *ligeant' acquiſita*, or denization; and this in the books and records of the law appeareth to be three-fold. 1. Abſolute, as the common denizations be, to them and their heirs, without any limitation or reſtraint. 2. Limited, as when the king doth grant letters of denization to an alien, and to the heirs *(b)* males of his body, as it appeareth in 9 *E.* 4. *fol.* 7, 8. in *Baggot*'s caſe; or to an alien for term of his life, as was granted to *J. Reynel*, 11 *H.* 6. 3. It may be granted upon *(c)* condition, for *(d) cujus eſt dare, ejus eſt diſponere*, whereof I have ſeen divers precedents. And this denization of an alien may be effected three manner of ways; by parliament, as it was in 3 *H.* 6. 55. in *Dower*; by letters patent, as the uſual manner is; and by conqueſt, as if the king and his ſubjects ſhould conquer another kingdom or dominion, as well *antenati* as *poſtnati*, as well they which fought in the field, as they which remained at home, for defence of their country, or employed elſewhere, are all denizens of the kingdom or dominion conquered. Of which point more ſhall be ſaid hereafter.

Ligeantia acquiſita.
Co.Lit. 129. a.

Ligeantia localis.

3. Concerning the local obedience it is obſervable, that as there is a local protection on the king's part, ſo there is a *(e)* local ligeance of the ſubjects part. And this appeareth in 4 *Mar. Br.* 32. *(f)* & 3 & 4 *Phil. & Mar. Dyer*, 144. *Sherley* a *Frenchman*, being in amity with the king, came into *England*, and joined with divers ſubjects of this realm in treaſon againſt the king and queen, and the indictment concluded *(g) contra ligeant' ſuæ debitum*; for he owed to the king a local obedience, that is, ſo long as he was within the king's protection; which local obedience being but momentary and uncertain, is yet ſtrong enough to make a natural ſubject, for if he hath iſſue here, that iſſue is *(h)* a natural born ſubject; *à fortiori*, he that is born under the natural and abſolute ligeance of the king (which, as it hath been ſaid, is *alta ligeantia*) as the plaintiff in the caſe in queſtion was, ought to be a natural born ſubject; for *localis ligeantia eſt ligeantia infima & minima, & maxime incerta.* And it is to be obſerved, that it is *nec cœlum, nec ſolum*, neither the climate nor the ſoil, but *ligeantia* and *obedientia* that make the ſubject born; for if enemies ſhould come into the realm, and poſſeſs a town or fort, and have iſſue there, that iſſue is no ſubject to the king of *England*, though he be born upon his ſoil, and under his meridian, for that he was not born under the ligeance of a ſubject, nor under the protection of the king. And concerning this local obedience, a precedent was cited in *Hilar.* 36 *Eliz.* when *Stephano Ferrara de Gama*, and *Emanuel Lewis Tinoco*, two *Portugueſe* born, coming into *England* under queen *Elizabeth*'s ſafe conduct, and living here under her protection, joined with doctor *Lopez* in treaſon within this realm againſt her majeſty; and in this caſe two points were reſolved by the judges. Firſt, that their indictment ought to begin, that they intended treaſon *contra dominam reginam, &c.* omitting theſe words *(naturalem domin' ſuam)* and ought to conclude *contra (i) ligeant' ſuæ debitum.* But if an *(k)* alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treaſon; for the indictment cannot conclude *contra ligeant' ſuæ debitum*, for he never was in the protection of the king, nor ever owed any manner of ligeance unto him, but malice and enmity, and therefore he ſhall be put to death by martial law. And ſo it was in *anno* 15 *H.* 7. *(l)* in *Perkin Warbeck*'s caſe, who, being an alien born in *Flanders*, feigned himſelf to be one of the ſons of *Edward* the fourth, and invaded this realm with great power, with an intent to take upon him the dignity royal: but being taken in the war, it was reſolved by the juſtices, that he could not be puniſhed by the common law, but before the conſtable and marſhal (who had ſpecial commiſſion under the great ſeal to hear and determine the ſame according to martial law) he had ſentence to be drawn, hanged, and quartered, which was executed accordingly. And this appeareth in the book of *Griffith* attorney-general, by an extract out of the book of *Hobart*, attorney-general to king *H.* 7.

Ligeantia legalis.

4. Now are we to ſpeak of legal ligeance, which in our books, *viz.* 7 *E.* 2. *tit. Avowry* 211. 4 *E.* 3. *fol.* 42. 13 *E.* 3. *tit. Avowry* 120, *&c.* is called ſuit royal, becauſe that the ligeance of the ſubject is only due unto the king. This oath of ligeance appeareth in *Britton*, who wrote in *anno* 5 *E.* 1. *cap.* 29. (and is yet commonly in uſe to this day in every leet) and in our books; the effect whereof is: 'You ſhall ſwear, that from this day forward, you ſhall be true and faithful to our ſovereign lord king *James*, and his heirs, and truth and faith ſhall bear of life and member, and terrene honour, and you ſhall neither know nor hear of any ill or damage intended unto him, that you ſhall not defend. So help you Almighty God.' The ſubſtance and effect hereof is as hath been ſaid due by the law of nature, *ex inſtitutione naturæ*, as hereafter ſhall appear. The form and addition of the oath is, *ex proviſione hominis.* In this oath of ligeance five things were obſerved. 1. That for the time it is indefinite, and without limit, 'from this day forward.' Secondly, two excellent qualities are required, that is, to be 'true and faithful.' 3. To whom, 'to our ſovereign lord the king, and his heirs:' (and albeit *Britton* doth ſay, to the king of *England*, that is ſpoken *propter excellentiam*, to deſign the perſon, and not to confine the ligeance; for a ſubject doth not ſwear his ligeance to the king, only as king of *England*, and not to him as king of *Scotland*, or of *Ireland*, *&c.* but generally to the king.) 4. In what manner; 'and faith and troth ſhall bear, *&c.* of life and member,' that is, until the letting out of the laſt drop of our deareſt heart's blood. 5. Where and in what places ought theſe things to be done, in all places whatſoever; for, 'you ſhall neither know nor hear of any ill or damage, *&c.*' that you ſhall not defend, *&c.* ſo as natural ligeance is not circumſcribed within any place. It is holden 12 *H.* 7. 18. b. that he, that is ſworn in the leet, is ſworn to the king for his ligeance, that is, to be true and faithful to the king; and if he be once ſworn for his ligeance, he ſhall not be ſworn again during his life. And all letters patent of denization be, that the patentee ſhall behave himſelf *tanquam verus & fidelis ligeus domini regis.* And this oath of ligeance at the torn and leet was firſt inſtituted by king *Arthur*; for ſo I read, *inter leges ſancti* Edwardi *regis ante Conqueſtum*, 3 cap. 35. *Et quod omnes principes & comites, proceres, milites & liberi homines debent jurare, &c. in* Folkemote, *& ſimiliter omnes proceres regni, & milites & liberi homines univerſi totius regni* Britann' *facere debent in pleno* Folkemote *fidelitatem domino regi, &c. Hanc legem invenit* Arthurus, *qui quondam fuit inclytiſſimus rex* Britonum, *&c. Hujus legis authoritate expulit* Arthurus *rex* Saracenos *et inimicos a regno, &c. et hujus legis authoritate* Etheldredus *rex uno et eodem die per univerſum regnum* Danos *occidit. Vide* Lambert *inter leges regis* Edwardi, * *&c. fol.* 135 & 136. By this it appeareth, when and from whom this legal ligeance had his firſt inſtitution within this realm. *Ligeantia* in the caſe in queſtion is meant and intended of the firſt kind of ligeance, that is, of ligeance natural, abſolute, *&c.* due by nature and birth-right. But if the plaintiff's father be made a denizen, and purchaſe lands in *England* to him and his heirs, and die ſeiſed, this land ſhall never deſcend to the plaintiff; for that the king by his letters patent may make a denizen, but cannot naturalize him to all purpoſes, as an act of parliament may do; neither can letters patent make any inheritable in this caſe, that by the common law cannot inherit. And herewith agreeth 36 *H.* 6. *tit. Denizen, Br.* 9.

Co. Lit. 68. b.

Co. Lit. 68. b.

Co. Lit. 68. b.

Co. Lit. 68. b. 172. b.

* See *L. L. Saxon. per Wilkins* p. 204.

Co. Lit. 8. a. 129. a.

Homage is two fold.
Co. Lit. 64. b.
Vaug. 279.

Homage in our book is two-fold, that is to ſay, *homagium ligeum*, and that is as much as ligeance, of which *Bracton* ſpeaketh, *l.* 2. *c.* 35. *f.* 79. *Soli regi debet' ſive dominio ſeu ſervitio*, and there is *homagium feodale*, which hath his original by tenure. In *Fit. Nat. Brev.* 269. there is a writ for reſpiting of this later homage, which is due *ratione feodi ſive tenuræ: ſciatis quod reſpectuamus homagium nobis de terr' et tenementis quæ tenenter de nobis in capite debit'.* But *homagium ligeum, i. ligeantia*, is inherent and inſeparable, and cannot be reſpited.

Where natural ligeance is due.

3. Now are we come to (and almoſt paſt) the conſideration of this circumſtance, where natural ligeance ſhould be due: for by that which hath been ſaid, it appeareth, that ligeance, and faith and truth, which are her members and parts, are qualities of the mind and ſoul of man, and cannot be circumſcribed within the predicament of *ubi*; for that were to confound predicaments, and to go about to drive (an abſurd and impoſſible thing) the predicament of quality into the predicament of *ubi. Non reſpondetur ad hanc quæſtionem, ubi eſt?* To ſay, *verus et fidelus ſubditus eſt*; *ſed ad hanc quæſtionem, qualis eſt? Recte & apte reſpondetur, verus & fidelis ligeus, &c. eſt.* But yet for the greater illuſtration of the matter, the point was handled by itſelf, and that ligeance of the ſubject was of as great an extent and latitude, as the royal power and protection of the king, *et è converſo.* It appeareth by the ſtat. of 11 *H.* 7. *cap.* 1. and 2 *E.* 6. *cap.* 2. that the ſubjects of *England* are bound by their ligeance to go with the king, *&c.* in his wars, as well within the realm, *&c.* as without. And therefore we daily ſee,

(a) *Lit.* ſect. 85. *Co. Lit.* 64. b.
(b) 9 *E.* 4. 8.
(c) *Co. Lit.* 129. a. 274. b.
(d) 2 *Co.* 7. b. 4 Inſt. 192. 2 *Siderf.* 73. *Hard.* 412. *Lit.* Rep. 128. 1 *And.* 115. *Salk.* 411, 412. 4 *Mod.* 215, 222. *Vaugh.* 405. *Dav.* 36.
(e) *Co. Lit.* 129. a.
(f) *B. N. C.* 487.
(g) *Hob.* 271. *Co. Lit.* 129. a. *Dyer* 145. pl. 62. *Cawly* 184. 3 Inſt. 11.
(h) *Co. Lit.* 8. a. 5 *Eliz. Dyer* 224. a. b.
(i) 3 Inſt. 11. *Dy.* 145. pl. 62. *Cawly* 185. *Hob.* 271. *Co. Lit.* 129. a.
(k) 3 Inſt. 5, 11.
(l) *Bacon*'s Hiſt. *H.* 7. *fo.* 11.

that when either *Ireland*, or any other of his majeſty's dominions, be infeſted with invaſion or inſurrection, the king of *England* ſendeth his ſubjects out of *England*, and his ſubjects out of *Scotland* alſo into *Ireland*, for the withſtanding or ſuppreſſing of the ſame, to the end his rebels may feel the ſwords of either nation. And ſo may his ſubjects of *Guernſey*, *Jerſey*, *Iſle* of *Man*, &c. be commanded to make their ſwords good againſt either rebel or enemy, as occaſion ſhall be offered. Whereas if natural ligeance of the ſubjects of *England* ſhould be local, that is, confined within the realm of *England* or *Scotland*, &c. then were not they bound to go out of the continent of the realm of *England* or *Scotland*, &c. And the opinion of *Thirninge* in 7 *H.* 4. *tit. Protect'* 100. is thus to be underſtood, that an *Engliſh* ſubject is not compellable to go out of the realm without wages, according to the ſtatutes of 1 *E.* 3. *c.* 7. 18 *E.* 3. *c.* 8. 18 *H.* 6. *c.* 19. &c. 7 *H.* 7. *c.* 1. 3 *H.* 8. *c.* 5. &c. In *ann.* 25 *E.* 1. *Bigot* earl of *Norfolk* and *Suffolk*, and earl marſhal of *England*, and *Bohun* earl of *Hereford* and high conſtable of *England*, did exhibit a petition to the king in *French* (which I have ſeen anciently recorded) on the behalf of the commons of *England*, concerning how and in what ſort they were to be employed in his majeſty's wars out of the realm of *England*; and the record ſaith, that, *poſt multas & varias altercationes*, it was reſolved, they ought to go but in ſuch manner and form as after was declared by the ſaid ſtatutes, which ſeem to be but declarative of the common law. And this doth plentifully and manifeſtly appear in our books, being truly and rightly underſtood. In 3 *H.* 6. *tit. Protection* 2. one had the benefit of a protection, for that he was ſent into the king's wars *in comitiva* of the protector; and it appeareth by the record, and by the chronicles alſo, that this employment was into *France*; the greateſt part thereof then being under the king's actual obedience, ſo as the ſubjects of *England* were employed into *France* for the defence and ſafety thereof: in which caſe it was obſerved, that ſeeing the protector, who was *prorex*, went, the ſame was adjudged a voyage royal. 8 *H.* 6. *fol.* 16. *b.* the lord *Talbot* went with a company of *Engliſhmen* into *France*, then alſo being for the greateſt part under the actual obedience of the king, who had the benefit of their protections allowed unto them. And here were obſerved the words of the writ in the *Regiſter*, *fol.* 88. where it appeareth that men were employed in the king's wars out of the realm *per præceptum noſtrum*, and the uſual words of the writ of protection be *in obſequio noſtro*. * 32 *H.* 6. *fol.* 4. *a.* it appeareth, that *Engliſhmen* were preſſed into *Guyienne*, † 44 *E.* 3. 12. *a.* into *Gaſcoyne* with the duke of *Lancaſter*, 17 *H.* 6. *tit. Protection*, into ‖ *Gaſcoyne* with the earl of *Huntington*, ſteward of *Guienne*, 11 and 12 *H.* 4. 7. *a.* into (a) *Ireland*, and out of this realm with the duke of *Glouceſter* and the lord *Knolles*: *vide* (b) 19 *H.* 6. 35. *b.* And it appeareth in 19 *Ed.* 2. *tit. Avowry* 224. 26 Aſſ. 66. 7 *H.* 4. 19, &c. that there was *forinſecum ſervitium*, foreign ſervice, which *Bracton*, *fol.* 36. calleth *regale ſervitium*; and in *Fitz. N. B.* 28. that the king may ſend men to ſerve him in his wars beyond the ſea. But thus much (if it be not in ſo plain a caſe too much) ſhall ſuffice for this point for the king's power, to command the ſervice of his ſubjects in his wars out of the realm, whereupon it was concluded, that the ligeance of a natural-born ſubject was not local, and confined only to *England*. Now let us ſee what the law ſaith in time of peace, concerning the king's protection and power of command, as well without the realm, as within, that his ſubjects in all places may be protected from violence, and that juſtice may equally be adminiſtered to all his ſubjects.

2 Inſt. 47, 48, 528.

2 Inſt. 528.

Maynard's E. 2. *fo.*

2 Inſt. 528.

Co. Lit. 130. b.

Co. Lit. 130. b.

Fitz. protect. 5. *Br.* protect. 48.

* *Fitz.* protect. 13.

† *Fitz.* protect. 35. *Br.* protect. 24.

‖ *Fitz.* protect. 56.

In the *Regiſter*, *fol.* 25 *b. Rex univerſis & ſingulis admirall'*, *caſtellan'*, *cuſtodibus caſtrorum*, *villar'*, *& aliorum fortalitiorum præpoſitis*, *vicecom' majoribus*, *cuſtumariis*, *cuſtodib' portuum*, *& alior' locor' maritimor' ballivis*, *miniſtr'*, *& aliis fidel' ſuis, tam in tranſmarinis quam in ciſmarinis partib' ad quos*, &c. *ſalutem. Sciatis, quod ſuſcepimus in protectionem et defenſion' noſtram, necnon ad ſalvam et ſecuram gardiam noſtram* W. *veniendo in regnum noſtram* Angl', *et poteſtatem noſtram, tam per terram quam per mare cum uno valetto ſuo, ac res ac bonâ ſuâ quæcunque ad tractand' cum dilecto noſtro & fideli* L. *pro redemptione priſonarii ipſius* L. *infra regnum & poteſtatem noſtram præd' per ſex menſes morando & exinde ad propria redeundo. Et ideo*, &c. *quod ipſum* W. *cum valetto, rebus et bonis ſuis præd' veniendo in regn' & poteſtat' noſtram præd' tam per terr' quam per mare ibid' ut prædict' eſt ex cauſâ antedicta morando, & exinde ad propria redeundo, manuteneatis, protegatis, & defendatis; non inferentes eis*, &c. *ſeu gravamen. Et ſi quid eis forisfactum*, &c. *reformari faciatis. In cujus*, &c. *per ſex menſes duratur'*. T. &c. In which writ three things are to be obſerved. 1. That the king hath *fidem & fideles in partib' tranſmarinis*. 2. That he hath *protection' in partib' tranſmarinis*. 3. That he hath *poteſtatem in partibus tranſmarinis*. In the *Regiſter*, *fol.* 26. *Rex univerſis & ſingulis admirallis, caſtellanis, cuſtodibus caſtrorum, villarum, et aliorum fortalitiorum præpoſitis, vicecom' majoribus, cuſtumariis, cuſtodib' portuum, & alior' locor' maritimorum ballivis, miniſtris, et aliis fidelibus ſuis, tam in tranſmarinis quam in ciſmarinis partibus ad quos*, &c. *ſalutem. Sciatis quod ſuſcepimus in protectionem et defenſionem noſtram, necnon in ſalvum & ſecurum conductum noſtr'* I. *valettum* P. *et* L. Burgenſium *de* Lyons *obſidum noſtrorum, qui de licentiâ noſtrâ ad partes tranſmarinas profecturus eſt, pro finantia magiſtrorum ſuorum prædict' obtinenda vel deferenda, eundo ad partes prædictas ibidem morando, et exinde in* Angl' *redeundo. Et ideo vobis mandamus, quod eidem* I. *eundo ad partes præd' ibidem morando, et exinde in* Angl' *redeundo, ut præd' eſt, in perſonâ, bonis, aut rebus ſuis, non inferatis, ſeu quantum in vobis eſt ab aliis inferri permittatis injuriam, moleſtiam*, &c. *aut gravamen. Sed eum potius ſalvum et ſecurum conductum, cum per loca paſſus, ſeu diſtrictus veſtros tranſierit, et ſuper hoc requiſiti fueritis, ſuis ſumptibus habere faciatis. Et ſi quid eis forisfactum fuerit*, &c. *reformari faciatis. In cujus*, &c. *per tres ann' durat'* T. &c. And certainly this was, when *Lyons* in *France* (bordering upon *Burgundy*, an ancient friend to *England*) was under the actual obedience of king *H.* 6. For the king commanded *fidelibus ſuis*, his faithful magiſtrates there, that if any injury were there done, it ſhould be by them reformed and redreſſed, and that they ſhould protect the party in his perſon and goods in peace. In the *Regiſter*, *fol.* 26. two other writs. *Rex omnibus ſeneſchallis, majoribus, juratis, paribus præpoſitis, ballivis et fidelibus ſuis in ducatu* Aquitaniæ *ad quos*, &c. *ſalutem. Quia dilecti nobis* T. *et* A. *cives civitat'* Burdegal' *coram nobis in cancellar' noſt'* Angl' *et* Aquitan' *jura ſua proſequentes, et metuentes ex veriſimilibus conjecturis per quoſdam ſibi comminantes tam in corpore quam in rebus ſuis, ſibi poſſe grave damnum inferri, ſupplicaverunt nobis ſibi de protectione regia providere: nos volentes dictos* T. *et* A. *ab oppreſſionibus indebitis præſervare, ſuſcepimus ipſos* T. *et* A. *res ac juſtas poſſeſſiones et bona ſua quæcunque in protectionem et ſalvam gardiam noſtram ſpecialem. Et vobis et cuilibet veſtrum injungimus et mandamus, quod ipſos* T. *et* A. *familias, res ac bona ſua quæcunque a violentiis et gravaminibus indebitis defendatis, et ipſos in juſtis poſſeſſionibus ſuis manuteneatis. Et ſi quid in præjudicium hujus protectionis et ſalvæ gardiæ noſtr' attentatum inveneritis, ad ſtatum debitum reducatis. Et ne quis ſe poſſit per ignorantiam excuſare, præſentem protectionem et ſalvam gardiam noſtram faciatis in locis de quibus requiſiti fueritis infra diſtrict' veſtrum publice intimari, inhibentes omnibus et ſingulis ſub pœnis gravibus, ne dictis* A. *et* T. *ſeu famulis ſuis in perſonis ſeu rebus ſuis, injuriam, moleſtiam, damnum aliquod inferant ſeu gravamen: et penocellas noſtras in locis et bonis ipſorum* T. *&* A. *in ſignum protectionis et ſal' gard' memorat', cum ſuper hoc requiſiti fueritis, apponatis. In cujus*, &c. *dat' in palatio noſtro* Weſtm' *ſub magni ſigilli teſtimonio, ſexto die* Auguſti *anno* 44 E. 3.—*Rex univerſis et ſingulis ſeneſchallis, conſtabular', caſtellanis, præpoſit', miniſt', et omnib' ballivis et fidelibus ſuis in dominio noſtro* Aquitan' *conſtitutis ad quos*, &c. *ſalut'. Volentes* G. *et* R. *uxor ejus favore proſequi gratioſe, ipſos* G. *et* R. *homines et familias ſuas ac juſtas poſſeſſiones, et bona ſua quæcunque, ſuſcepimus in protectionem et defenſionem noſtram, necnon in ſalvam gardiam noſtram ſpecialem. Et ideo vobis et cuilibet veſtrum injungimus et mandamus, quod ipſos* G. *et* R. *eorum homines, familias ſuas, ac juſtas poſſeſſiones et bona ſua quæcunque manuteneatis, protegatis, et defendatis: non inferentes eis, ſeu quantum in vobis eſt ab aliis inferri permittentes, injuriam, moleſtiam, damnum, violentiam, impedimentum aliquod ſeu gravamen. Et ſi quid eis forisfact', injuriatum vel contra eos indebite attentatum fuerit, id eis ſine dilatione corrigi, et ad ſtatum debitum reduci faciatis, prout ad vos et quemlibet veſtrum noveritis pertinere: penocellas ſuper domibus ſuis in ſignum præſentis ſalvæ gardiæ noſtræ (prout moris erit) facientes. In cujus*, &c. *per unum annum duratur'*. T. &c. By all which it is manifeſt, that the protection and government of the king is general over all his dominions and kingdoms, as well in time of peace by juſtice, as in time of war by the ſword, and that all be at his command, and under his obedience. Now ſeeing power and protection draweth ligeance, it followeth, that ſeeing the king's power command and protection extendeth out of *England*, that ligeance cannot be local, or confined within the bounds thereof. He that is abjured the realm, *qui abjurat regnum amittit regnum, ſed non regem, amittit patriam, ſed non patrem patriæ*: for notwithſtanding the abjuration, he oweth the king his ligeance, and he remaineth within the king's protection; for the king may pardon and reſtore him to his country again. So ſeeing that ligeance is a quality of the mind, and not confined within any place; it followeth, that the plea, that doth confine the ligeance of the plaintiff to the kingdom of *Scotland*, *infra ligeantiam regis regni ſui* Scotiæ, *& extra ligeantiam regis regni ſui* Angliæ, whereby the defendants do make one local ligeance for the natural ſubjects of *England*, and another local ligeance for the natural ſubjects of *Scotland*, is utterly inſufficient, and againſt the nature and quality of natural ligeance, as often it hath been ſaid. And *Coke*, chief juſtice of the court of *Common Pleas*, cited a ruled caſe out of *Hingham*'s reports, *tempore E.* 1. which in his argument he ſhewed in court written in parchment, in an ancient hand of that time. *Conſtance de N.* brought a writ of ayel againſt *Roger de Cobledike*, and others, named in the writ, and counted that from the ſeiſin of *Roger* her grandfather it deſcended to *Gilbert* his ſon, and from *Gilbert* to *Conſtance*, as daughter and heir. Sutton *dit, ſir, el ne doit eſte reſponde, pur ceo que el eſt* Francois *& nient de la ligeance ne a la foy* Denglitterre, *& demand judgement ſi el doit action aver*: that is, ſhe is not to be anſwered, for that ſhe is a *French* woman, and not of the ligeance, nor of the faith of *England*, and demanded judgment, if ſhe this action ought to have. *Bereford* (then chief juſtice of the court of *Common Pleas*) by the rule of the court diſalloweth the plea, for that it was too ſhort, in that it referred ligeance and faith to *England*, and not to the king. And thereupon *Sutton* ſaith as followeth; *ſir, nous voilomus averre, que el ne eſt my de la ligeance* Denglitterre, *ne a la foy le roy, et demand jugement, et ſi vous agardes que el doit eſte reſponde, nous dirromus aſſets*: that is, ſir, we will aver, that ſhe is not of the ligeance of *England*, nor of the faith of the king, and demand judgment, &c. Which latter words of the plea (nor of the faith of the king) referred faith to the king indefinitely and generally, and reſtrained not the ſame to *England*, and thereupon the plea was allowed for good, according to the rule of the court: for the book ſaith, that afterward the plaintiff deſired leave to depart from her writ. The rule of that caſe of *Cobledike*, did (as *Coke* chief juſtice ſaid) over-rule this caſe of *Calvin*, in the very point now in queſtion; for that the plea in this caſe doth not refer faith or ligeance to the king indefinitely and generally, but limiteth and reſtraineth faith and ligeance to the kingdom, *extra ligeantiam regis regni ſui* Angliæ, out of the ligeance of the king of his kingdom of *England*: which afterwards the lord chancellor and the chief juſtice of the *King's Bench*, having copies of the ſaid ancient report, affirmed in their arguments. So as this point was thus concluded, *quod ligeantia naturalis nullis clauſtris coercetur, nullis metis refrænatur, nullis finibus premitur*.

Cawly 139.

Cobledike's caſe, *temp. E.* 1. reported by *Hingham*.

Elleſmere's Poſtnati 91, 92.

Note.

4 & 5. By that which hath been ſaid it appeareth, that this ligeance is due only to the king; ſo as therein the queſtion is not now, *cui, ſed quomodo debetur*. It is true, that the king hath two capacities in him: one a natural body, being deſcended of the blood royal of the realm; and this body is of the creation

To whom and how ligeance is due.

(a) *Fitz.* protect. 24. *Co. Lit.* 130. b. *Br.* protect. 34.

(b) *Fitz.* protect. 8. *Br.* protect. 49.

of Almighty God, and is ſubject to death, infirmity, and ſuch like: the other is a ‖ politick body or capacity, ſo called, becauſe it is framed by the policy of man (and in 21 *E.* 4. 39. *b.* is called a myſtical body;) and in this capacity the king is eſteemed to be immortal, inviſible, not ſubject to death, infirmity, infancy, *(a)* nonage, *&c. Pl. Com.* in the caſe of the lord *Barkley* 238. and in the caſe of the Duchy 213. 6 *E.* 3. 291. and 26 Aſſ. *pl.* 54. Now ſeeing the king hath but one perſon, and ſeveral capacities, and one politick capacity for the realm of *England*, and another for the realm of *Scotland*, it is neceſſary to be conſidered, to which capacity ligeance is due. And it was reſolved, that it was due to the natural perſon of the king (which is ever accompanied with the politick capacity, and the politick capacity as it were appropriated to the natural capacity) and it is not due to the politick capacity only, that is, to his crown or kingdom diſtinct from his natural capacity, and that for divers reaſons. Firſt, every ſubject (as it hath been affirmed by thoſe that argued againſt the plaintiff) is preſumed by law to be ſworn to the king, which is to his natural perſon, and likewiſe the king is ſworn to his ſubjects, (as it appeareth in *Bracton, lib.* 3. *de actionibus, cap.* 9. *fol.* 107.) which oath he taketh in his natural perſon: for the politick capacity is inviſible and immortal; nay, the politick body hath no ſoul, for it is framed by the policy of man. 2. In all indictments of treaſon, when any do intend or compaſs *mortem & deſtructionem domini regis* (which muſt needs be underſtood of his natural body, for his politick body is immortal, and not ſubject to death) the indictment concludeth, *contra (b) ligeantiæ ſuæ debitum*; *ergo*, the ligeance is due to the natural body. *Vide Fit.* Juſtice of Peace 53. and *Pl. Com.* 384. in the earl of *Leiceſter*'s caſe. 3. It is true, that the king *in genere* dieth not, but, no queſtion, *in individuo* he dieth: as for example, *H.* 8. *E.* 6. *&c.* and queen *Eliz.* died, otherwiſe you ſhould have many kings at once. In 2 and 3 *Ph.* and *Mar. Dyer* 128. *(c)* one *Conſtable* diſperſed divers bills in the ſtreets in the night, in which it was written, that king *E.* 6. was alive and in *France*, *&c.* and in *Coleman-ſtreet*, in *London*, he pointed to a young man, and ſaid that he was king *Edward* the ſixth. And this being ſpoken *de individuo* (and accompanied with other circumſtances) was reſolved to be high treaſon; for the which *Conſtable* was attainted and executed. 4. A *(d)* body politick (being inviſible) can as a body politick neither make or take homage: *Vide* 33 *H.* 8. *tit. Fealty, Brook* 15. 5. *In fide*, in faith or ligeance, nothing ought to be feigned, but ought to be *ex fide non ficta.* 6. The king holdeth the kingdom of *England* by birth-right inherent, by deſcent from the blood royal, whereupon ſucceſſion doth attend; and therefore it is uſually ſaid, to the king, his heirs, and ſucceſſors, wherein heirs is firſt named, and ſucceſſors is attendant upon heirs. And yet in our ancient books ſucceſſion and ſucceſſor are taken for hereditance and heirs. *Bract. lib.* 2. *de acquirendo rerum dominio, c.* 29. *Et ſciend' eſt, quod hæreditas eſt ſucceſſio in univerſum jus quod defunctus anteceſſor habuit, ex cauſâ quacunque acquiſitionis vel ſucceſſionis, & alibi affinitatis jure nulla ſucceſſio permittitur.* But the title is by deſcent. By queen *Elizabeth*'s death the crown and kingdom of *England* deſcended to his majeſty, and he was fully and abſolutely thereby king, without any eſſential ceremony or act to be done *ex poſt facto:* for coronation is but a royal ornament and ſolemnization of the royal deſcent, but no part of the title. In the firſt year of his majeſty's reign, before his majeſty's coronation, *Watſon (e)* and *Clerke*, ſeminary prieſts, and others, were of opinion, that his majeſty was no complete and abſolute king before his coronation, but that coronation did add a confirmation and perfection to the deſcent; and therefore (obſerve their damnable and damned conſequent) that they by ſtrength and power might before his coronation take him and his royal iſſue into their poſſeſſion, keep him priſoner in the *Tower*, remove ſuch counſellors and great officers as pleaſed them, and conſtitute others in their places, *&c.* and that theſe and other acts of like nature could not be treaſon againſt his majeſty, before he were a crowned king. But it was clearly reſolved by all the judges of *England*, that preſently by the deſcent his majeſty was completely and abſolutely king, without any eſſential ceremony or act to be done *ex poſt facto*; and that *(f)* coronation was but a royal ornament, and outward ſolemnization of the deſcent. And this appeareth evidently by infinite precedents and book-caſes; as (taking one example in a caſe ſo clear for all) king *Henry* VI. was not crowned until the eighth year of his reign, and yet divers men before his coronation were attainted of treaſon, of felony, *&c.* and he was as abſolute and complete a king, both for matters of judicature, as for grants, *&c.* before his coronation, as he was after, as it appeareth in the Reports of the 1, 2, 3, 4, 5, 6, and 7 years of the ſame king. And the like might be produced for many other kings of this realm, which for brevity in a caſe ſo clear I omit. By which it manifeſtly appeareth, that by the laws of *England* there can be no * *interregnum* within the ſame. If the king be ſeiſed of land by a defeaſible title, and dieth ſeiſed, this deſcent ſhall toll the entry of him that right hath, as it appeareth by 9 *(g) E.* 4. 51. But if the next king had it by ſucceſſion, that ſhould take away no entry, as it appeareth by *Littleton, fol.* 97. If a diſſeiſor of an infant convey the land to the king who dieth ſeiſed, this deſcent taketh away the entry of the infant, as it is ſaid in 34 *H.* 6. *fol.* 34. *(h)* 45. *lib.* Aſſ. *pl.* 6. *Plow. Com.* 234. where the caſe was; king *H.* 3. gave a manor to his brother the earl of *Cornwal* in tail (at what time the ſame was a fee-ſimple conditional) king *H.* 3. died, the earl before the ſtatute of *donis conditional'* (having no iſſue) by deed exchanged the manor with warranty for other lands in fee, and died without iſſue, and the warranty and aſſets deſcended upon his nephew king *Edward* I. and it was adjudged, that this warranty and aſſets, which deſcended upon the natural perſon of the king, barred him of the poſſibility of reverter. In the reign of *Ed.* 2. the *Spencers*, the father and the ſon, to cover the treaſon hatched in their hearts, invented this damnable and damned opinion, that homage and oath of ligeance was more by reaſon of the king's crown (that is, of his politic capacity) than by reaſon of the perſon of the king, upon which opinion they inferred execrable and deteſtable conſequences. 1. If the king do not demean himſelf by reaſon in the right of his crown, his lieges be bound by oath to remove the king. 2. Seeing that the king could not be reformed by ſuit of law, that ought to be done by the ſword. 3. That his lieges be bound to govern in aid of him, and in default of him. All which were condemned by two parliaments; one in the reign of *Ed.* 2. called *Exilium* Hugonis *le* Spencer, and the other in *ann.* 1. *Ed.* 3. *c.* 1. *Bracton, lib.* 2. *de acquirendo rerum dominio, c.* 24. *f.* 55, ſaith thus, *eſt enim corona regis facere juſtitiam & judic', & tenere pacem, & ſine quibus corona conſiſtere non poteſt nec tenere. Hujuſmodi autem jura ſive juriſdictiones ad perſonas vel tenementa transferri non poterunt, nec a privatâ perſonâ poſſideri, nec uſus nec executio juris, niſi hoc datum fuit ei deſuper, ſicut juriſdictio delegata delegari non poterit quin ordinaria remaneat cum ipſo rege.* *Et lib.* 3. *de actionibus, cap.* 9. *fol.* 107. *ſeparare autem debet rex, cum ſit Dei vicarius in terrâ, jus ab injuriâ, æquum ab iniquo, ut omnes ſibi ſubjecti honeſte vivant, & quod nullus alium lædat, & quod unicuique quod ſuum fuerit rectâ contributione reddatur.* In reſpect whereof one ſaith, that *corona eſt quaſi cor ornans, cujus ornamenta ſunt miſericordia & juſtitia.* And therefore a king's crown is an hieroglyphic of the laws, where juſtice, *&c.* is adminiſtered; for ſo ſaith *P. Val. l.* 41. *p.* 400. *coronam dicimus legis judicium eſſe, propterea quod certis eſt vinculis complicata, quibus vita noſtra veluti religata coercetur.* Therefore if you take that which is ſignified by the crown, that is, to do juſtice and judgment, to maintain the peace of the land, *&c.* to ſeparate right from wrong, and the good from the ill; that is to be underſtood of that capacity of the king, that *in rei veritate* hath capacity, and is adorned and endued with endowments as well of the ſoul, as of the body, and thereby able to do juſtice and judgment according to right and equity, and to maintain the peace, *&c.* and to find out and diſcern the truth, and not of the inviſible and immortal capacity that hath no ſuch endowments; for of itſelf it hath neither ſoul nor body. And where divers books and acts of parliament ſpeak of the ligeance of *England*, as 31 *E.* 3. *tit. Coſinage* 5. 42 *Ed.* 3. 2. 13 *E.* 3. *tit. Brief* 677. 25 *Ed.* 3. *ſtat. de natis ultra mare*; all theſe and other ſpeaking briefly in a vulgar manner (for *(i) loquendum ut vulgus*) and not pleading (for *ſentiendum ut docti*) are to be underſtood of the ligeance due by the people of *England* to the king; for no man will affirm, that *England* itſelf, taking it for the continent thereof, doth owe any ligeance or faith, or that any faith or ligeance ſhould be due to it: but it manifeſtly appeareth, that the ligeance or faith of the ſubject is *proprium quarto modo* to the king, *omni, ſoli, & ſemper.* And oftentimes in the reports of our book-caſes, and in acts of parliament alſo, the crown or kingdom is taken for the king himſelf *, as in *Fitzh. Natur. Brev. fol.* 5. Tenure *in capite* is a tenure of the crown, and is a ſeigniory in groſs, that is of the perſon of the king: and ſo is 30 *H.* 8. *Dyer fol.* 44, 45. a tenure in chief, as of the crown, is merely a tenure of the perſon of the king, and therewith agreeth 28 *H.* 8. *tit. Tenure Br.* 65. The ſtatute of 4 *H.* 5. *cap. ultimo*, gave priors aliens, which were conventual to the king and his heirs, by which gift ſaith 34 *H.* 6. 34. the ſame were annexed to the crown. And in the ſaid act of 25 *Ed.* 3. whereas it is ſaid in the beginning, within the ligeance of *England*, it is twice afterward ſaid in the ſame act, within the ligeance of the king, and yet all one ligeance due to the king. So in 42 *Ed.* 3. *fol.* 2. where it is firſt ſaid, the ligeance of *England*, it is afterwards in the ſame caſe called, the ligeance of the king; wherein though they uſed ſeveral manner and phraſes of ſpeech, yet they intended one and the ſame ligeance. So in our uſual commiſſion of aſſiſe, of gaol-delivery, of *oyer* and *terminer*, of the peace, *&c.* power is given to execute juſtice, *ſecundum legem & conſuetudinem regni noſtri* Angliæ; and yet *Littleton, lib.* 2. in his chapter of *Villenage, fol.* 43. in diſabling of a man that is attainted in a premunire ſaith, that the ſame is the king's law; and ſo doth the *Regiſter* in the writ of *ad jura regia* ſtyle the ſame.

‖ Politick body. 1 Inſt. 15. b. 16.

* Q. If not ſo between king *J.* 2. abdication and king *W.* 3. ſucceſſion? poſt.

Pryn's Sovereign Power of Parliament. 2 Part pa. 43. Cro. Arg. 64.

* i. e. Of the politic capacity.

The reaſons wherefore the king by judgment of law hath a politic capacity. 1 *H.* 7. 4.

The reaſons and cauſes, wherefore by the policy of the law the king is a body politic, are three, *viz.* 1. *cauſa majeſtatis*, 2. *cauſa neceſſitatis*, and 3. *cauſa utilitatis.* Firſt, *cauſa majeſtatis*, the king cannot give or take but by matter of record for the dignity of his perſon. Secondly, *cauſa neceſſitatis*, as to avoid the *(k)* attainder of him that hath right to the crown, as it appeareth in 1 *H.* 7. 4. leſt in the *interim* there ſhould be an *(l) interregnum*, which the law will not ſuffer. Alſo by force of this politic capacity, though the *(m)* king be within age, yet may he make leaſes and other grants, and the ſame ſhall bind him; otherwiſe his revenue ſhould decay, and the king ſhould not be able to reward ſervice, *&c.* Laſtly, *cauſa utilitatis*, as when lands and poſſeſſions deſcend from his collateral anceſtors, being ſubjects, as from the earl of *March*, *&c.* to the king, now is the king ſeiſed of the ſame *in jure coronæ*, in his politic capacity; for which cauſe the ſame ſhall go with the crown; and therefore, albeit queen *Elizabeth* was of the half-blood to queen *Mary*, yet ſhe in her body politic enjoyed all thoſe fee-ſimple lands, as by the law ſhe ought, and no collateral couſin of the whole blood to queen *Mary* ought to have the ſame. And theſe are the cauſes wherefore by the policy of the law the king is made a body politic: ſo as for theſe ſpecial purpoſes the law makes him a body politic, immortal and inviſible, whereunto our ligeance cannot appertain. But to conclude this point, our ligeance is to our natural liege ſovereign, deſcended of the blood royal of the kings of this realm. And thus much of the firſt general part *de ligeantiâ.*

Co. Lit. 15. b. See *Treby*'s argument in the *quo warranto.*

(a) Poſtea *Co. Lit.* 43. a. 5 *Co.* 27. a. *Plowd.* 213. a. 221. a. 364. b. 26 Aſſ. 54. *Fitz.* enfant 15. *Br.* age 34.

(b) Antea 3 Inſt. 11. *Hob.* 271. *Dy.* 143. pl. 62. *Cawly* 185. *Co. Lit.* 129. a.

(c) This caſe is not in the book at large, but is in the *Abridgment* of *Dy. fo.* 32. *Stow's Abridgm. p.* 1062. 1064. *Speed's Chron. p.* 1127. *col.* 2. *num.* 100.

(d) 10 *Co.* 32. b. *Co. Lit.* 66. b. 4 *Co.* 11. a.

(e) 3 Inſt. 7.

(f) 3 Inſt. 7.

(g) 4 *Co.* 58. b.

(h) 10 *Co.* 96. b. *Co. Lit.* 19. b. 370. b. *Plowd.* 234. a. 553. b. *Fitz.* garranty 68. *Br.* aſſets per diſcent 31. *Br.* tail 34. *Br.* prærog. 52. *Br.* ſerch pur le roy 5. *Br.* garranty 52. 9 *Co.* 132. b.

(i) 3 *Keb.* 30. *Cart.* 120. 2 Roll. *Rep.* 239. *Het.* 101. 4 *Co.* 46. b.

(k) *Co. Lit.* 16. a. *Bacon's H.* 7. *fo.* 8, 9. *Fitz.* Parl. 2. *Br.* Parl. 37, 105. *Plowd.* 238. b.

(l) 1 *W.* & *M. cap.* 4. *ſect.* 10. *Co. Lit.* 43. a.

(m) 5 *Co.* 27. a. 1. Roll. 728. *Plowd.* 213. a. 238. 221. a. 364. b. 26. Aſſ. 54. *Fitz.* enfant 15. *Br.* age 14.

De legibus. The ſecond general part.

Now followeth the ſecond part, *de legibus*, wherein theſe parts were conſidered: firſt, that the ligeance or faith of the ſubject is due unto the king by the law of nature: ſecondly, that the law of nature is part of the law of *England:* thirdly, that the law of nature was before any judicial or municipal law: fourthly, that the law of nature is immutable.

The law of nature. *Wing's* Max. 1. *Co. Lit.* 11. b. poſt. 14. b.

The law of nature is that which God at the time of creation of the nature of man infuſed into his heart, for his preſervation and direction; and this is *lex æterna*, the moral law, called alſo the law of nature. And by this law, written with the finger of God in the heart of man, were the people of God a long time governed, before the law was written by *Moſes*, who was the firſt reporter or writer of law in the world. The apoſtle in the ſecond chapter to the *Romans* ſaith, *cum enim gentes, quæ legem non habent, naturaliter ea quæ legis ſunt faciunt.* Q. And this is within that command of the moral law, *honora patrem*, which doubtleſs doth extend to him that is *pater patriæ.* And the apoſtle ſaith, *omnis anima poteſtatibus ſublimioribus ſubdita ſit.* And theſe be the words of the great divine, *hoc Deus in ſacris ſcripturis jubet, hoc lex naturæ dictat, ut quilibet ſubditus obediat ſuperiori.* And *Ariſtotle*, nature's ſecretary, *lib.* 5. *Æthic.* ſaith, that *jus naturale eſt, quod apud omnes homines eandem habet potentiam.* And herewith doth agree *Bracton, lib.* 1. *cap.* 5. and *Forteſcue, cap.* 8, 12, 13, and 16. Doctor and Student, *cap.* 2, and 4. And the reaſon hereof is, for that God and nature is one to all, and therefore the law of God and nature is one to all.

Juſtinian Inſt. *lib.* 1. *cap.* 2.

By this law of nature is the faith, ligeance, and obedience of the ſubject due to his ſovereign or ſuperior. And *Ariſtotle* 1 *Politicorum* proveth, that to command and to obey is of nature, and that magiſtracy is of nature: for whatſoever is neceſſary and profitable for the preſervation of the ſociety of man is due by the law of nature; but magiſtracy and government are neceſſary and profitable for the preſervation of the ſociety of man; therefore magiſtracy and government are of nature. And herewith accordeth *Tully, lib.* 3. *de legibus, ſine imperio nec domus ulla, nec civitas, nec gens, nec hominum univerſum genus ſtare, nec ipſe denique mundus poteſt.* This law of nature, which indeed is the eternal law of the Creator, infuſed into the heart of the creature at the time of his creation, was two thouſand years before any laws written, and before any judicial or municipal laws. And certain it is, that before judicial or municipal laws were made, kings did decide cauſes according to natural equity, and were not tied to any rule or formality of law, but did *dare jura.* And this appeareth by *Forteſcue, cap.* 12 and 13. and by *Virgil* that philoſophical poet, 7 *Æneid.*

Note.

> *Hoc* Priami *geſtamen erat, cum jura vocatis*
> *More daret populis.*

And 5th *Æneid.*

> ——*Gaudet regno* Trojanus Aceſtes,
> *Indicitque forum & patribus dat jura vocatis.*

And *Pomponius, lib.* 2. *cap. de origine juris*, affirmeth, that in *Tarquinius Superbus*'s time there was no civil law written, and that *Papirius* reduced certain obſervations into writing, which was called *Jus Civile* Papirianum. Now the reaſon wherefore laws were made and publiſhed, appeareth in *Forteſcue, cap.* 13. and in *Tully, lib.* 2. *Officiorum: at cum jus æquabile ab uno viro homines non conſequerentur, inventi ſunt leges.* Now it appeareth by demonſtrative reaſon, that ligeance, faith, and obedience of the ſubject to the ſovereign, was before any municipal or judicial laws. 1. For that government and ſubjection were long before any municipal or judicial laws. 2. For that it had been in vain to have preſcribed laws to any, but to ſuch as owed obedience, faith, and ligeance before, in reſpect whereof they were bound to obey and obſerve them: *fruſtra enim feruntur leges niſi ſubditis & obedientibus.* Seeing then that faith, obedience, and ligeance, are due by the law of nature, it followeth that the ſame cannot be changed or taken away; for albeit judicial or municipal laws have inflicted and impoſed in ſeveral places, or at ſeveral times, divers and ſeveral puniſhments and penalties, for breach or not obſervance of the law of nature, (for that law only conſiſted in commanding or prohibiting, without any certain puniſhment or penalty) yet the very law of nature itſelf, never was nor could be (a) altered or changed. And therefore it is certainly true, that (b) *jura naturalia ſunt immutabilia.* And herewith agreeth *Bracton, lib.* 1. *cap.* 5. and Doctor and Student, *cap.* 5 and 6. And this appeareth plainly and plentifully in our books.

If a man hath a ward by reaſon of a ſeigniory, and is outlawed, he forfeiteth the wardſhip to the king: but if a man hath the wardſhip of his own ſon or daughter, which is his heir apparent, and is outlawed, he doth not (c) forfeit this wardſhip; for nature hath annexed it to the perſon of the father, as it appeareth in 33 *H.* 6. 55. *b. Et bonus rex nihil a bono patre differt; & patria dicitur a patre, quia habet communem patrem, qui eſt pater patriæ.* In the ſame manner, *maris & fæminæ conjunctio eſt de jure naturæ*, as *Bracton* in the ſame book and chapter, and St. *Germin* in his book of the Doctor and Student, *cap.* 5. do hold. Now if he, that is attainted of treaſon or felony, be ſlain by one that hath no authority, or executed by him that hath authority, but purſueth not his warrant, in this caſe his eldeſt ſon can have no appeal, for he muſt bring his appeal as heir, which being *ex proviſione hominis*, he loſeth it by the attainder of his father; but his (d) wife (if any he have) ſhall have an appeal, becauſe ſhe is to have her appeal as wife, which ſhe remaineth notwithſtanding the attainder, becauſe *maris & fæminæ conjunctio* is *de jure naturæ*, and therefore (it being to be intended of true and right matrimony) is indiſſoluble; and this is proved by the book in 33 *H.* 6. 57. So if there be mother and daughter, and the daughter is attainted of felony, now cannot ſhe be heir to her mother for the cauſe aforeſaid; yet after her attainder, if ſhe kill her mother, this is parricide and petit treaſon; for yet ſhe remaineth her daughter, for that is of nature; and herewith agreeth 21 *E.* 3. 17. *b.* If a man be attainted of felony or treaſon, he hath loſt the king's legal protection, for he is thereby utterly diſabled to ſue any action real or perſonal (which is a greater diſability than an alien in league hath) and yet ſuch a perſon ſo attainted hath not loſt that protection which by the law of nature is given to the king, for that is *indelebilis & immutabilis*, and therefore the king may protect and pardon him, and if any man kill him without warrant, he ſhall be puniſhed by the law as a manſlayer, and thereunto accordeth 4 *Ed.* 4. and 35 *H.* 6. 57. 2 Aſſ. *pl.* 3. By the ſtatute of 25 *Ed.* 3. *cap.* 22. a man attainted in a *præmunire*, is by expreſs words out of the king's protection generally; and yet this extendeth only to legal protection, as it appeareth by *Littleton, fol.* 43. for the parliament could not take away that protection which the law of nature giveth unto him; and therefore notwithſtanding that ſtatute, the king may protect and pardon him. And though by that ſtatute it was farther enacted, that it ſhould be done with him as with an enemy, by which words any man might have ſlain ſuch a perſon (as it is holden in 24 *H.* 8. *tit. Coron. Br.* 197.) until the ſtatute made *anno* 5 *Eliz. cap.* 1. yet the king might protect and pardon him. A man outlawed is out of the benefit of the municipal law; for ſo ſaith *Fitz N. B.* 161. *a. utlegatus eſt quaſi extra legem poſitus:* and *Bract. l.* 3. *tract.* 2. *c.* 11. ſaith, that *caput gerit lupinum*; yet is he not out either of his natural ligeance, or of the king's natural protection; for neither of them is tied to municipal laws, but is due by the law of nature, which (as hath been ſaid) was long before any judicial or municipal laws. And therefore if a man were outlawed for felony, yet was he within the king's natural protection, for no man but the ſheriff could execute him, as it is adjudged in 2 *lib.* Aſſ. *pl.* 3. Every ſubject is by his natural ligeance bound to obey and ſerve his ſovereign, *&c.* It is enacted by the parliament of 23 *H.* 6. that no man ſhould ſerve the king as ſheriff of any county above one year, and that, notwithſtanding any clauſe of *non obſtante* to the contrary, that is to ſay, notwithſtanding that the king ſhould expreſly diſpenſe with the ſaid ſtatute. Howbeit it is agreed in 2 *H.* 7. that againſt the expreſs purview of that act, the king may by a ſpecial *non obſtante* diſpenſe with that act, for that the act could not bar the king of the ſervice of his ſubject, which the law of nature did give unto him. By theſe and many other caſes that might be cited out of our books, it appeareth, how plentiful the authorities of our laws be in this matter. (dd) Wherefore to conclude this point (and to exclude all that hath been or could be objected againſt it) if the obedience and ligeance of the ſubject to his ſovereign be due by the law of nature, if that law be parcel of the laws, as well of *England* as of all other nations, and is immutable, and that *poſtnati* * and we of *England* are united by birth-right in obedience and ligeance (which is the true cauſe of natural ſubjection) by the law of nature; it followeth, that *Calvin* the plaintiff being born under one ligeance to one king, cannot be an alien born. And there is great reaſon, that the law of nature ſhould direct this caſe, wherein five natural operations are remarkable: firſt, the king hath the crown of *England* by birth-right, being naturally procreated of the blood royal of this realm: ſecondly, *Calvin* the plaintiff naturalized by procreation and birth-right, ſince the deſcent of the crown of *England:* thirdly, ligeance and obedience of the ſubject to the ſovereign, due by the law of nature: fourthly, protection and government due by the law of nature: fifthly, this caſe, in the opinion of divers, was more doubtful in the beginning, but the further it proceeded, the clearer and ſtronger it grew; and therefore the doubt grew from ſome violent paſſion, and not from any reaſon grounded upon the law of nature, *quia quanto magis violentus motus (qui fit contra naturam) appropinquat ad ſuum finem, tanto debiliores & tardiores ſunt ejus motus; ſed naturalis motus, quanto magis appropinquat ad ſuum finem, tanto fortiores & velociores ſunt ejus motus.* Hereby it appeareth how weak the objection grounded upon the rule of (e) *quando duo jura concurrunt in unâ perſonâ, &c.* is: for that rule holdeth not in perſonal things, that is, when two perſons are neceſſarily and inevitably required by law, as in the caſe of an alien born there is; and therefore no man will ſay, that now the king of *England* can make war or league with the king of *Scotland*, *& ſic de cæteris:* and ſo in caſe of an alien born, you muſt of neceſſity have two ſeveral ligeances to two ſeveral perſons. And to conclude this point concerning laws, *non adverſatur diverſitas regnor' ſed regnant'; non patriarum, ſed patrum patriar'; non coronarum, ſed coronatorum; non legum municipalium, ſed regum majeſtatum.* And therefore thus were directly and clearly anſwered as well the objections drawn from the ſeveralty of the kingdoms, ſeeing there is but one head of both, and the *poſtnati* and us joined in ligeance to that one head, which is *copula & tanquam oculus* of this caſe; as alſo the diſtinction of the laws, ſeeing that ligeance of the ſubjects of both kingdoms, is due to their ſovereign by one law, and that is the law of nature.

Q. *Cawly* 47. 3 Inſt. 126. Q. *Co. Lit.* 130. a *B. N. C.* 53. *Co. Lit.* 130. a. 2. *Bulſtr.* 299. *Cawly* 46, 47. *Co. Lit.* 128. b. *Br. Corone* 67. 23 *H.* 6. *c.* 8. *Plowd.* 502. b. 2 *H.* 7. 6. b. *Br.* patents 109. 12 *Co.* 18. * *i. e.* of *Scotland.* Q.

The 3d general part concerning both kingdoms.

For the third, it is firſt to be underſtood, that as the law hath wrought four unions, ſo the law doth ſtill make four ſeparations. The firſt union is of both kingdoms under one natural liege ſovereign king, and ſo acknowledged by the act of parliament of recognition. The 2d is an union of ligeance and obedience of the ſubjects of both kingdoms, due by the law of nature to their ſovereign: and this union doth ſuffice to rule and over-rule the caſe in queſtion; and this in ſubſtance is but a uniting of the hearts of the ſubjects of both kingdoms one to another, under one head and ſovereign. The 3d union is an union of protection of both kingdoms, equally belonging to the ſubjects of either of them: and therefore the two firſt arguments or objections drawn from two ſuppoſed ſeveral ligeances were fallacious, for they did *disjungere conjungenda.* The 4th union and conjunction is of the three lions of *England* and that one of *Scotland*, united and quartered in one eſcutcheon.

(a) Dr. & Stud. 4. a. ante 12 b. (b) *Cart.* 130. (c) 3 *Co.* 39. a. 7 *Co.* 12. b. *Co. Lit.* 84. b. *Br.* gard. 6. *Br.* forfeit 70. *Plowd.* 294. a. *Englefield*'s caſe, 2 Inſt. 234. (d) *Stamf.* cor. 59. *c.* 35 *H.* 6. 58. *a. Br.* appeal 5. 131. *Fitz.* cor. 21. 2 Inſt. 215. (dd) In one of the notes to the new edition of *Coke* upon *Littleton*, we have had occaſion to obſerve on this extravagant doctrine about the diſpenſing power. *Co. Lit.* 13th ed. *fol.* 120. a. notes 3. and 4. EDITOR. (e) *Elleſmere*'s poſtnat. *c.* 88. 4 *Co.* 118. a. *Cawly* 209. *Antea* *Moor* 793, 834

Concerning the ſeparations yet remaining: 1ſt, *England* and *Scotland* remain ſeveral and diſtinct kingdoms. 2. They are governed by ſeveral judicial or municipal laws. 3. They have ſeveral diſtinct and ſeparate parliaments. 4. Each kingdom hath ſeveral nobilities; for albeit a *poſtnatus* in *Scotland*, or any of his poſterity, be the heir of a nobleman of *Scotland*, and by his birth is legitimated in *England*, yet he is none of the *(a)* peers or nobility of *England*; for his natural ligeance and obedience, due by the law of nature, maketh him a ſubject and no alien within *England:* but that ſubjection maketh him not noble within *England*, for that nobility had his original by the king's creation, and not of nature. And this is manifeſted by expreſs authorities, grounded upon excellent reaſons in our books. If a baron, viſcount, earl, marquis, or duke of *England*, bring any action real or perſonal, and the defendant pleadeth in abatement of the writ, that he is no baron, viſcount, earl, *&c.* and thereupon the demandant or plaintiff taketh iſſue; this iſſue ſhall not be tried by jury, but by the *(b)* record of parliament, whether he or his anceſtor, whoſe heir he is, were called to ſerve there as a peer, and one of the nobility of the realm. And ſo are our books adjudged in 22 Aſſ. 24. 48 *Edw.* 3. 30. 35 *H.* 6. 40. 20. *Eliz. Dyer* 360. *Vide* in the ſixth part of my reports, in the counteſs of *Rutland*'s caſe. So as the man, that is not *de jure* a peer, or one of the nobility, to ſerve in the upper houſe of the parliament of *England*, is not in the legal proceedings of law accounted noble within *England.* And therefore if a countee of *France* or *Spain*, or any other foreign kingdom, ſhould come into *England*, he ſhould not here ſue, or be ſued by the name of countee, *&c.* for that he is none of the nobles that are members of the upper houſe of the parliament of *England*; and herewith agree the book-caſes of *(c)* 20 *Ed.* 4. 6. *a. b.* and 11 *Ed.* 3. *tit. Bre.* 473. like law it is, and for the ſame reaſon, of an earl or baron of *Ireland*, he is not any peer, or of the nobility of this realm: and herewith agreeth the book in 8 *R.* 2. *tit. (d) Proceſ. pl. ultim.* where in an action of debt proceſs of outlawry was awarded againſt the earl of *Ormond* in *Ireland*; which ought not to have been, if he had been noble here. *Vide Dyer (e)* 20 *Eliz.* 360.

But yet there is a diverſity in our books worthy of obſervation, for the higheſt and loweſt dignities are univerſal; for if a king of a foreign nation come into *England*, by the leave of the king of this realm (as it ought to be) in this caſe he ſhall ſue and be ſued by the name of a king; and herewith agreeth 11 *E.* 3. *tit. Br. (f)* 473. where the caſe was, that *Alice*, which was the wife of *R. de O.* brought a writ of dower againſt *John* earl of *Richmond*, and the writ was *præcip.* Johann'. *comiti* Richmondiæ *cuſtodi terr' & hæredis* of *William* the ſon of *R. de O.* the tenant pleaded that he is duke of *Britain*, not named duke, judgment of the writ? But it is ruled, that the writ was good, for that the dukedom of *Britain* was not within the realm of *England.* But there it is ſaid, that if a man bring a writ againſt *Edward (g) Baliol*, and name him not king of *Scotland*, the writ ſhall abate for the cauſe aforeſaid. And hereof there is a notable precedent in *Fleta*, *lib.* 2. *cap.* 3. § 9. where treating of the juriſdiction of the king's court of *Marſhalſea* it is ſaid, *et hæc omnia ex officio ſuo licite facere poterit (ſſ. ſeneſchal' aul' hoſpitii regis) non obſtante alicujus libertate, etiam in alieno regno, dum tamen reus in hoſpitio regis poterit inveniri; ſecundum quod contigit* Pariſ. *anno* 14 Ed. 1. *de* Engelramo *de* Nogent *capto in hoſpitio regis* Angl' *(ipſo rege tunc apud* Pariſiam *exiſtente) cum diſcis argenti furatis recenter ſuper facto, rege* Franc' *tunc preſente; & unde licèt curia regis* Franc' *de præd' latrone per caſtellanum* Pariſ. *petita fuerit, habitis hinc & inde tractatibus in conſilio regis* Franc', *tandem conſideratum fuit, quod rex* Angl' *illa regia prærogativa, & hoſpitii ſui privilegio uteretur, & gauderet; qui, coram* Roberto Fitz-John *milite tunc hoſpitii regis* Angl' *ſeneſchallo de latrocinio convictus, per conſiderationem ejus cur' fuit (h) ſuſpenſus in patibulo ſancti* Germani *de pratis.* Which proveth, that though the king be in a foreign kingdom, yet he is judged in law a king there. The other part of the ſaid diverſity is proved by the book-caſe in 20 *(i) E.* 4. *fol.* 6. *a. b.* where in a writ of debt brought by ſir *J. Douglas*, knight, againſt *Elizabeth Molford*, the defendant demanded judgment of the writ, for that the plaintiff was an earl of *Scotland*, but not of *England*; and that our ſovereign lord the king had granted unto him ſafe conduct, not named by his name of dignity, judgment of the writ, *&c.* And there juſtice *Littleton* giveth the rule. The plaintiff (ſaith he) is an earl in *Scotland*, but not in *England*; and if our ſovereign lord the king grant to a duke of *France* a ſafe conduct to merchandize, and enter into his realm, if the duke cometh and bringeth merchandize into this land, and is to ſue an action here, he ought not to name himſelf duke, for he is not a duke in this land, but only in *France.* And theſe be the very words of that book-caſe; out of which I collect three things. Firſt, that the plaintiff was named by the name of a knight, whereſoever he received that degree of dignity. *Vide (k)* 7 *H.* 6. 14 *b.* accord. 2. That an earl of another kingdom or nation is no earl (to be ſo named in legal proceedings) within this realm: and herewith agreeth the book of *(l)* 11 *Ed.* 3. the earl of *Richmond*'s caſe before recited. 3. That albeit the king by his letters patent of ſafe conduct do name him duke, yet that appellation maketh him no duke, to ſue or to be ſued by that name within *England:* ſo as the law in theſe points (apparent in our books) being obſerved, and rightly underſtood, it appeareth how cauſeleſs their fear was, that the adjudging of the plaintiff to be no alien ſhould make a confuſion of the nobilities of either kingdom.

The 4th general part, *de alienigena.*

Now are we in order come to the fourth noun (which is the fourth general part) *alienigena*; wherein ſix things did fall into conſideration. 1. Who was *alienigena*, an alien born by the laws of *England.* 2. How many kinds of aliens born there were. 3. What incidents belonged to an alien born. 4. The reaſon why an alien is not capable of inheritance or freehold within *England.* 5. Examples, reſolutions, and judgments reported in our books in all ſucceſſions of ages, proving the plaintiff to be no alien. 6. Demonſtrative concluſions upon the premiſes, approving the ſame.

Who is an alien.

Co. Lit. 128. b. 129. a. 4 Inſt. 152. *Lit.* ſect. 198.

1. An alien is a ſubject that is born out of the ligeance of the king, and under the ligeance of another, and can have no real or perſonal action for or concerning land; but in every ſuch action the tenant or defendant may plead, that he was born in ſuch a country which is not within the ligeance of the king, and demand judgment if he ſhall be anſwered. And this is in effect the deſcription which *Lit.* himſelf maketh, *lib.* 2. *cap.* 14. *Villen. fol.* 43. *Alienigena eſt alienæ gentis ſeu alienæ ligeantiæ, qui etiam dicitur peregrinus, alienus, exoticus, extraneus, &c. Extraneus eſt ſubditus, qui extra terram, i. e. poteſtatem regis, natus eſt.* And the uſual and right pleading of an alien born doth livelily and truly deſcribe and expreſs what he is. And therein two things are to be obſerved. Firſt, that the moſt uſual and beſt pleading in this caſe is both excluſive and incluſive, *viz. extra ligeantiam domini regis, &c. & infra ligeantiam alterius regis*, as it appeareth in *(m)* 9 *Ed.* 4. 7. *b.* Book of Entries, *fol.* 244, *&c.* which cannot poſſibly be pleaded in this caſe, for two cauſes. 1. For that one king is ſovereign of both kingdoms. 2. One ligeance is due by both to one ſovereign, and in caſe of an alien there muſt of neceſſity be ſeveral kings and ſeveral ligeances. Secondly, no pleading was ever *extra regnum*, or *extra legem*, which are circumſcribed to place; but *extra ligeantiam*, which (as it hath been ſaid) is not local or tied to any place.

Note.

Full. Ch. Hiſt. *l.* 1. 12.

It appeareth by *Bracton*, *lib.* 3. *tract.* 2. *c.* 15. *fol.* 134. that *(n) Canutus* the *Daniſh* King, having ſettled himſelf in this kingdom in peace, kept notwithſtanding (for the better continuance thereof) great armies within this realm. The peers and nobles of *England* diſtaſting this government by arms and armies, *odimus accipitrem quia ſemper vivit in armis*, wiſely and politicly perſuaded the king, that they would provide for the ſafety of him and his people, and yet his armies carrying with them many inconveniences ſhould be withdrawn; and therefore offered, that they would conſent to a law, that whoſoever ſhould kill an alien, and be apprehended, and could not acquit himſelf, he ſhould be ſubject to juſtice: but if the manſlayer fled, and could not be taken, then the town where the man was ſlain ſhould forfeit ſixty-ſix marks unto the king; and if the town were not able to pay it, then the hundred ſhould forfeit and pay the ſame unto the king's treaſure; whereunto the king aſſented. This law was penned *quicunque occiderit* Francigenam, *&c.* not excluding other aliens, but putting *Francigena* a *Frenchman* for example, that others muſt be like unto him, in owing ſeveral ligeance to a ſeveral ſovereign, that is, to be *extra ligeantiam regis* Angl', and *infra ligeantiam alterius regis.* And it appears before out of *Bracton* and *Fleta*, that both of them uſe the ſame example (in deſcribing of an alien) *ad fidem regis* Franciæ. And it was holden, that except it could be proved, that the party ſlain was an *Engliſhman*, that he ſhould be taken for an alien; and this was called *Engleſherie*, *Engleſheria*, that is, a proof that the party ſlain was an *Engliſhman.* (Hereupon *Canutus* preſently withdrew his armies, and within a while after loſt his crown, and the ſame was reſtored to his right owner.) The ſaid law of *Engleſherie* continued until 14 *Ed.* 3. *cap.* 4. and then the ſame was by act of parliament ouſted and aboliſhed. So amongſt the laws of *William* the firſt, (publiſhed by maſter *Lambert*, *fol.* 125.) *omnis* Francigena (there put, for example as before is ſaid, to expreſs what manner of perſon *alienigena* ſhould be) *qui tèmpore* Edvardi *propinqui noſtri fuit particeps legûm & conſuetudinûm* Anglorum (that is made denizen) *quod dicunt ad ſcot & lot perſolvat ſecundum legem* Anglorum.

How many kind of aliens there be.

Every man is either *alienigena*, an alien born, or *ſubditus*, a ſubject born. Every alien is either a friend that is in league, *&c.* or an enemy that is in open war, *&c.* Every alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *ſpecialiter permiſſus*, permitted eſpecially. Every ſubject is either *natus*, born, or *datus*, given or made: and of theſe briefly in their order. An alien friend, as at this time, a *German*, a *Frenchman*, a *Spaniard*, *&c.* (all the kings and princes in Chriſtendom being now in league with our ſovereign; but a *Scot* being a ſubject, cannot be ſaid to be a friend, nor *Scotland* to be *ſolum amici*) may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treaſure, or *(o)* goods perſonal whatſoever, as well as an *Engliſhman*, and may maintain any *(p)* action for the ſame: but *(q)* lands within this realm, or houſes (but for their neceſſary habitation only) alien friends cannot acquire, or get, nor maintain any action real or perſonal, for any land or houſe, unleſs the houſe be for their neceſſary habitation. For if they ſhould be diſabled to acquire and maintain theſe things, it were in effect to deny unto them trade and traffick, which is the life of every iſland. But if this alien become an enemy (as all alien friends may) then is he utterly diſabled to maintain any action, or get any thing within this realm. And this is to be underſtood of a temporary alien, that being an enemy, may be a friend, or being a friend may be an enemy. But a perpetual enemy (though there be no wars by fire and ſword between them) cannot maintain any action, or get any thing within this realm. All infidels are in law *perpetui (r) inimici*, perpetual enemies (for the law preſumes not that they will be converted, that being *remota potentia*, a remote poſſibility) for between them, as with the devils, whoſe ſubjects they be, and the *Chriſtian*, there is perpetual hoſtility, and can be no *(s)* peace; for as the apoſtle ſaith, 2 *Cor.* 6. 15. *quæ autem conventio* Chriſti *ad* Belial, *aut quæ pars fideli cum infideli?* And the law ſaith, Judæo Chriſtianum *nullum ſerviat mancipium, nefas enim eſt quem* Chriſtus *redemit blaſphemum* Chriſti *in ſervitutis vinculis detinere.* Regiſter 282. *Infideles ſunt* Chriſti & Chriſtianorum *inimici.* And herewith agreeth the book in 12 *H.* 8. *fol.* 4. where it is holden that a pagan cannot have or maintain any action at all. [*Quære.*]

(a) *Dyer* 360. pl. 6. 9. *Co.* 117. a. b. 2 Inſt. 48. (b) *Co. Lit.* 16. b. 6 *Co.* 53. a. 9 *Co.* 31. a. 49. a. 12 *Co.* 70, 94, 95. 2 Inſt. 50. 2 *Roll.* 575. *Moor* 767. (c) 9 *Co.* 117. b. *Br.* noſme de dignity 49. (d) 9 *Co.* 117. b. *Fitz.* proc. 224. (e) *Dy.* 360. pl. 6. *Co. Lit.* 261. b. (f) *Moor* 803. 9 *Co.* 117. b. poſtea (g) *Moor* 803. (h) *Moor* 798, 799. (i) 9 *Co.* 117. b. *Br.* noſme de dignity, 49. (k) *Br. Brief* 159. *Fitz. Brief* 35. (l) 11 *E.* 3. *Fitz. Brief* 473. Antea 15. b. *Moor* 803. 9 *Co.* 117. b. (m) Antea 5. a. (n) *Stanf.* cor. 17. f. (o) *Co. Lit.* 2. b. (p) 1 *Bulſt.* 134. *Yel.* 198. *Owen* 45. *Co. Lit.* 129. b. 1. *And.* 25. *Moor* 431. 1 *Keb.* 266. *Cr. El.* 142. 683. *Cr. Car.* 9. 4 Inſt. 152. *Dy.* 2. pl. 8. *O. Benl.* 10. *B. N. C.* 375. *Br.* non-ability 62. (q) *Poph.* 36. *Co. Lit.* 2. b. *Dy.* 2. pl. 8. (r) *Wing.* Max. 10. *Skin.* 166. (s) 4 Inſt. 155.

By what laws kingdoms gotten by conqueſt,&c. ſhall be governed. *Dav.* 30. b. 3 *Keb.* 402. *Salk.*411,412. 666. *Comb.* 55.

And upon this ground there is a diverſity between a conqueſt of a kingdom of a Chriſtian king, and the conqueſt of a kingdom of an infidel; for if a king come to a Chriſtian kingdom by conqueſt, ſeeing that he hath *vitæ & necis poteſtatem*, he may at his pleaſure alter and change the laws of that kingdom, but until he doth make an alteration of thoſe laws, the ancient laws of that kingdom remain. But if a Chriſtian king ſhould conquer a kingdom of an infidel, and bring them under his ſubjection, there *ipſo facto* the laws of the infidel are abrogated; for that they be not only againſt Chriſtianity, but againſt the law of God and of nature, contained in the Decalogue: and in that caſe, until certain laws be eſtabliſhed amongſt them, the king by himſelf, and ſuch judges as he ſhall appoint, ſhall judge them and their cauſes according to natural equity, in ſuch ſort as kings in ancient time did with their kingdoms, before any certain municipal laws were given, as before hath been ſaid. But if a king hath a kingdom by title of deſcent, there ſeeing by the laws of that kingdom he doth inherit the kingdom, he cannot change thoſe laws of himſelf, without conſent of parliament. Alſo if a king hath a Chriſtian kingdom by conqueſt, as king *Henry* the ſecond had *Ireland*, after king *John* had given unto them, being under his obedience and ſubjection, the laws of *England* for the government of that country, no ſucceeding king could alter the ſame without parliament.

Ireland.

And in that caſe while the realm of *England* and that of *Ireland* were governed by ſeveral laws, any that was born in *Ireland* was no alien to the realm of *England*. In which precedent of *Ireland* three things are to be obſerved. 1. That then there had been two deſcents, one from *Henry* the ſecond to king *Richard* the firſt, and from *Richard* to king *John*, before the alteration of the laws. 2. That albeit *Ireland* was a diſtinct dominion, yet, the title thereof being by conqueſt, the ſame by judgment of law might by expreſs words be bound by act of the parliament of *England*. 3. That albeit no reſervation were in king *John*'s charter, yet by judgment of law a writ of error did lie in the *King's Bench* in *England* of an erroneous judgment in the *King's Bench* of *Ireland*. Furthermore, in the caſe of a conqueſt of a Chriſtian kingdom, as well thoſe that ſerved in wars at the conqueſt, as thoſe that remained at home for the ſafety and peace of their country, and other the king's ſubjects, as well *antenati* as *poſtnati*, are capable of lands in the kingdom or country conquered, and may maintain any real action, and have the like privileges and benefits there, as they may have in *England*.

Kelw. 202. pl. 19 4 Inſt. 71. *F. N. B.* 22. d. *Vaugh.* 290. 291.

The third kind of enemy is, *inimicus permiſſus*, an enemy that cometh into the realm by the king's ſafe-conduct, of which you may read in the *Regiſter*, *fol.* 25. Book of Entries, *ejectione firmæ*, 7, 32 *H.* 6. 23. *b. &c.*

Co. Lit. 129. a.

Now what a ſubject born is, appeareth at large by that which hath been ſaid *de ligeantia:* and ſo likewiſe *de ſubdito dato*, of a *donaiſon:* for that is the right name, ſo called, becauſe his legitimation is given unto him; for if you derive denizen from *deins nee*, one born within the obedience or ligeance of the king, then ſuch a one ſhould be all one with a natural-born ſubject. And it appeareth before out of the laws of king *W.* 1. of what antiquity the making of denizens by the king of *England* hath been.

Of the incidents to an alien. *Lit. rep.* 27.

3. There be regularly (unleſs it be in ſpecial caſes) three incidents to a ſubject born. 1. That the parents be under the actual obedience of the king. 2. That the place of his birth be within the king's dominion. And 3. The time of his birth is chiefly to be conſidered; for he cannot be a ſubject born of one kingdom that was born under the ligeance of a king of another kingdom, albeit afterwards one kingdom deſcend to the king of the other. 1. For the firſt, it is termed actual obedience, becauſe though the king of *England* hath abſolute right to other kingdoms or dominions, as *France*, *Aquitain*, *Normandy*, *&c.* yet ſeeing the king is not in actual poſſeſſion thereof, none born there ſince the crown of *England* was out of actual poſſeſſion thereof, are ſubjects to the king of *England*. 2. The place is obſervable, but ſo as many times ligeance or obedience, without any place within the king's dominions, may make a ſubject born; but any place within the king's dominions without obedience can never produce a natural ſubject. And therefore if any of the king's ambaſſadors in foreign nations have children there of their wives, being *Engliſh* women, by the common laws of *England* they are natural-born ſubjects, and yet they are born out of the king's dominions. But if enemies ſhould come into any of the king's dominions, and ſurpriſe any caſtle or fort, and poſſeſs the ſame by hoſtility, and have iſſue there, that iſſue is no ſubject to the king, though he be born within his dominions; for that he was not born under the king's ligeance or obedience. But 3. the time of his (a) birth is of the eſſence of a ſubject born; for he cannot be a ſubject to the king of *England*, unleſs at the time of his (a) birth he was under the ligeance and obedience of the king. And that is the reaſon that *antenati* in *Scotland* (for that at the time of their birth they were under the ligeance and obedience of another king) are aliens born, in reſpect of the time of their birth.

Cr. Car. 601. 602. *March* 91. *Jenk.* Cent. 3.

Wherefore an alien born is not capable of lands.

4. It followeth next in courſe to ſet down the reaſons, wherefore an alien born is not capable of inheritance within *England*; and that he is not for three reaſons. 1. The ſecrets of the realm might thereby be diſcovered. 2. The revenues of the realm (the ſinews of war, and ornament of peace) ſhould be taken and enjoyed by ſtrangers born. 3. It ſhould tend to the deſtruction of the realm. Which three reaſons do appear in the ſtatute of 2 *H.* 5. *cap.* and 4 *H.* 5. *cap. ultimo.* But it may be demanded, wherein doth that deſtruction conſiſt. Whereunto it is anſwered: firſt, it tends to deſtruction *tempore belli*; for then ſtrangers might fortify themſelves in the heart of the realm, and be ready to ſet fire on the commonwealth, as was excellently ſhadowed by the *Trojan* horſe in *Virgil*'s ſecond book of his *Æneid*, where a very few men in the heart of the city did more miſchief in a few hours, than ten thouſand men without the walls in ten years. Secondly, *tempore pacis*, for ſo might many aliens born get a great part of the inheritance and freehold of the realm, whereof there ſhould follow a failure of juſtice (the ſupporter of the commonwealth), for that aliens born cannot be returned of juries (b) for the trial of iſſues between the king and the ſubject, or between ſubject and ſubject. And for this purpoſe, and many other, ſee a charter (worthy of obſervation) of king *Ed.* 3. written to pope *Clement*, *datum apud* Weſtm. 26. *die* Sept. *ann. regni noſtri* Franciæ 4. *regni vero* Angliæ 17.

See 2 *H.* 4. *c.* 7. & *c.* 9.

Examples and authorities in law.

5. Now are we come to the examples, reſolutions, and judgments of former times; wherein two things are to be obſerved. Firſt, how many caſes in our books do over-rule this caſe in queſtion; for *ubi (c) eadem ratio ibi idem jus, & de ſimilibus idem eſt judicium.* 2. That for want of an expreſs text of law *in terminis terminantibus*, and of examples and precedents in like caſes (as was objected by ſome), we are driven to determine the queſtion by natural reaſon: for it was ſaid, *ſi ceſſet lex ſcripta, id cuſtodiri oportet, quod moribus & conſuetudine inductum eſt; & ſi qua in re hoc defecerit, recurrendum eſt ad rationem.* But that receiveth a threefold anſwer. Firſt, that there is no ſuch rule in the common or civil law; but the true rule of the civil law is, *lex ſcripta ſi ceſſet, id cuſtodiri oportet quod moribus et conſuetudine inductum eſt; & ſi qua in re hoc defecerit, tunc id quod proximum & conſequens ei eſt; & ſi id non appareat, tunc jus, quo urbs* Romana *utitur, ſervari oportet.* Secondly, if the ſaid imaginative rule be rightly and legally underſtood, it may ſtand for truth: for if you intend *ratio* for the legal and profound reaſon of ſuch, as by diligent ſtudy and long experience and obſervation are ſo learned in the laws of this realm, as out of the reaſon of the ſame they can rule the caſe in queſtion, in that ſenſe the ſaid rule is true: but if it be intended of the reaſon of the wiſeſt man that profeſſeth not the laws of *England*, then (I ſay) the rule is abſurd and dangerous; for *(d) cuilibet in ſuâ arte perito eſt credendum, & quod quiſque (e) norit in hoc ſe exerceat. Et omnes prudentes illa admittere ſolent, quæ probantur iis, qui in ſuâ arte bene verſati ſunt.* Ariſt. 1. *Topicorum*, *cap.* 6. Thirdly, there be multitudes of examples, precedents, judgments, and reſolutions in the laws of *England*, the true and unſtrained reaſon whereof doth decide this queſtion. For example,

Gaſcoin, Vaſconia, Gaſconia.

The dukedom of *Acquitain*, whereof *Gaſcoin* was parcel, and the earldom of *Poitiers*, came to king *Henry* the ſecond by the marriage of *Eleanor*, daughter and heir of *William* duke of *Aquitain*, and earl of *Poitiers*, which deſcended to *Rich.* 1. *Hen.* 3. *Ed.* 1. *Ed.* 2. *Ed.* 3. *&c.* In 27. *lib.* (f) *Aſſ. pl.* 48. in one caſe there appear two judgments and one reſolution to be given by the judges of both benches in this caſe following. The poſſeſſions of the prior of *Chelſey* in the time of war were ſeiſed into the king's hands, for that the prior was an alien born. The prior by petition of right ſued to the king; and the effect of his petition was, that before he became prior of *Chelſey*, he was prior of *Andover*; and whilſt he was prior there, his poſſeſſions of that priory were likewiſe ſeiſed for the ſame cauſe, ſuppoſing that he was an alien born; whereupon he ſued a former petition, and alledged that he was born in *Gaſcoin* within the ligeance of the king: which point being put in iſſue, and found by jury to be true, it was adjudged that he ſhould have reſtitution of his poſſeſſions generally without mentioning of advowſons. After which reſtitution, one of the ſaid advowſons became void, the prior preſented, againſt whom the king brought a *quare impedit*, wherein the king was barred; and all this was contained in the latter petition. And the book ſaith, that the earl of *Arundel*, and ſir *Guy* of *B.* came into the court of *Common Pleas*, and demanded the opinion of the judges of that court concerning the ſaid caſe, who reſolved, that upon the matter aforeſaid the king had no right to ſeize. In which caſe amongſt many notable points, this one appeareth to be adjudged and reſolved, that a man born in *Gaſcoin* under the king's ligeance, was no alien born, as to lands and poſſeſſions within the realm of *England*, and yet *England* and *Gaſcoin* were, 1. Several and diſtinct countries. 2. Inherited by ſeveral and diſtinct titles. 3. Governed by ſeveral and diſtinct municipal laws, as it appeareth amongſt the records in the *Tower*, *Rot. Vaſc.* 10. *Ed.* 1. *num.* 7. 4. Out of the extent of the great ſeal of *England*, and the juriſdiction of the *Chancery* of *England*. 5. The like objection might be made for default of trial, as hath been made againſt the plaintiff. And where it was ſaid that *Gaſcoin* was no kingdom, and therefore it was not to be matched to the caſe in hand, it was anſwered, that this difference was without a diverſity, as to the caſe in queſtion; for if the plea in the caſe at the bar be good, then without queſtion the prior had been an alien; for it might have been ſaid (as it is in the caſe at the bar) that he was born *extra ligeantiam regis regni ſui* Angliæ, *& infra ligeantiam dominii ſui* Vaſconiæ, and that they were ſeveral dominions, and governed by ſeveral laws: but then ſuch a conceit was not hatched, that a king having ſeveral dominions ſhould have ſeveral ligeances of his ſubjects. Secondly, it was anſwered, that *Gaſcoin* was ſometime a kingdom, and likewiſe *Millan*, *Burgundy*, *Bavaria*, *Bretagne*, and others, were, and now are become dukedoms. *Caſtile*, *Arragon*, *Portugal*, *Barcelona*, *&c.* were ſometime earldoms, afterwards dukedoms, and now kingdoms. *Bohemia* and *Poland* were ſometimes dukedoms, and now kingdoms; and (omitting many other, and coming nearer home) *Ireland* was before 32 *H.* 8. a lordſhip, and now is a kingdom, and yet the king of *England* was as abſolute a prince and ſovereign when he was lord of *Ireland*, as now, when he is ſtyled king of the ſame. 10 *Ed.* 3. 41. an exchange was made between an *Engliſhman* and a *Gaſcoin*, of lands in *England* and in *Gaſcoin*; *ergo*, the *Gaſcoin* was no alien, for then had he not been capable of lands in *England*. 1 *H.* 4. 1. the king brought a writ of right of ward againſt one *Sybil*, whoſe huſband was exiled into *Gaſcoin*; *ergo*, *Gaſcoin* is no parcel or member of *England*, for *exilium eſt patriæ privatio, natalis ſoli mutatio, legum nativarum amiſſio.* 4 *E.* 3. 10. *b.* the king directed his writ out of *Chancery* under the great ſeal of *England*, to the mayor of (g) *Burdeaux* (a city in *Gaſcoin*), then being under the king's obedience, to certify, whether one that was

Vaſconia appellata fuit tempore Caroli *magni regnum de* Vaſconia. *Mo.* 800. *Vaugh.* 300.

Co. Lit. 7. b.

(a) 2 *Vent.* 6. *Vaugh.* 286. (b) 10 *Co.* 104. a. *Co. Lit.* 156. b. *Poph.* 36. (c) *Co. Lit.* 10. a. 191. a. 232. a. (d) 4 *Co.* 29. a. 5 *Co.* 7. a. *Caudry*'s caſe. *Cawly* 31. *Co. Lit.* 125. a. (e) 11 *Co.* 10. b. 12 *Co.* 66. 13 *Co.* 12. *Co. Lit.* 125. a. 8 *Co.* 130. a. (f) *Moor* 796, 801. (g) *Vaugh.* 290. 9 *Co.* 31. b. 2 *Roll.* 583. *Co. Lit.* 74. a. *Br.* trial. 126.

outlawed here in *England*, was at that time in the king's ſervice under him *in obſequio regis:* whereby it appeareth, that the king's writ did run into *Gaſcoin*, for it is the trial that the common law hath appointed in that caſe. But as to other caſes, it is to be underſtood, that there be two kinds of writs, *brevia mandatoria & remedialia, & brevia mandatoria & non remedialia. Brevia mandatoria & remedialia*, as writs of right, of *formedon, &c.* of debt, treſpaſs, *&c.* and ſhortly, all writs real and perſonal, whereby the party wronged is to recover ſomewhat, and to be remedied for that wrong was offered unto him, are returnable or determinable in ſome court of juſtice within *England*, and to be ſerved and executed by the ſheriffs, or other miniſters of juſtice within *England*; and theſe cannot by any means extend into any other kingdom, country, or nation, though that it be under the king's actual ligeance and obedience. But the other kind of writs, that are mandatory, and not remedial, are not tied to any place, but do follow ſubjection and ligeance, in what country or nation ſoever the ſubject is, as the king's writ to command any of his ſubjects reſiding in any foreign country to return into any of the king's own dominions, *ſub fide et ligeantia quibus nobis tenemini.* And ſo are the aforeſaid mandatory writs cited out of the *Regiſter* of protection for ſafety of body and goods, and requiring, that if any injury be offered, that the ſame be redreſſed according to the laws and cuſtoms of that place. *Vide le Reg. fol.* 26. *Stamford Prærog. cap.* 12. *fol.* 39. ſaith, that men born in *Gaſcoin* are inheritable to lands in *England.* This doth alſo appear by divers acts of parliament: for by the whole parliament, 39 *E.* 3. *cap.* 16. it is agreed, that the *Gaſcoins* are of the ligeance and ſubjection of the king. *Vide* 42 *Ed.* 3. *cap.* 2. & 28 *H.* 6. *cap.* 5. *&c.*

Vaugh. 401. 2 Inſt. 486. *Moor* 804.

3 Inſt. 179.

Antea

Cuyan. Guienna. 13 *H.* 4. *nu.* 22. *Cotton's Abr.* 480.

Guienne was another part of *Aquitain*, and came by the ſame title: and thoſe of *Guienne* were by act of parliament in 13 *H.* 4. not imprinted, *ex rot parliament. eodem anno*, adjudged and declared to be no aliens, but able to poſſeſs and purchaſe, *&c.* lands within this realm. And ſo doth *Stamford* take the law. *Prærog. c.* 12. *f.* 39.

And thus much of the dukedom of *Aquitain*, which (together with the earldom of *Poitiers*) came to king *Henry* the ſecond (as hath been ſaid) by marriage, and continued in the actual poſſeſſion of the kings of *England* by ten deſcents, *viz.* from the firſt year of king *Henry* the ſecond, unto the two and thirtieth year of king *Henry* the ſixth, which was upon the very point of three hundred years, within which duchy there were (as ſome write) 4 archbiſhopricks, 24 biſhopricks, 15 earldoms, 202 baronies, and above a thouſand captainſhips and bailliwicks: and in all this long time neither book-caſe nor record can be found wherein any plea was offered to diſable any of them that were born there, by foreign birth, but the contrary hereof directly appeareth by the ſaid book-caſe of *(a)* 27 *lib. Aſſ.* 48.

Normandy. Normannia. Normandia.

Stamf. Prærog. 58, 39, *&c.*

Kel. 202. *pl.* 19. 4 Inſt. 286. *Co. Lit.* 11. b. *Seld. Mare Clau. lib.* 2. *cap.* 19. *Guernſey* and *Jerſey.*

Co. Lit. 11. b.

4 Inſt. 286.

The kings of *England* had ſometimes *Normandy* under actual ligeance and obedience. The queſtion is then, whether men born in *Normandy*, after one king had them both, were inheritable to lands in *England*; and it is evident by our books that they were: for ſo it appeareth by the declaratory act of 17 *E.* 2. *de Prærog. Reg. c.* 12. that they were inheritable to, and capable of lands in *England*; for the purview of that ſtatute is, *quod rex habebit eſcaetas de terris* Normannorum, *&c. Ergo, Normans* might have lands in *England: et hoc ſimiliter intelligendum eſt, ſi aliqua hæreditas deſcendat alicui nato in partibus tranſmarinis, &c.* Whereby it appeareth, that they were capable of lands within *England* by deſcent. And that this act of 17 *E.* 2. was but a declaration of the common law, it appeareth both by *Bracton*, who (as it hath been ſaid) wrote in the reign of *Henry* the third, *lib.* 3. *tract.* 2. *c.* 1. *f.* 116. and by *Britton* who wrote in 5 *E.* 1. *c.* 18. that all ſuch lands as any *Norman* had either by deſcent or purchaſe, eſcheated to the king for their treaſon, in revolting from their natural liege lord and ſovereign. And therefore *Stamford Prærog. cap.* 12. *fol.* 39. expounding the ſaid ſtatute of 17 *E.* 2. *cap.* 12. concludeth, that by that chapter it ſhould appear (as if he had ſaid, it is apparent without queſtion) that all men born in *Normandy, Gaſcoin, Guienne, Anjou*, and *Britain*, (whilſt they were under actual obedience) were inheritable within this realm as well as *Engliſhmen.* And the reaſon thereof was, for that they were under one ligeance due to one ſovereign. And ſo much (omitting many other authorities) for *Normandy:* ſaving I cannot let paſs the iſles of *Guernſey* and *Jerſey*, parts and parcels of the dukedom of *Normandy*, yet remaining under the actual ligeance and obedience of the king. I think no man will doubt, but thoſe that are born in *Guernſey* and *Jerſey* (though thoſe iſles are no parcel of the realm of *England*, but ſeveral dominions enjoyed by ſeveral titles, governed by ſeveral laws) are inheritable and capable of any lands within the realm of *England*, 1 *E.* 3. *fol.* 7. Commiſſion to determine the title of lands within the ſaid iſles, according to the laws of the iſles; and *Mich.* 41 *E.* 3. in the treaſury, *quia negotium præd' nec aliqua alia negotia de inſulâ præd' emergentia non debent terminari, niſi ſecundum legem inſulæ præd', &c.* And the *Regiſter, fol.* 22. *rex fidelibus ſuis de* Guernſey & Jerſey. King *William* the firſt brought this dukedom of *Normandy* with him, which by five deſcents continued under the actual obedience of the kings of *England*; and in or about the 6th year of king *John*, the crown of *England* loſt the actual poſſeſſion thereof, until king *Henry* the fifth recovered it again, and left it to king *Henry* the ſixth, who loſt it in the 28th of his reign; wherein were (as ſome write) one archbiſhoprick and ſix biſhopricks, and an hundred ſtrong towns and fortreſſes, beſides thoſe that were waſted in war.

Anjou, Tourain, and *Mayne.*

Maud the empreſs, the only daughter and heir of *Henry* the firſt, took to her ſecond huſband *Jeffrey Plantagenet*, earl of *Anjou, Tourain*, and *Mayne*, who had iſſue king *H.* 2. to whom the ſaid earldom by juſt title deſcended, who, and the kings that ſucceeded him, ſtyled themſelves by the name of *comes* Andegav', *&c.* until king *E.* 3. became king of all *France*; and ſuch as were born within that earldom, ſo long as it was under the actual obedience of the king of *England*, were no aliens, but natural-born ſubjects, and never any offer made, that we can find, to diſable them for foreign birth.

Co. Lit. 7. a.

Man, Mannia. 4 Inſt. 283, 284. *Co. Lit.* 11 b. *Kelw.* 202. *pl.* 19. 2 *And.* 155, 156.

But leave we *Normandy* and *Anjou*, and ſpeak we of the little, but yet ancient and abſolute kingdom of the *Iſle* of *Man*, as it appeareth by divers ancient and authentic records; as taking one for many. *Artold* king of *Man* ſued to king *H.* 3. to come into *England* to confer with him, and to perform certain things which were due to king *H.* 3. thereupon king *H.* 3. 21 *Decemb. ann. regni ſui* 34, at *Winchester*, by his letters patent gave licence to *Artold* king of *Man* as followeth. *Rex omnibus ſalutem. Sciatis, quod licentiam dedimus, &c.* Artoldo *regi de* Man *veniendo ad nos in* Angl' *ad loquend' nobiſc' & ad faciend' nobis quod facere debet*; *& ideo vobis mandamus, quod ei regi in veniendo ad nos in* Angl', *vel ibi morando, vel inde redeundo, nullum faciat' aut fieri permittatis damnum, injur', moleſtiam, aut gravamen, vel etiam hominib' ſuis quos ſecum ducet*; *& ſi aliquid eis forisfact' fuerit, id eis ſine dilat' faciat' emendari. In cujus, &c. duratur' uſque ad feſt'* S. Mich. Wherein two things are to be obſerved; 1. That ſeeing that *Artold* king of *Man* ſued for a licence in this caſe to the king, it proveth him an abſolute king, for that a monarch or an abſolute prince cannot come into *England* without licence of the king; but any ſubject being in league, may come into this realm without licence. 2. That the king in his licence doth ſtyle him by the name of a king. It was reſolved in 11 *H.* 8. that where an office was found after the deceaſe of *Thomas* earl of *Derby*, and that he died ſeiſed, *&c.* of the *Iſle* of *Man*, that the ſaid office was utterly void; for that the *Iſle* of *Man, Normandy, Gaſcoin, &c.* were out of the power of the *Chancery*, and governed by ſeveral laws; and yet none will doubt, but thoſe that are born within that iſle, are capable and inheritable of lands within the realm of *England.*

Wales, Cambria, Wallia. 3 *Keb.* 402. 4 Inſt. 239, 240, *&c. Plow.* 126. b. 129. *Vaugh.* 281.

Co. Lit. 130. b. *Fitz.* protect. 23. *Br.* protect. 33. 3 *Keb.* 405. *Vaugh.* 414.

Wales was ſometime a kingdom, as it appeareth by 19 *H.* 6. *fol.* 6. and by the act of parliament of 2 *H.* 5. *c.* 6. but whilſt it was a kingdom, the ſame was holden, and within the fee, of the king of *England*; and this appeareth by our books, *Fleta, lib.* 1. *cap.* 16. 1 *E.* 3. 14. 8 *E.* 3. 59. 13 *E.* 3. *tit. Juriſdict.* 10 *H.* 4. 6. *Plow. Com.* 368. And in this reſpect, in divers ancient charters, kings of old time ſtyled themſelves in ſeveral manners, as king *Edgar*, Britanniæ Βασιλεὺς; Etheldredus, *totius* Albion' *Dei providentiâ imperator*; Edredus Magn' Britann' *monarcha*; which among many other of like nature I have ſeen. But by the ſtatute of 12 *E.* 1. *Wales* was united and incorporated into *England*, and made parcel of *England* in poſſeſſion; and therefore it is ruled in 7 *H.* 4. *f.* 13. *a.* that no protection doth lie *quia moratur in* Wallia, becauſe *Wales* is within the realm of *England.* And where it is recited in the act of 27 *H.* 8. that *Wales* was ever parcel of the realm of *England*, it is true in this ſenſe, *viz.* that before 12 *E.* 1. it was parcel in tenure, and ſince it is parcel of the body of the realm. And whoſoever is born within the fee of the king of *England*, though it be in another kingdom, is a natural-born ſubject, and capable and inheritable of lands in *England*, as it appeareth in *Plow. Com.* 126. And therefore thoſe that were born in *Wales* before 12 *E.* 1. whilſt it was only holden of *England*, were capable and inheritable of lands in *England.*

France, Gallia, Francia.

Now come we to *France* and the members thereof, as *Callice, Guynes, Tournay, &c.* which deſcended to king *Edw.* the third as ſon and heir to *Iſabel*, daughter and heir to *Philip le Beau*, king of *France.* Certain it is, whilſt king *Henry* the ſixth had both *England*, and the heart and greateſt part of *France* under his actual ligeance and obedience (for he was crowned king of *France* in *Paris*) that they that were then born in thoſe parts of *France* that were under actual ligeance and obedience, were no aliens, but capable of, and inheritable to lands in *England.* And that is proved by the writs in the *Regiſter, fol.* 26. cited before. But the inrollment of letters patent of denization in the *Exchequer int' originalia, ann.* 11 *H.* 6. with the lord treaſurer's remembrancer was ſtrongly urged and objected; for (it was ſaid) thereby it appeareth, that king *H.* 6. *in anno* 11 of his reign, did make denizen one *Reynel* born in *France.* Whereunto it was anſwered, that it is proved by the ſaid letters patent, that he was born in *France*, before king *Henry* the ſixth had the actual poſſeſſion of the crown of *France*, ſo as he was *antenatus*; and this appeareth by the ſaid letters patent, whereby the king granteth, that *magiſter* Johannes Reynel *ſerviens noſter, &c. infra regnum noſtrum* Franc' *oriundus pro termino vitæ ſuæ ſit ligeus noſter, & eodem modo teneatur ſicut verus & fidelis noſter infra regnum* Angl' *oriundus, ac quod ipſe terras infra regnum noſtrum* Angl' *ſeu alia dominia noſtra perquirere poſſit & valeat.* Now if that *Reynel* had been born ſince *Henry* the ſixth had the quiet poſſeſſion of *France* (the king being crowned king of *France* about one year before) of neceſſity he muſt be an infant of very tender age, and then the king would never have called him his ſervant, nor made the patent (as thereby may be collected) for his ſervice, nor have called him by the name of *magiſter* Johannes Reynel: but without queſtion he was *antenatus*, born before the king had the actual and real poſſeſſion of that crown.

Calice, Calecia, Caletum. Kelw. 202. *pl.* 19. 2. *And.* 116. *Br.* trial, 58, 133. *Br.* error 101. *Br.* cinque ports 10. *Vaugh.* 401, 4 Inſt. 282.

Calais is a part of the kingdom of *France*, and never was parcel of the kingdom of *England*, and the kings of *England* enjoyed *Calais* in and from the reign of king *Edw.* the third, until the loſs thereof in queen *Mary*'s time, by the ſame title that they had to *France.* And it is evident by our books, that thoſe, that were born in *Calais*, were capable and inheritable to lands in *England*, 42 *E.* 3. *c.* 10. *Vide* 21 *H.* 7. 33. *b.* 19 *H.* 6. 2 *E.* 4. 1. *a. b.* 39 *H.* 6. 39. *a.* 21 *E.* 4. 18. *a.* 28 *H.* 6. 3. *b.* By all which it is manifeſt, that *Calais* being parcel of *France* was under the actual obedience and commandment of the king; and by conſequent, thoſe that were born there, were natural-born ſubjects, and no aliens. *Calais* from the reign of king *Edw.* 3. until the fifth year of queen *Mary*, remained under the actual obedience of the king of *England.*

(a) Dav. 19. a. *Moor* 796, 801.

Fitz. Protect. 13. *Guynes.* *Tournay.* *Dy.* 224, *pl.* 29 *Vaugh.* 282. *Co. Lit.* 8. a.

Guines alſo, another part of *France*, was under the like obedience to king *Henry* the ſixth, as appeareth by 31 *H.* 6. *fol.* 4. And *Tournay* was under the obedience of *Henry* the eighth, as it appeareth by 5 *El. Dyer*, *fol.* 224. for there it is reſolved, that a baſtard born at *Tournay*, whilſt it was under the obedience of *Henry* the eighth, was a natural ſubject, as an iſſue born within this realm by aliens. If then thoſe that were born at *Tournay*, *Calais*, &c. whilſt they were under the obedience of the king, were natural ſubjects, and no aliens, it followeth, that when the kingdom of *France* (whereof thoſe were parcels) was under the king's obedience, that thoſe that were then born there, were natural ſubjects, and no aliens.

Ireland, Hibernia, 12 *Co.* 108, 109. &c. 4 Inſt. 349, 350. &c. *Dav.* 60. Præf. 4. Rep. 32, 33. *Co. Lit.* 7. a.

Next followeth *Ireland*, which originally came to the kings of *England* by conqueſt; but who was the firſt conqueror thereof, hath been a queſtion. I have ſeen a charter made by king *Edgar* in theſe words. *Ego* Edgarus Anglorum Βασιλευς, *omniumque inſularum oceani, quæ* Britanniam *circumjacent, imperator & dominus, gratias ago ipſi Deo omnipotenti regi meo, qui meum imperium ſic ampliavit & exaltavit ſuper regnum patrûm meorum*, &c. *Mihi conceſſit propitia divinitas, cum* Anglorum *imperio, omnia regna inſularum oceani*, &c. *cum ſuis ferociſſimis regibus uſque* Norvegiam, *maximamque partem* Hibern', *cum ſuâ nobiliſſimâ civitate de* Dublinâ, Anglorum *regno ſubjugare, quapropter & ego* Chriſti *gloriam & laudem in regno meo exaltare, & ejus ſervitium amplificare devotus diſpoſui*, &c. Yet for that it was wholly conquered in the reign of *Henry* the ſecond, the honour of the conqueſt of *Ireland* is attributed to him; and his ſtyle was, *rex* Angl', *dominus* Hibern', *dux* Normann', *dux* Aquitan', & *comes* Andegav', king of *England*, lord of *Ireland*, duke of *Normandy*, duke of *Aquitain*, and earl of *Anjou*. That *Ireland* is a dominion ſeparate and divided from *England*, it is evident from our books,

12 *Co.* 111. 4 Inſt. 351. 1 *And.* 263. 2 *And.* 116. *Dav.* 37. a. *Jenk.* Cent. 164. *Br.* parliam. 98. *Co.Lit.*141.a.

20 *H.* 6. 8. ſir *John Pilkington*'s caſe. 32 *H.* 6. 25. 20 *Eliz. Dyer* 360. *Plow. Com.* 360. And 2 *R.* 3. 12. *a.* Hibernia *habet parliamentum, & faciunt leges, & noſtra ſtatuta non ligant eos, quia non mittunt milites ad parliamentum* (which is to be underſtood, unleſs they be eſpecially named) *ſed perſonæ eorum ſunt ſubjecti regis, ſicut inhabitantes in* Caleſiâ, Gaſconiâ, & Guyan. Wherein it is to be obſerved, that the *Iriſhman* (as to his ſubjection) is compared to men born in *Calais*, *Gaſcoin*, and *Guienne*. Concerning their laws, *ex rotulis patentium de anno* 11 *regis H.* 3. there is a charter which that king made, beginning in theſe words. *Rex*, &c. *baronibus, militibus, & omnibus libere tenentibus L. ſalutem. Satis ut credimus veſtra audivit diſcretio, quod, quando bonæ memoriæ (a)* Johannes *quondam rex* Angl' *pater noſter venit in* Hiberniam, *ipſe duxit ſecum viros diſcretos & legis peritos, quorum communi conſilio & ad inſtantiam* Hibernenſium *ſtatuit & præcepit leges* Anglicanas *in* Hibern' *ita quod leges eaſdem in ſcripturas redactas reliquit ſub ſigillo ſuo ad Scaccarium* Dublin'. So as now the laws of *England* became the proper laws of *Ireland*; and therefore, becauſe they have parliaments holden there, whereat they have made divers particular laws concerning that dominion, as it appeareth in 20 *H.* 6. 8. and 20 *El. (b) Dyer* 360. and for that they retain unto this day divers of their ancient cuſtoms, the book in 20 *H.* 6. 8. holdeth, that *Ireland* is governed by laws and cuſtoms ſeparate and diverſe from the laws of *England.* A voyage royal may be made into *Ireland. Vide (c)* 11 *H.* 4. 7. *a.* and 7 *(d) E.* 4. 27. *a.* which proveth it a diſtinct dominion. And in *anno* 33 *reg. El.* it was reſolved by all the judges of *England* in the caſe of *(e) Orurke* an *Iriſhman*, who had committed high treaſon in *Ireland*, that he by the ſtatute of 23 *H.* 8. *c.* 33. might be indicted, arraigned, and tried for the ſame in *England*, according to the purview of that ſtatute; the words of which ſtatute be, 'that all treaſons, &c. committed by any *(f)* perſon out 'of the realm of *England* ſhall be from henceforth enquired of, &c.' and they all reſolved (as afterward they did alſo in ſir *John Perrot*'s caſe) that *Ireland* was out of the realm of *England*, and that treaſons committed there were to be tried within *England* by that ſtatute. In the ſtatute of 4 *H.* 7. *cap.* 24. of *(g)* fines, proviſion is made for them that be out of this land, and it is holden in *Plow. Com.* in *Stowel*'s caſe 375, that he that is in *Ireland* is out of this land, and conſequently within that proviſo. Might not then the like plea be deviſed as well againſt any perſon born in *Ireland*, as (this is againſt *Calvin* that is a *poſtnatus)* in *Scotland?* for the *Iriſhman* is born *extra ligeantiam regis regni ſui* Angl', &c. which be *verba operativa* in the plea: but all men know, that they are natural-born ſubjects, and capable of and inheritable to laws in *England*.

Scotland, Scotia.

Laſtly, to conclude this part with *(h) Scotland* itſelf. In ancient time part of *(i) Scotland* (beſides *Berwick)* was within the power and ligeance of the king of *England*, as appeareth by our books *(k)* 42 *E.* 3. 2. *b.* the lord *Beaumont*'s caſe, 11 *E.* 3. c. 2, &c. and by precedents hereafter mentioned; and that part (though it were under the king of *England*'s ligeance and obedience) yet was it governed by the laws of *Scotland. Ex rotulis* Scotiæ, *anno* 11 *Ed.* 3. amongſt the records in the *Tower* of *London*. *Rex*, &c. *Conſtituimus* Rich. Talebot *juſticiarium noſtrum villæ* Berwici ſuper Twedam, *ac omnium aliarum terrarum noſtrarum in partibus* Scot', *ad faciend' omnia & ſingula quæ ad officium juſticiarii pertinent, ſecundum legem & conſuetudinem regni* Scot'. And after *anno* 26 *E.* 3. *ex eodem rot. Rex* Henrico de Percey, Ricardo de Nevil, &c. *Volumus & vobis & alteri veſtrum tenore præſentium committimus & mandamus, quod homines noſtri de* Scot' *ad pacem & obedientiam noſtram exiſtentes, legibus, libertatibus, & liberis conſuetudinibus, quibus ipſi & anteceſſores ſui tempore celebris memoriæ* Alexandri *quondam regis* Scot' *rationabiliter uſi fuerunt, uti et gaudere deberent, prout in quibuſdam indenturis*, &c. *plenius dicitur contineri.* And there is a writ in the *Regiſter* 295. a. *Dedimus poteſtatem recipiendi ad fidem & pacem noſtram homines de* Galloway. Now the caſe in *(l)* 42 *Ed.* 3. 2. *b.* (which was within ſixteen years of the ſaid grant, concerning the laws in 26 *E.* 3.) ruleth it, that ſo many as were born in that part of *Scotland*, that was under the ligeance of the king, were no aliens, but inheritable to lands in *England*; yet was that part of *Scotland* in another kingdom governed by ſeveral laws, &c. And if they were natural ſubjects in that caſe, when the king of *England* had but part of *Scotland*, what reaſon ſhould there be, why thoſe that are born there, when the king hath all *Scotland*, ſhould not be natural ſubjects, and no aliens? So likewiſe *(m) Berwick* is no part of *England*, nor governed by the laws of *England*, and yet they that have been born there, ſince they were under the obedience of one king, are natural-born ſubjects, and no aliens, as it appeareth in 15 *R.* 2. *cap.* 7, &c. *Vide (n)* 19 *H.* 6. 35. *b.* and 39 *H.* 6. 39. *a.* And yet in all theſe caſes and examples, if this new deviſed plea had been ſufficient, they ſhould have been all aliens againſt ſo many judgments, reſolutions, authorities, and judicial precedents in all ſucceſſions of ages. There were ſometimes in *England*, whilſt the heptarchy laſted, ſeven ſeveral crowned kings of ſeven ſeveral and diſtinct kingdoms, but in the end the *Weſt Saxons* got the monarchy, and all the other kings melted (as it were) the crowns to make one imperial diadem, for the king of the *Weſt Saxons* over all. Now when the whole was under the actual and real ligeance and obedience of one king, were any, that were born in any of thoſe ſeveral and diſtinct kingdoms, aliens one to another? Certainly they, being born under the obedience of one king and ſovereign, were all natural-born ſubjects, and capable of and inheritable unto any lands in any of the ſaid kingdoms.

Berwick.

In the holy hiſtory reported by St. *Luke*, *ex dictamine Spiritus Sancti*, *cap.* 21 & 22 *Act. Apoſtolorum*, it is certain, that St. *Paul* was a *Jew*, born in *Tarſus*, a famous city of *Cilicia*; for it appeareth in the ſaid 21ſt chapter, *ver.* 39. by his own words, *ego homo ſum quidem* Judæus *a* Tarſo Ciliciæ, *non ignotæ civitatis municeps.* And in the 22d chapter, *ver.* 3. *ego ſum vir* Judæus *natus* Tarſo Ciliciæ, &c. and then made that excellent ſermon there recorded; which when the *Jews* heard, the text ſaith, verſe 22. *levaverunt vocem ſuam, dicentes, tolle de terra hujuſmodi, non enim fas eſt eum vivere; vociferantibus autem eis et projicientibus veſtimenta ſua, & pulverem jactantibus in aerem. Claudius Lyſias* the popular tribune, to pleaſe this turbulent and prophane multitude (though it were utterly againſt juſtice and common reaſon) the text ſaith, *juſſit tribunus* 1. *induci eum in caſtra*, 2. *flagellis cædi*, and 3. *torqueri eum (quid ita?) ut ſciret propter quam cauſam ſic acclamarent*; and when they had bound *Paul* with cords, ready to execute the tribune's unjuſt commandment, the bleſſed apoſtle (to avoid unlawful and ſharp puniſhment) took hold of the law of a heathen emperor, and ſaid to the centurion ſtanding by him, *ſi hominem* Romanum *et indemnatum licet vobis flagellare?* Which when the centurion heard, he went to the tribune and ſaid, *quid acturus es? Hic enim homo cives* Romanus *eſt.* Then came the tribune to *Paul*, and ſaid unto him; *dic mihi ſi tu* Romanus *es? At ille dixit, etiam.* And the tribune anſwered, *ego multa ſumma civitatem hanc conſequutus ſum.* But *Paul* not meaning to conceal the dignity of his birth-right ſaid, *ego autem et natus ſum:* as if he ſhould have ſaid to the tribune, you have your freedom by purchaſe of money, and I (by a more noble means) by birthright and inheritance. *Protinus ergo* (ſaith the text) *deceſſerunt ab illo qui illum torturi erant: tribunus quoque timuit poſtquam reſcivit, quia civis* Romanus *eſſet, et quia alligaſſet eum.* So as hereby it is manifeſt, that *Paul* was a *Jew*, born at *Tarſus* in *Cilicia* in *Aſia Minor*; and yet being born under the obedience of the *Roman* emperor, he was by birth a citizen of *Rome* in *Italy* in *Europe*, that is, capable of and inheritable to all privileges and immunities of that city. But ſuch a plea as is now imagined againſt *Calvin* might have made St. *Paul* an alien to *Rome.* For if the emperor of *Rome* had ſeveral ligeances for every ſeveral kingdom and country under his obedience, then might it have been ſaid againſt St. *Paul*, that he was *extra ligeantiam imperatoris regni ſui* Italiæ, *et infra ligeantiam imperatoris regni ſui* Ciliciæ, &c. But as St. *Paul* was Judæus *patriâ et* Romanus *privilegio*, Judæus *natione et* Romanus *jure nationum*; ſo may *Calvin* ſay, that he is Scotus *patriâ &* Anglus *privilegio*, Scotus *natione &* Anglus *jure nationum.*

Samaria in *Syria* was the chief city of the ten tribes; but it being uſurped by the king of *Syria*, and the *Jews* taken priſoners, and carried away in captivity, was after inhabited by the *Panyms.* Now albeit *Samaria* of right belonged to *Jewry*, yet becauſe the people of *Samaria* were not under actual obedience, by the judgment of the chief juſtice of the whole world they were adjudged *alienigenæ*, aliens: for in the Evangeliſt St. *Luke*, *c.* 17. when Chriſt had cleanſed the ten lepers, *unus autem ex illis* (ſaith the text) *ut vidit quia mundatus eſſet, regreſſus eſt cum magnâ voce magnificans Deum et cecidit in faciem ante pedes ejus gratias agens, & hic erat* Samaritanus. *Et* Jeſus *reſpondens dixit, nonne decem mundati ſunt, et novem ubi ſunt? Non eſt inventus, qui rediret et daret gloriam Deo, niſi hic alienigena.* So as by his judgment this *Samaritan* was *alienigena*, a ſtranger born, becauſe he had the place, but wanted obedience. *Et ſi deſit obedientia non adjuvat locus.* And this agreeth with the divine, who ſaith, *ſi locus ſalvare potuiſſet*, Satan *de cœlo pro ſua inobedientia non cecidiſſet.* Adam *in* Paradiſo *non cecidiſſet.* Lot *in monte non cecidiſſet, ſed potius in* Sodom.

6. Now reſteth the ſixth part of this diviſion, that is to ſay, ſix demonſtrative illations or concluſions, drawn plainly and expreſsly from the premiſes.

1. Every one that is an alien by birth, may be, or might have been an enemy by accident; but *Calvin* could never at any time be an enemy by any accident; *ergo*, he cannot be an alien by birth. *Vide* 33 *H.* 6. *f.* 1. *a. b.* the difference between an alien enemy, and a ſubject traitor. *Hoſtes ſunt, qui nobis, vel quibus nos bellum decernimus; cæteri proditores, prædones*, &c. The *major* is apparent, and is proved by that which hath been ſaid. *Et vide magna charta, cap.* 30. 19 *E.* 4. 6. 9 *E.* 3. *c.* 1. 27 *E.* 3. *c.* 2. 4 *H.* 5. *c.* 7. 14 *E.* 3. *ſtat.* 2. *c.* 2, &c.

2. Whoſoever are born under one natural ligeance and obedience, due by the law of nature to one ſovereign, are natural-born ſubjects: but

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(a) *Co. Lit.* 141. b. 2 *Vent.* 4. (b) 9 *Co.* 117. b. *Cart.* 186. (c) *Fitz.* Protect. 24. *Br.* Protect. 34. (d) *Fitz.* Protect. 16. *Br.* Protect. 72. 3 Inſt. 11, 18, 24. *Co. Lit.* 261. b. 1. *And.* 262, 263. 2 *Vent.* 4. *Cart.* 190. *Cawly* 93. (f) 35 *H.* 8. c. 2. (g) *Cawly* 93. *Co. Lit.* 261. b. 3 Inſt. 11. (h) 3 Inſt. 18. *Plowd.* 368. b. (i) *Heylin*'s Coſmog. *lib.* 4. p. 305, 306. (k) *Fitz.* Brief 551. (l) *Fitz.* Brief 551. *Ant.* 23. a. (m) 1 *Sid.* 381, 382. 2 *Burro.* 858. (n) *Fitz.* Protect. 8. *Br.* Protect. 49.

Calvin was born under one natural ligeance and obedience due by the law of nature to one ſovereign; *ergo* he is a natural-born ſubject.

3. Whoſoever is born within the king's power or protection, is no alien: but *Calvin* was born under the king's power and protection: *ergo* he is no alien.

4. Every ſtranger born muſt at his birth be either *amicus*, or *inimicus:* but *Calvin* at his birth could neither be *amicus* nor *inimicus*; *ergo* he is no ſtranger born. *Inimicus* he cannot be, becauſe he is *ſubditus*; for that cauſe alſo he cannot be *amicus*; neither now can *Scotia* be ſaid to be *ſolum amici*, as hath been ſaid.

Sawyer's argument in *quo warranto*, 25.

Antea.

5. Whatſoever is due by the law or conſtitution of man, may be altered; but natural ligeance or obedience of the ſubject to the ſovereign cannot be altered; *ergo* natural ligeance or obedience to the ſovereign is not due by the law or conſtitution of man. Again, whatſoever is due by the law of nature, cannot be altered; but ligeance and obedience of the ſubject to the ſovereign is due by the law of nature; *ergo* it cannot be altered. It hath been proved before, that ligeance or obedience of the inferior to the ſuperior, of the ſubject to the ſovereign, was due by the law of nature many thouſand years before any law of man was made; which ligeance or obedience (being the only mark to diſtinguiſh a ſubject from an alien) could not be altered; therefore it remaineth ſtill due by the law of nature. For *leges naturæ perfectiſſimæ ſunt et immutabiles, humani vero juris conditio ſemper in infinitum decurrit, et nihil eſt in eo quod perpetuo ſtare poſſit. Leges humanæ naſcuntur, vivunt, & moriuntur.*

Co. Lit. 2. b.

Br. denizen 1. *Fitz.* dower 179.

Br. patents 111.

Laſtly, whoſoever at his birth cannot be an alien to the king of *England*, cannot be an alien to any of his ſubjects of *England*; but the plaintiff at his birth could be no alien to the king of *England*; *ergo* the plaintiff cannot be an alien to any of the ſubjects of *England*. The *major* and *minor* both be *propoſitiones perſpicue veræ.* For as to the *major* it is to be obſerved, that whoſoever is an alien born, is ſo accounted in law in reſpect of the king. And that appeareth, 1. by the pleading ſo often before remembered, that he muſt be *extra ligeantiam regis*, without any mention making of the ſubject. 2. When an alien born purchaſeth any lands, the king only ſhall have them, though they be holden of a ſubject, in which caſe the ſubject loſeth his ſeigniory. And as it is ſaid in our books, an alien may purchaſe *ad proficuum regis*; but the act of law giveth the alien nothing: and therefore if a woman alien marrieth a ſubject, ſhe ſhall not be endowed, neither ſhall an alien be tenant by the curteſy. *Vide* 3 *H.* 6. 55. *a.* 4 *H.* 3. 179. 3. The ſubject ſhall plead, that the defendant is an alien born, for the benefit of the king, that he upon office found may ſeize; and that the tenant may yield to the king the land, and not to the alien, becauſe the king hath beſt right thereunto. 4. Leagues between our ſovereign and others are the only means to make aliens friends; *et fœdera percutere*, to make leagues, only and wholly pertaineth to the king. 5. Wars do make aliens enemies, and *bellum indicere* belongeth only and wholly to the king, and not to the ſubject, as appeareth in 19 *Ed.* 4. *fol.* 6. *b.* 6. The king only without the ſubject may make, not only letters of ſafe-conduct, but letters patent of denization, to whom, and how many he will, and enable them at his pleaſure to ſue any of his ſubjects in any action whatſoever, real or perſonal, which the king could not do without the ſubject, if the ſubject had any intereſt given unto him by the law in any thing concerning an alien born. Nay, the law is more preciſe herein than in a number of other caſes, of higher nature: for the king cannot grant to any other to make of ſtrangers born, denizens; it is by the law itſelf ſo inſeparably and individually annexed to his royal perſon (as the book is in 20 *H.* 7. *fol.* 8.). For the law eſteemeth it a point of high prerogative, *jus majeſtatis, et inter inſignia ſummæ poteſtatis*, to make aliens born ſubjects of the realm, and capable of the lands and inheritances of *England* in ſuch ſort as any natural-born ſubject is. And therefore by the ſtatute of 27 *H.* 8. *c.* 24. many of the moſt ancient prerogatives and royal flowers of the crown, as authority to pardon treaſon, murther, manſlaughter, and felony, power to make juſtices in eyre, juſtices of aſſiſe, juſtices of peace and gaol-delivery, and ſuch like, having been ſevered and divided from the crown, were again reunited to the ſame: but authority to make letters of denization, was never mentioned therein to be reſumed, for that never any claimed the ſame by any pretext whatſoever, being a matter of ſo high a point of prerogative. So as the pleading againſt an alien, the purchaſe by any alien, leagues, and wars between aliens, denizations, and ſafe-conducts of aliens, have aſpect only and wholly unto the king. It followeth therefore, that no man can be alien to the ſubject that is not alien to the king. *Non poteſt eſſe alienigena corpori, qui non eſt capiti, non gregi qui non eſt regi.*

The authorities of law cited in this caſe for maintenance of the judgment: 4 *H.* 3. *tit. Dower. Bracton, lib.* 5. *fol.* 427. *Fleta, lib.* 6. *cap.* 47. *In temp. E.* 1. *Hingham's Report.* 17 *Edw.* 2. *cap.* 12. 11 *Edw.* 3. *cap.* 2. 14 *Ed.* 3. *Statut. de* Franciâ. 42 *Ed.* 3. *fol.* 2. 42 *Ed.* 3. *cap.* 10. 22. *Lib. Aſſ.* 25. 13 *Rich.* 2. *cap.* 2. 15 *Rich.* 2. *cap.* 7. 11 *Hen.* 4. *fol.* 26. 14 *Hen.* 4. *fol.* 19. 13 *H.* 4. *Statutum de* Guyan. 29 *Hen.* 6. *tit. Eſtoppel* 48. 28 *Hen.* 6. *cap.* 5. 32 *Hen.* 6. *fol.* 23. 32 *Hen* 6. *fol.* 26. *Littl. temps Ed.* 4. *lib.* 2. *cap. Villenage.* 15 *Ed.* 4. *fol.* 15. 19 *Ed.* 4. 6. 22 *Ed.* 4. *cap.* 8. 2 *Rich.* 3. 2. & 12. 6 *Hen.* 8. *fol.* 2. *Dyer* 14. *Hen.* 8. *cap.* 2. No manner of ſtranger born out of the king's obeyſance, 22 *H.* 8. *cap.* 8. Every perſon born out of the realm of *England*, out of the king's obeyſance, 32 *Hen.* 8. *cap.* 16. 25 *Hen.* 8. *cap.* 15. &c. 4 *Ed.* 6. *Plowd. Comment. fol.* 2. *Fogaſſa*'s caſe. 2 & 3 *Ph.* & *Mar. Dyer* 145. *Shirley*'s caſe. 5 *El. Dyer* 224. 13. *El. cap.* 7. *de Bankrupts.* All commiſſions ancient and late, for the finding of offices, to entitle the king to the lands of aliens born: alſo all letters patent of denization of ancient and later times do prove, that he is no alien that is born under the king's obedience.

The 5 general part concerning inconveniences.

Now we are come to conſider of legal inconveniences: and firſt of ſuch as have been objected againſt the plaintiff, and ſecondly of ſuch as ſhould follow, if it had been adjudged againſt the plaintiff.

Of ſuch inconveniences as were objected againſt the plaintiff, there remain only four to be anſwered; for all the reſt are clearly and fully ſatisfied before: 1. That if *poſtnati* ſhould be inheritable to our laws and inheritances, it were reaſon they ſhould be bound by our laws; but *poſtnati* are not bound by our ſtatute or common laws; for they having (as it was objected) never ſo much freehold or inheritance, cannot be returned of juries, nor ſubject to ſcot or lot, nor chargeable to ſubſidies or quinzimes, nor bound by any act of parliament made in *England.* 2. Whether one be born within the kingdom of *Scotland* or no, is not triable in *England*; for that it is a thing done out of this realm, and no jury can be returned for the trial of any ſuch iſſue: and what inconvenience ſhould thereof follow, if ſuch pleas that wanted trial ſhould be allowed (for then all aliens might imagine the like plea) they, that objected it, left it to the conſideration of others. 3. It was objected, that this innovation was ſo dangerous, that the certain event thereof no man could foreſee; and therefore, ſome thought it fit, that things ſhould ſtand and continue as they had been in former time, for fear of the worſt. 4. If *poſtnati* were by law legitimated in *England*, it was objected what inconvenience and confuſion ſhould follow, if (for the puniſhment of us all) the king's royal iſſue ſhould fail, &c. whereby thoſe kingdoms might again be divided. All the other arguments and objections, that have been made, have been all anſwered before, and need not to be repeated again.

1. To the firſt it was reſolved, that the cauſe of this doubt was the miſtaking of the law: for if a *poſtnatus* do purchaſe any lands in *England*, he ſhall be ſubject in reſpect thereof, not only to the laws of this realm, but alſo to all ſervices and contributions, and to the payment of ſubſidies, taxes, and public charges, as any denizen or *Engliſhman* ſhall be; nay, if he dwell in *England*, the king may command him, by a writ of *ne exeat regnum*, that he depart not out of *England.* But if a *poſtnatus* dwell in *Scotland*, and have lands in *England*, he ſhall be chargeable for the ſame to all intents and purpoſes, as if an *Engliſhman* were owner thereof, and dwelt in *Scotland*, *Ireland*, in the iſles of *Man*, *Guernſey*, or *Jerſey*, or elſewhere. The ſame law is of an *Iriſhman* that dwells in *Ireland*, and hath land in *England.* But if *poſtnati*, or *Iriſhmen*, men of the iſles of *Man*, *Guernſey*, *Jerſey*, &c. have lands within *England*, and dwell here, they ſhall be ſubject to all ſervices and public charges within this realm, as any *Engliſhman* ſhall be. So as to ſervices and charges, the *poſtnati* and *Engliſhmen* born are all in one predicament.

Co. Lit. 261. a. b. 6 *Co.* 47. a.

2. Concerning the trial, a threefold anſwer was thereunto made and reſolved: 1. That the like objection might be made againſt *Iriſhmen*, *Gaſcoins*, *Normans*, men of the iſles of *Man*, *Guernſey*, and *Jerſey*, of *Berwick*, &c. all which appear by the rule of our books to be natural-born ſubjects; and yet no jury can come out of any of thoſe countries and places, for trial of their births there. 2. If the demandant or plaintiff in any action concerning lands be born in *Ireland*, *Guernſey*, *Jerſey*, &c. out of the realm of *England*, if the tenant or defendant plead, that he was born out of the ligeance of the king, &c. the demandant or plaintiff may reply, that he was born under the ligeance of the king at ſuch place within *England*; and upon the evidence the place ſhall not be material, but only the iſſue ſhall be, whether the demandant or plaintiff were born under the ligeance of the king in any of his kingdoms or dominions whatſoever: and in that caſe the jury (if they will) may find the ſpecial matter, *viz.* the place where he was born, and leave it to the judgment of the court: and that jurors may take knowledge of things done out of the realm in this and like caſes, *vide* 7 *H.* 7. 8. *b.* 20 *Ed.* 3. *Averment* 34. 5 *Ric.* 2. *tit. Trial* 54. 15 *Ed.* 4. 15. 32 *H.* 6. 25. *Fitz. Nat. Br.* 196. *Vide Dowdale*'s caſe, in the ſixth part of my Reports, *fol.* 47. and there divers other judgments be vouched. 3. *Brown, in anno* 32 *H.* 6. reporteth a judgment then lately given, that where the defendant pleaded, that the plaintiff was a *Scot*, born at St. *John*'s town in *Scotland*, out of the ligeance of the king; whereupon they were at iſſue, and that iſſue was tried where the writ was brought, and that appeareth alſo by 27 Aſſ. *pl.* 24. that the jury did find the prior to be born in *Gaſcoin.* (for ſo much is neceſſarily proved by the words *trove fuit.*) And 20 *Ed.* 3. *tit. Averment* 34. in a *juris utrum*, the death of one of the vouchees was alledged at ſuch a caſtle in *Britain*, and this was enquired of by the jury. And it is holden in 5 *Rich.* 2. *tit. Trial* 54. that if a man be adhering to the enemies of the king in *France*, his land is forfeitable, and his adherency ſhall be tried where the land is, as oftentimes hath been done, as there it is ſaid by *Belknap:* and *Fitz. Nat. Br.* 196. in a *mortdanc'*, if the anceſtor died *in itinere peregrinationis ſuæ verſ.* Terram Sanctam, the jury ſhall enquire of it. But in the caſe at bar, ſeeing the defendant hath pleaded the truth of the caſe, and the plaintiff hath not denied it, but demurred upon the ſame, and thereby confeſſed all matters of fact, the court now ought to judge upon the ſpecial matter, even as if a jury upon an iſſue joined in *England*, as it is aforeſaid, had found the ſpecial matter, and left it to the court.

3. To the third it was anſwered and reſolved, that this judgment was rather a renovation of the judgments and cenſures of the reverend judges and ſages of the law in ſo many ages paſt, than any innovation, as appeareth by the book and book-caſes before recited: neither have judges power to judge according to that which they think to be fit, but that which out of the laws they know to be right and conſonant to law. *Judex bonus nihil ex arbitrio ſuo faciat, nec propoſito domeſticæ voluntatis, ſed juxta leges & jura pronuntiet.* And as for *timores*, fears grounded upon no juſt cauſe, *qui non cadunt in conſtantem virum, vani timores æſtimandi ſunt.*

2 *Ventris* 6.

4. And as to the fourth, it is leſs than a dream of a ſhadow, or a ſhadow of a dream: for it hath been often ſaid, natural legitimation reſpecteth actual obedience to the ſovereign at the time of the

birth: for as the *antenati* remain aliens as to the crown of *England*, becauſe they were born when there were ſeveral kings of the ſeveral kingdoms, and the uniting of the kingdoms, by deſcent ſubſequent, cannot make him a ſubject to that crown to which he was alien at the time of his birth; ſo albeit the kingdoms (which Almighty God of his infinite goodneſs and mercy divert) ſhould by deſcent be divided, and governed by ſeveral kings; yet it was reſolved, that all thoſe, that were born under one natural obedience, while the realms were united under one ſovereign, ſhould remain natural-born ſubjects, and no aliens; for that naturalization due and veſted by birth-right, cannot by any ſeparation of the crowns afterward be taken away; nor he, that was by judgment of law a natural ſubject at the time of his birth, become an alien by ſuch a matter *ex poſt facto*. And in that caſe, upon ſuch an accident, our *poſtnatus* may be *ad fidem utriuſque regis*, as *Bracton* ſaith in the afore-remembered place, *fol.* 427. *Sicut* Anglicus *non auditur in placitando aliquem de terris & tenement' in* Franciâ, *ita nec debet* Francigena *& alienigena, qui fuerit ad fidem regis* Franciæ, *audiri placitando in* Angliâ: *ſed tamen ſunt aliqui* Francigenæ *in* Franciâ, *qui ſunt ad fidem utriuſque, et ſemper fuerunt ante* Normanniam *deperditam & poſt, et qui placitant hic et ibi, eâ ratione, quia ſunt ad fidem utriuſque, ſicut fuit* Willielmus *comes mareſchallus et manens in* Anglia, *et M. de* Gynes *manens in* Franciâ, *et alii plures.* Concerning the reaſon drawn from the (a) etymologies, it made againſt them, for that by their own derivation, *alienæ gentis* and *alienæ ligeantiæ* is all one: but arguments drawn from etymologies, are too weak and too light for judges to build their judgments upon: for *ſæpenumero ubi proprietas* (b) *verborum attenditur, ſenſus veritatis amittitur*: and yet when they agree with the judgment of law, judges may uſe them for ornaments.

Note, on the abdication of k. *J.* 2. they were divided; but are now conſolidated by the union act.

But on the other ſide, ſome inconveniences ſhould follow, if the plea againſt the plaintiff ſhould be allowed. For, firſt, it maketh ligeance local; *videlicet, ligeantia regis regni ſui* Scotiæ, and *ligeantia regis regni ſui* Angliæ: whereupon ſhould follow, firſt, that faith or ligeance, which is univerſal, ſhould be confined within local limits and bounds; ſecondly, that the ſubjects ſhould not be bound to ſerve the king in peace or in war out of thoſe limits; thirdly, it ſhould illegitimate many, and ſome of noble blood, which were born in *Gaſcoin*, *Guienne*, *Normandy*, *Calais*, *Tournay*, *France*, and divers other of his majeſty's dominions, whilſt the ſame were in actual obedience, and in *Berwick*, *Ireland*, *Guernſey* and *Jerſey*, if this plea ſhould have been admitted for good. And ſecondly, this ſtrange and new-deviſed plea inclineth too much to countenance that dangerous and deſperate error of the *Spencers*, touched before, to receive any allowance within *Weſtminſter-Hall*.

In the proceeding of this caſe, theſe things were obſerved, and ſo did the chief juſtice of the *Common Pleas* publicly deliver in the end of his argument in the *Exchequer-Chamber*. Firſt, that no commandment or meſſage by word or writing was ſent or delivered from any whatſoever to any of the judges to cauſe them to incline to any opinion in this caſe; which I remember, for that it is honourable for the ſtate, and conſonant to the laws and ſtatutes of this realm. Secondly, there was obſerved, what a concurrence of judgments, reſolutions, and rules, there be in our books in all ages concerning this caſe, as if they had been prepared for the deciding of the queſtion of this point: and that (which never fell out in any doubtful caſe) no one opinion in all our books is againſt this judgment. Thirdly, that the five judges of the *King's Bench*, who adjourned this caſe into the *Exchequer-Chamber*, rather adjourned it for weight than difficulty, for all they in their arguments *unâ voce* concurred with the judgment. Fourthly, that never any caſe was adjudged in the *Exchequer-Chamber* with greater concordance and leſs variety of opinions, the lord-chancellor and twelve of the judges concurring in one opinion. Fifthly, that there was not in any remembrance ſo honourable, great, and intelligent an auditory at the hearing of the arguments of any *Exchequer-Chamber* caſe, as was at this caſe now adjudged. Sixthly, it appeareth, that *juriſprudentia legis communis* Angliæ *eſt ſcientia ſocialis & copioſa*: ſociable, in that it agreeth with the principles and rules of other excellent ſciences, divine and human: copious, for that *quamvis ad * ea quæ frequentius accidunt jura adaptantur*, yet in a caſe ſo rare, and of ſuch a quality, that loſs is the aſſured end of the practice of it (for no alien can purchaſe lands, but he loſeth them, and *ipſo facto* the king is entitled thereunto, in reſpect whereof a man would think few men would attempt it) there ſhould be ſuch a multitude and *farrago* of authorities in all ſucceſſions of ages, in our books and book-caſes, for the deciding of a point of ſo rare an accident. *Et ſic determinata & terminata eſt iſta quæſtio.*

* 5 *Co.* 127. b. *Co. Lit.* 218. a. 2 Inſt. 137. *Cart.* 13. 6 *Co.* 87. a.

The judgment in the ſaid caſe, as entered on record, *&c.*

'Whereupon all and ſingular the premiſes being ſeen, and by the court 'of the lord the now king here diligently inſpected and examined, and 'mature deliberation being had thereof; for that it appears to the court 'of the lord the now king here, that the aforeſaid plea of the ſaid '*Richard Smith* and *Nicholas Smith*, above pleaded, is not ſufficient in law 'to bar the ſaid *Robert Calvin* from having an anſwer to his aforeſaid 'writ: therefore it is conſidered by the court of the lord the now king 'here, that the aforeſaid *Richard Smith* and *Nicholas Smith* to the writ of 'the ſaid *Robert* do further anſwer.'

[See now the ſtatutes for the union of both kingdoms.]

(a) *Co. Lit.* 68. b.

(b) 9 *Co.* 110. b.

Lord-chancellor Elleſmere'*s ſpeech in the* Exchequer-Chamber, *in the caſe of the* poſtnati (c).

MY lords, mine age, mine infirmitie, and indiſpoſition of health, my decaie and weakeneſſe of memorie, and *deſuetudo*, and long diſcontinuance from this maner of legall exerciſe (aboue foureteene yeeres) haue bereaued mee of the meanes and helpes that ſhould inhable me to ſpeake in ſo great a caſe.

I feare therefore, that it will be deemed preſumption (if not worſe) that I aduenture to ſpeake heerein at all; ſpecially after ſo many learned and iudicious arguments of ſo many graue, learned, and reuerend iudges.

To ſay the ſame that hath beene ſaied, muſt needes be vnpleaſaunt, weariſome, and loathſome to the hearers; and not to ſay the ſame, is to ſpeake little to the purpoſe: for, what more can bee ſaied than hath beene?

Yet, for that the caſe is depending in *Chancerie*, and adiourned hither for difficultie in law, and there I muſt giue iudgement according to the law, whether the complainant bee inhabled, by lawe, to maintaine his ſuit in that court, or not; I holde it more fitting to deliuer the reaſons of my iudgement heere, where others haue beene heard, than there, before a few, which haue not heard that, which hath beene ſo learnedly argued and largely debated heere.

And therefore the caſe ſtanding thus, I will ſpeake what I thinke. And I muſt ſay, as one of the graue iudges ſaied, I can tell no newes; but ſome old things which I haue read and obſerued, I will remember; but I can not diuine, or propheſie *de futuris*, I leaue that as iuſtice *Yeluerton* did.

I am free and at libertie, *nullius addictus iurare in verba magiſtri*, and therefore I will ſpeake ingenuouſly and freely.

In the arguing of this caſe, ſome thinges, which are of great weight with mee, haue (in mine opinion) beene paſſed ouer too lightly; and ſome other thinges, which ſeeme to me but light, haue beene ouerweighed, as I thinke.

Halfe an howers time longer or ſhorter I meane not to ſtriue for; and therefore I will preſume on your patience, and aſſume to my ſelfe ſuch conuenient time as others haue done; and yet I will huſband time as well as I can.

I will not be abaſhed to ſtrengthen my weake memory with helpe of ſome ſcribled papers, as others haue done: for I accompt it a point of wiſedome to followe wiſe mens examples.

Other *exordium*, inſinuation, proteſtation, or preface for the matter it ſelfe, either to prepare attentiue and beneuolent auditors, or to ſtirre offence or miſlike againſt either partie, I meane not to vſe. It is fit for oratours; I neuer profeſſed the art; I had neuer ſkill in it: and it is not *decorum* for iudges, that ought to reſpect the matter, and not the humours of the hearers.

The *exordium* the ciuilians vſe in their ſentences I like well; *in Dei nomine amen, & Deo primitùs inuocato.* Other *exordium* I care not for.

(c) This argument was printed in 1609, with the following title:—*The ſpeech of the lord chancellor of* England, *in the* Eſchequer-Chamber, *touching the* poſt-nati. Before the ſpeech there was the following addreſs to the reader:

'To the louing readers.

'Before I preſumed to ſpeake in the *Eſchequer-Chamber* in *R. C.* caſe (which is now commonly called, the caſe of *poſt-nati,*) I conſidered mine age and infirmities, and how long I had diſcontinued from ſuch legall exerciſes. I might hereupon haue iuſtly challenged the priuiledge of ſilence. But greater and weightier reaſons ouerruled mee, and enforced mee to waiue the benefit of that priuiledge: for, looking into the nature of the queſtion then in hand, and examining the circumſtaunces, I found the caſe to bee rare, and the matter of great import and conſequence, as being a ſpeciall and principall part of the bleſſed and happy vnion of *Great Britaine*.

'I heard many learned and iudicious arguments, made by the reuerend iudges: and finding that they did not all concurre in opinion (though the number was indeede ſo few, of them that differed, that in *Greeke* it woulde not make a plurall number) and that ſome things were by them omitted, which ſeemed to mee to be both pertinent to the matter, and neceſſary to bee knowne, and more proper and fit to bee ſpoken by me, reſpecting the place I hould, than by them, that did wholy binde themſelues to the forme and rule of legall argument and diſcourſe: I thought that I coulde not, in duetie, ſit as a dumbe and idle hearer onelie; the cauſe being iudicially depending in the high court of *Chancerie*, where I was to iudge of it according to lawe, following the rule of mine owne conſcience, and the meaſure of mine owne vnderſtanding, and not to bee ſwayed with the weight of other mens opinions.

'I conſidered alſo, that althogh *ſilentij tutum præmium* is often true in humane policie, yet ſometime there is *crimen reticentiæ*; and therefore the prophet ſaid, *væ mihi quia tacui.* And *Chryſoſtome* obſerueth, that, *tribus modis in veritatem peccatur*: 1. *veritatem præ timore tacendo*: 2. *veritatem in mendatium commutando*: 3. *veritatem non defendendo.* Remembring this, my conſcience tould me, that howſoeuer ſilence might in this caſe haue excuſed mee of the ſecond, yet I could not haue eſcaped by ſilence, from offending in the firſt and laſt. And if *Feſtus* thoght it not reaſon, to ſend a priſoner, without ſhewing the cauſes which were layed againſt him, I might haue beene worthily & iuſtly cenſured, if vpon other mens arguments, and as it were *ſide implicita*, I ſhould haue pronounced my iudgement and ſentence in ſo great a cauſe, without declaring the grounds and reaſons whereupon I ſtood. Thus, duetie and neceſſitie (for, *ratio ſapienti neceſſitas*) were the cauſes that induced mee to ſpeake in this rare and weightie cauſe, and the force of truth moued mee to ſpeake that which I did ſpeake, without reſpect of pleaſing or diſpleaſing any. And ſo, hauing the warrant of a ſincere conſcience, which is truly ſaid to be, *veluti comes, & teſtis, & iudex actionum*, I haue in the *Chancerie* iudged and decreed the caſe for *R. C.* And the like iudgement is alſo giuen by the iudges of the *Kings Bench*, in the aſſiſe depending in that court. The decree and iudgement being thus paſſed, diuerſe vnperfect reports, and ſeuerall patches and pieces of my ſpeech haue bin put in writing, and diſperſed into many hands, and ſome offred to the preſſe. The kings maieſtie, hauing knowledge thereof, miſliked it; and thereupon commanded me to deliuer to him in writing, the whole diſcourſe of that which I ſaid in that cauſe.

'Thus I was put to an vnexpected new labour, to reuiew my ſcribled & broken papers. Out of which (according to the charge impoſed vpon me) I gathered all which I had before ſpoken, and ſo ſet it downe faithfully & plainly, and (as neare as I could) in the ſame words I vttered it. It pleaſed his ſacred maieſtie to take ſome view of it; and taking occaſion thereby, to remember the diligence of the lord chiefe iuſtice of the *Common Place*, for the ſummary report he had publiſhed of the iudges arguments, he gaue mee in charge to cauſe this to be likewiſe put in print, to preuent the printing of ſuch miſtaken and vnperfect reports of it, as were alreadie ſcattered abroad.

'Whatſoeuer it is, it was firſt conceiued & ſpoken out of conſcience & duty; and is now publiſhed in humble obedience to my moſt gracious ſoueraigne. And ſo I offer and commend it to your good acceptance and fauourable interpretation.

T. Elleſmere, Canc.'

BAYERISCHE STAATS- BIBLIOTHEK MÜNCHEN

The caſe.

The caſe now depending in *Chauncerie*, which is adiourned hither, is thus.

Robert Caluine, ſonne and heire apparant of *Iames* lord *Caluine* of *Colcroſſe* in the realme of *Scotland*, an infant of three yeares of age, borne in the ſaied realme of *Scotland*, maketh title by his bill to a meſſuage and garden with th' appurtenaunces in the pariſh of St. *Buttolph* without *Biſhops-gate* in the citie of *London*; and complaineth againſt *Iohn Bingley*, and *Richard Griffin*, for detaining the euidences concerning the ſame meſſuage and lands, and taking the profits thereof.

The defendants pleade, that the plaintife is an *alien*; and that in the third yeere of his maieſties raigne of *England*, and in the nine and thirtieth yere of his maieſties raigne of *Scotland*, hee was borne in the realme of *Scotland*, within the ligeance of his ſaid maieſtie, of his realme of *Scotland*, and out of the ligeance of our ſoueraigne lord the king of his realme of *England*.

And the defendants ſay further, that at the time of the birth of the complainant, and long before, and euer ſithence, the ſaied kingdome of *Scotland* was, and ſtill is, ruled and gouerned by the proper lawes and ſtatutes of the ſaid kingdome of *Scotland*, and not by the lawes and ſtatutes of this realme of *England*; and therefore the defendants demaund iudgement, whether the complainant ought to bee anſwered to his ſaid bill, or ſhall be receiued to proſecute the ſaid ſuite againſt the defendants, being for, and concerning the title of inheritance, and euidence touching the ſame.

Heereupon the complainant hath demurred in law.

This is the ſpeciall caſe now depending in the *Chancerie*; in which, and touching all like caſes in generall, mine opinion is, and ſince the queſtion was firſt mooued hath beene, that theſe *poſt-nati* are not *aliens* to the king, nor to his kingdome of *England*, but by their birth-right are liege ſubiects to the king, and capable of eſtates of inheritance and freehould of landes in *England*; and may haue and maintaine as wel reall as perſonall actions for the ſame: and that therefore the now complainant *Robert Caluine* ought to bee anſwered.

This opinion I did firſt conceiue vpon thoſe rules and reaſons in lawe (as well the common law of *England*, as the *ciuile* law) which heereafter in the courſe of my ſpeech I will remember. And in this opinion I haue beene ſince confirmed by many great and weighty reaſons.

The proceeding in the general caſe of *poſt-nati.* ſtat. 1. *Iac.* 16. *Mart.* 1603.

Firſt, in the *ſtatute* made in the firſt yeare of his maieſties raigne of *England*, authorizing the treatie betweene the commiſſioners for both the kingdomes, it is ſaid (as iuſtice *Warburton* noted well) that both the famous & ancient realmes of *England* and *Scotland* are now vnited in allegeance and loyall ſubiection in his royall perſon, to his maieſtie, and his poſteritie for euer.

Heere wee haue the iudgement of the parliament, that there is a vnitie in allegeance to one royall perſon; and therefore I ſee not how wee may out of imaginarie conceipts, and by ſubtile diſtinctions ſtraine our wittes to frame ſeuerall allegeances to one and the ſame royall perſon, contrary to ſo plaine a declaration made by parliament.

The proclamation, 2 *Iacobi* 20. *Octobr.* 1604.

Next followeth his maieſties proclamation 20 *Octobris* 1604, by which hee aſſumed to himſelfe the name and ſtile of *king of Great Britaine*: in which proclamation, among many other weighty reaſons, this is added for one, *we haue receiued from thoſe that be ſkilful in the lawes of the land, that immediately vpon our ſucceſſion, diuerſe of our auncient lawes of this realme are* ipſo facto *expired*; *as namely, that of eſcuage, and of the naturalization of the ſubiects.* This was not done ſodainely, nor lightly; but vpon graue and ſerious deliberation, and aduiſe: and therefore ſeemeth to mee to be a matter of great importaunce, and not to be lightly regarded.

The commiſſioners authorized by parliament, did begin 20 *Octob.* and did continue vntill 6 *Decemb.* 2 *Iacobi.*

The reſolution of the commiſſioners.

The ſame twentieth of *October*, theſe commiſſioners beganne their treatie. Of the graue and iudicious courſe which they held, in debating of the matter then propounded, I will forbeare to ſpeake: but for this point of naturalization now in queſtion, their reſolution in the end was thus:

That it ſhall be propounded to both the parliaments at the next ſeſſions, that an act be made containing a declaration, as followeth: that all the ſubiects of both the realmes, borne ſince the deceaſe of *Elizabeth* the late queen of *England* of happie memory, and all, that ſhal be born hereafter vnder the obedience of his maieſtie and his royall progeny, are by the common lawes of both the realmes, and ſhall be for euer, inhabled to obtaine, ſucceede, inherite, and poſſeſſe all *lands*, *goods*, and *chattels*, *&c.* as fully and amply as the ſubiects of either realme reſpectiuely might haue done, or may doe in any ſort within the kingdome where they were borne. This, after long debating, and graue and deliberate conſideration, was, in the end, the reſolution of the greater part of the commiſſioners, not one openly gaineſaying it. And diuerſe of the principall iudges of the realme were preſent at all times when the point was debated. And herein I note the wiſe and iudicious forme of that reſolution, which was not to propound to the parliament the making of a new lawe, but a declaration of the common lawes of both the realmes in this queſtion.

Now, if wee conſider who theſe commiſſioners were, what lords of the higher houſe, and what perſons of the common houſe, ſelected of all degrees, moſt eminent for their learning and iudgement, as well in ciuile and common law, as in knowledge, and experience other waies, beeing aſſiſted by the graue iudges of the realme: if this, I ſay, be well conſidered, then this reſolution muſt be accompted and eſteemed as a matter of great and weighty importance, and much to be regarded in the deciding of this queſtion.

The iudges opinion in parliament.

According to this act of the commiſſioners, the caſe was propounded in the next ſeſſion of parliament. In the higher houſe, the iudges were required to deliuer their opinions. There were then eleauen iudges preſent; whereof tenne did with one vniforme conſent affirme the law to be, that the *poſt-nati* were not aliens, but natural ſubiects (one onely diſſenting). After this, the queſtion was debated in a ſolemne conference betweene both the houſes of parliament at ſeuerall times, and at great length, and with much libertie; nothing was omitted that wit or art could inuent to obiect againſt this opinion; and that was done by men of great learning, and ſingular iudgement in the common lawe, and ciuile lawe, and by ſome other gentlemen of the common houſe, of rare gifts for their learning, knowledge, elocution and experience.

At this conference the iudges were preſent; who, after they had heard all that was, or could be ſaid, did confirme their former opinions, which they had before deliuered in the higher houſe: three of the chiefe of them declaring their reaſons, and all the reſt (ſauing one alone) concurring in the ſame. So, here was now a generall reſolution by all the iudges of the realme (one excepted) and that deliuered, not priuately, but in parliament; which without more adoe had beene ſufficient to haue decided and determined this queſtion.

The force and ſtrength of the kings proclamations.

Touching the proclamation, it was diſcreetely and modeſtly ſaied by a learned gentleman of the lower houſe, that it was of great reſpect, and much to bee regarded; but yet it was not binding, nor concluding: for, proclamations can neither make, nor declare lawes: and beſides, that this proclamation was not grounded vpon any reſolution of the reuerend iudges; but vpon the opinion of ſome ſkilfull in the lawes of this land.

Of the ſtrength of proclamations, being made by the king, by the aduiſe of his counſell and iudges, I will not diſcourſe; yet I will admoniſh thoſe that bee learned and ſtudious in the lawes, and by their profeſſion are to giue counſell, and to direct themſelues, and others, to take heede that they doe not contemne, or lightly regard ſuch proclamations.

And to induce them thereunto, I deſire them to looke vpon, and conſider aduiſedly theſe few proclamations, prouiſions, or ordinaunces, which I will point out vnto them; and of what validitie and force they haue beene houlden to bee in conſtruction of lawe, albeit they be neither ſtatutes, nor acts of parliament.

Fitzb. dower, 179.

M. 4. *H.* 3. in *Dower*, the defendant pleaded, *quod petens eſt de poteſtate regis* Franciæ, *& reſidens in* Francia; *et prouiſum eſt à conſilio regis, quod nullus de poteſtate regis* Franciæ *reſpondeatur in* Anglia, *antequam* Angli *reſpondeantur de iure ſuo in* Francia. This the plaintifes atturney could not denie; and thereupon the iudgement was, *ideo ſine die.*

Anno 20 *Hen.* 3. certaine prouiſions and ordinaunces were made which were called *prouiſiones Merton*, where the king aſſembled his archbiſhops, biſhops, earles, and barons for the coronation of the king, and his wife queene *Elenor*; and the words be, *prouiſum eſt in curia dom. regis apud* Merton *coram* Willihelmo Cantuarienſi *archiepiſcopo, & coepiſcopis, ſuffraganeis ſuis; et coram maiori parte comitum & baronum* Angliæ *ibidem exiſtentium pro coronatione ipſius domini regis &* Elionoræ *reginæ, pro qua omnes vocati fuerunt, cum tractatum eſſet de communi vtilitate regni ſuper articulis ſulſcriptis, ita prouiſum fuit & conceſſum, tam a prædictis archiepiſcopis, epiſcopis, comitibus, & baronibus, & alijs. De viduis primò, &c.*

Fitzherbert Nat. Br. 32.

Fitzherbert citeth a prouiſion made *anno* 19 *H.* 3. in theſe words, *et prouiſum fuit coram domino rege, archiepiſcopis, epiſcopis, comitibus, & baronibus, quod nulla aſſiſa vltimæ, præſentationis de cætero capiatur de eccleſiis, præbendatis nec de præbendis.* This prouiſion was alowed and continued for lawe, vntill *W.* 2. *anno* 13 *Edw.* 1. *cap.* 5. which prouides the contrary by expreſſe words.

Anno 6 *Ed.* 1. Explan. ſtat. *Glouceſter.*

Anno 6 *Ed.* 1. the king and his iudges made certaine explanations of the ſtatute of *Glouceſter*, which are called *explanationes ſtatuti* Gloceſtriæ: and theſe be the words, *Poſtmodum per dominum regem & iuſticiarios ſuos factæ ſunt quædam explanationes quorundam articulorum ſuperius poſitorum.* Which explanations haue euer ſince beene receiued as a law.

A proclamation. 15 *Ed.* 3.

There is a proclamation by king *Ed.* 3. bearing *teſte* at *Weſtminſter anno* 15 *Ed.* 3. And iudge *Thorpes* opinion *pa.* 39 *Ed.* 3. 7. both which I will now forbeare to report, and wiſh the ſtudents to reade the ſame in the printed bookes, where they ſhall ſee both the effect, and the reaſon, and the cauſe thereof; they are worth their reading, and may informe and direct them what iudgement to make of proclamations.

How the iudges opinion deliuered in parliament ought to be regarded.

Obiect.

Touching the opinion of the iudges, ſome haue obiected (yet modeſtly, and I ſuppoſe, according to their conſcience and vnderſtanding) that there is not like regarde to be had of iudges opinions giuen in parliament, as ought to bee of their iudgements in their proper courts and ſeates of iuſtice: for, in thoſe places their oath bindeth them; but not ſo in the other.

Reſponſ.

1. To this I anſwere: the reuerence, and woorthineſſe of the men is ſuch, as is not to bee quarrelled and doubted of, if there were no oathe at all: for, if men of ſo great and eminent places feare not God and his iudgements, euen out of a religious conſcience, which is *frænum ante peccatum, & flagrum poſt peccatum*, it may be doubted that the externall ceremonie of adding a booke will little auaile.

2. Their oath doth bind them as much in the court of parliament, as in their proper courts: for, that is the ſupreme court of all; and they are called thither by the kings writ, not to ſit as tell-clockes, or idle hearers; but, *quòd perſonalitèr interſitis nobiſcum, ac cum cæteris de conſilio noſtro ſuper dictis negotiis tractaturi, veſtrumque conſilium impenſuri:* and thoſe *negotia* be *ardua & vrgentia negotia regni, &c.* And their oath, amongeſt other thinges, is, that they ſhall counſell the king truely in his buſineſſe.

3. This exception may ſerue againſt the iudges, as well in caſes when they ſit and giue iudgement, as iuſtices of aſſiſes, *niſi prius*, *oyer* and *terminer*, and *gaole deliuerie*, as in this caſe of parliament: for, there they haue none other oath but their generall oath.

4. It becomes vs to eſteeme of iudges now, as our forefathers eſteemed them in times paſt; for, as they ſucceede them in time and place (I thanke God, and the king, I haue neither cauſe to feare any for diſpleaſure,

pleaſure, nor to flatter any for fauour: wherefore I will neither be afraid, nor abaſhed to ſpeake what I thinke:) I ſay therefore, that as our iudges now ſucceed the former iudges, in time and place; ſo they ſucceede them, and are not inferior to them in wiſedome, learning, integritie, and all other iudicious and religious vertues.

Then let vs ſee what the wiſedome of parliaments in times paſt attributed to the iudges opinions declared in parliament; of which there bee many examples; but I will trouble you but with two or three.

I wil not remember *Richard* the ſeconds time (of which ſome of our chroniclers doe talke idely, and vnderſtand little) where power and might of ſome potent perſons oppreſſed iuſtice, and faithfull iudges, for expounding the law ſoundly, and truely.

1. The firſt, that I will remember, is this, in the parliament 28 *H.* 6. 16 *Ianuarij*, the commons made ſuite, that *W. de la Poole* duke of *Suffolke* ſhould bee committed to priſon for many treaſons and other hainous crimes committed by him. The lordes in parliament were in doubt what anſwer to giue; they demaunded the opinion of the iudges. Their opinion was, that hee ought not to bee committed; and their reaſon was, for that the commons did not charge him with anie particular offence, but with generall ſlaunders and reports; and therefore becauſe the ſpecialties were not ſhewed, hee was not to bee committed. This opinion was allowed; and thereupon 28 *Ianuarij*, the commons exhibited certaine ſpeciall articles againſt him, *viz.* that hee conſpired with the *French* king to inuade the realme, *&c.* And thereupon hee was committed to the *Tower*.

2. In the parliament *anno* 31 *H.* 6. in the vacation (the parliament being continued by prorogation) *Thomas Thorpe* the ſpeaker was condemned in a thouſand pounds dammages in an action of treſpaſſe, brought againſt him by the duke of *Yorke*, and was committed to priſon in execution for the ſame. After, when the parliament was re-aſſembled, the commons made ſuite to the king and the lords, to haue *Thorpe* the ſpeaker deliuered, for the good exploite of the parliament; whereupon the duke of *Yorkes* counſell declared the whole caſe at large. The lords demaunded the opinion of the iudges, whether, in that caſe, *Thorpe* ought to bee deliuered out of priſon by priuiledge of parliament. The iudges made this aunſwere, that they ought not to determine the priuiledge of that high court of parliament; but for the declaration of proceeding in lower courts, in caſes where writtes of *ſuperſedeas* for the priuiledge of the parliament be brought vnto them, they aunſwered, that if any perſon that is a member of the parliament bee arreſted in ſuch caſes as bee not for treaſon or felonie, or for ſuretie of peace, or condemnation had before the parliament, it is vſed that ſuch perſons be releaſed, and may make atturney, ſo as they may haue their freedome and libertie, freely to intend the parliament. Hereupon it was concluded, that *Thorpe* ſhould ſtill remaine in priſon according to the lawe, notwithſtanding the priuiledge of parliament, and that hee was the ſpeaker. Which reſolution was declared to the commons by *Walter Moyle*, one of the kings ſerieants at lawe. And then the commons were commaunded in the kings name, by the biſhop of *Lincolne* (in the abſence of the archbiſhop of *Canterbury* then chauncellor) to chooſe another ſpeaker.

3. In the parliament *an.* 7 *H.* 8. a queſtion was moued, whether ſpirituall perſons might bee conuented before temporall iudges for criminall cauſes. There ſir *Iohn Fineux* and the other iudges deliuered their opinion, that they might and ought to bee ſo. And their opinion was allowed, and maintained by the king and the lords: and *D. Standiſh*, who before had houlden the ſame opinion, was deliuered from the biſhops. And it is worth the noting, what wordes paſſed in that caſe betweene the archbiſhop of *Canterbury* and that worthy iudge *Fineux*.

Writs of errour ſued in parliament.

4. If a writ of errour bee brought in parliament vpon a iudgement giuen in the *King's Bench*, the lords of the higher houſe alone (without the commons) are to examine the errours; but that is by the aduiſe and counſell of the iudges, who are to informe them what the lawe is, and ſo to direct them in their iudgement. And if the iudgement bee reuerſed, then commaundement is to bee giuen to the lord chancellour to doe execution accordingly. And ſo it was in *anno* 17 *R.* 2. in a writte of errour brought in parliament by the deane and chapiter of *Lichfield*, againſt the prior and conuent of *Newport-Panell*, as appeareth by the record. But if the iudgement bee affirmed, then the court of the *King's Bench* are to proceede to execution of the iudgement, as it appeareth in *Flowerdewes* caſe *P.* 1 *H.* 7. *fol.* 19. But it is to bee noted, that in all ſuch writtes of errour, the lords are to proceede according to the lawe; and for their iudgement therein they are informed and guided by the iudges, and doe not follow their owne opinions or diſcretions otherwiſe.

This extrauagant diſcourſe touching proclamations, and iudges opinions deliuered in parliament, and how they ought to bee regarded, I haue thought materiall and neceſſarie, both in reſpect of the time wherein wee liue, and the matter which we haue in hand. And theſe bee thinges which I thinke haue beene too lightly paſſed ouer. But if you condemne it as impertinent, I muſt then confeſſe I haue preſumed too much vpon your patience; I pray you beare with mee, it is but my labour loſt, and a little time miſ-ſpent, if it ſeeme ſo vnto you: you are wont to pardon greater faultes; call it either a paſſe-time, or waſte-time, as pleaſeth you. Now, to returne to the caſe we haue in hand.

The proceſſe and forme of proceeding in the caſe of *R. C.* now in queſtion.

The generall queſtion hauing had this paſſage (by proclamation, by commiſſion, and by debating in parliament) remaineth yet without concluſion or iudgement: and as euerie man abounds in his owne ſence, ſo euery one is left to his owne opinion; ſpecially theſe that were not ſatisfied with the graue reſolution of the iudges in parliament, which (although ſome may tearme and accompt as bare opinions) I muſt alwayes valew, and eſteeme as a reall and abſolute iudgement. Now, I ſay, this generall queſtion is reduced to two particular caſes, and is iudicially depending in two the higheſt courts of iuſtice in this realme; and that is by one complainant againſt ſeuerall defendants for the freehoulde and inheritance of ſeuerall parcells of land: and (as M. Solicitor ſaid well) is a caſe, not fained, nor ſurmiſed, but a true caſe betweene true parties: and being *quæſtio iuris, non facti*, is by both theſe courts adiourned hither to bee decided, and determined by all the iudges of *England*, as the rareneſſe of the caſe, and the weight and importaunce of it, both for the preſent and the future, doth require.

And the caſe being of this nature and qualitie, it is not amiſſe to obſerue the proceeding in it: for, it is woorth the obſeruing, and not to bee forgotten. The defendants counſell, men of great learning, and in their profeſſion inferiour to none of their qualitie and degree, men conuerſant and well exerciſed in the queſtion, and ſuch as in the great conference in parliament, moſt of them were ſpecially ſelected and choſen (for ſo they wel deſerued) as moſt ſufficient, able, and fit, as well for learning and knowledge, as for all other giftes of witte and nature, to handle ſo great and rare a queſtion. And although it hath pleaſed them of their good diſcretion to vſe the paines but of a few in the debating and arguing of the caſe at the barre: yet no doubt that was done vpon mature deliberation and conference with all the reſidue: and whatſoeuer the ſpirites, the learning, the wiſedome, and knowledge of all the others, vpon long ſtudy could affoorde, was put into the mouth of thoſe few to ſerue as organs and inſtruments to deliuer it vnto vs; which they haue ſo well and ſufficiently performed, that they deſerue great praiſe and commendation: for, in my poore opinion, the witte of man could not deuiſe to ſay more touching this queſtion in lawe than they haue ſaied. And whatſoeuer hath beene ſithence ſpoken for that part, it is for the matter but the ſame in ſubſtance, which the counſell at the barre did deliuer; though it hath beene varied in forme, and amplified with other wordes and phraſes, and furniſhed with ſhew of ſome other ſtrained caſes and authorities.

The handling of it by the learned and reuerend iudges hath beene ſuch, as it may appeare to the world, that euerie one hath ſpoken his owne heart and conſcience; and hath laboured by long ſtudie to ſearch out the lawe and the true reaſon of the lawe in this rare caſe; and ſo they haue ſpoken, as *coram Deo & angelis:* none, with deſire to ſeeme popular; for nothing ought to bee *tam populare quam veritas:* none to ſeeme to be timeſeruers, or men-pleaſers; for the king (whome vnder God they ſerue) being *pater patriæ*, and ſoueraigne head of both theſe great vnited kingdomes, is to them both, like as the head of a naturall body is to all the members of the ſame, and is not, nor can not bee partiall more to one than to another. Hee deliteth in truth, and deſireth it; and without truth hee can not bee pleaſed. Hee ruleth by his lawe, and commaundeth his iudges to miniſter to all his ſubjects lawe and iuſtice ſincerely, and truely; and equally and indifferently, without any partiall reſpect.

It was neuer ſeene, but that in all rare and difficult caſes, there haue beene diuerſitie of opinions; but yet without breach of charitie, which is the bond of vnitie. So it hath happened in this caſe. The caſe hath beene argued at large by foureteene learned iudges; twelue of them haue concurred in iudgement, but vpon ſeuerall reaſons: for, as many wayes may leade to one end of the iourney; ſo diuerſe and ſeuerall reaſons may conduce to one true and certaine concluſion.

And here I may not omit the woorthie memorie of the late graue and reuerend iudge, ſir *Iohn Popham*, chiefe iuſtice of the *King's Bench* deceaſed (a man of great wiſedome, and of ſingular learning and iudgement in the lawe) who was abſolutely of the ſame opinion, as he often declared, as well in open parliament, as otherwiſe.

The apoſtle *Thomas* doubted of the reſurrection of our Sauiour *Ieſus Chriſt*, when all the reſt of the apoſtles did firmly beleeue it: but that his doubting confirmed, in the whole church, the faith of the reſurrection.

The two woorthy and learned iudges that haue doubted in this caſe, as they beare his name, ſo I doubt not but their doubting hath giuen occaſion to cleare the doubt in others; and ſo to confirme in both the kingdomes, both for the preſent and the future, the truth of the iudgement in this caſe.

Thus, my lords, haue you hitherto nothing from mee but *Amen*, to that which all the iudges (ſauing two) haue ſaied; and much more you cannot expect from mee: yet, ſince I muſt giue iudgement in this caſe; and I ſaied in the beginning, that I would render the reaſons of my iudgement (for that is the courſe of argument I muſt houlde); I will now deliuer vnto you, what are the ſpeciall and principall reaſons that firſt haue induced mee, and ſtill mooue mee to houlde the opinion that I doe: and as I goe, I will indeuour to cleere ſome doubts and queſtions, that partly in the conference in parliament, and partly otherwiſe, I haue heard made; not onely touching this caſe it ſelfe, but alſo touching the forme and manner how it is to be decided and iudged.

How this caſe is to be iudged, and by what law.

The caſe is rare, and new (as it hath beene often ſaied); it was neuer decided *terminis terminantibus*; it was neuer iudged by any ſtatute lawe, which is a poſitiue lawe; nor by iudgement of the iudges of the common lawe.

Now, the firſt queſtion is (as ſome would haue it) how it is to be iudged, and by what lawe; and haue wiſhed that it might haue ſtayed vntill the parliament, and ſo bee decided by parliament. They that make this doubt, I will let them demurre, and die in their doubts: for, the caſe beeing adiourned hither before all the iudges of *England*, is now to be iudged by them according to the common lawe of *England*; and not tarrie for a parliament: for, it is no tranſcendent queſtion, but that the common lawe can and ought to rule it, and ouer-rule it, as iuſtice *Williams* ſaid well.

What is the common law of *England:* and whether it be *ius ſcriptum*.

Queſtioniſts.

But then this queſtion produceth another; that is, what is the common lawe of *England?* whether it be *ius ſcriptum*, or *non ſcriptum?* and ſuch other like niceties: for, wee haue in this age ſo many queſtioniſts; and *quo modo* and *quare*, are ſo common in moſt mens mouthes, that they leaue neither religion, nor lawe, nor king, nor counſell, nor policie, nor gouernment out of queſtion.

And the end they haue in this queſtion, what is the common lawe, is to ſhake and weaken the ground and principles of all gouernement: and in this particular queſtion of the law of *England*, to ouerthrow that law whereby this realme hath many hundred yeares beene gouerned in all honour and happineſſe: or at leaſt to caſt an aſperſion vpon it, as though it were weake and vncertaine. I will therefore declare mine opinion in this point plainely and confidently, as I thinke in my conſcience, and as I finde to be ſufficiently warranted by ancient writers, and good authorities voide of all exception.

The ground of the common law.

The common law of *England* is grounded vpon the law of God, *and extendes itſelfe to the originall lawe of nature, and the vniuerſall lawe of nations.*

When it reſpectes the church, it is called *lex eccleſiæ* Anglicanæ, as *magna charta, ca.* 1. *Eccleſia* Anglicana *habeat omnia ſua iura integra & illæſa.*

When it reſpectes the crowne, and the king, it is ſometimes called *lex coronæ*, as in ſtat. 25 *Edw.* 3. *cap.* 1. *Lex coronæ* Angliæ *eſt & ſemper fuit, &c.* And it is ſometimes called *lex regia*, as *in Regiſtro fo.* 61. *Ad iura regia ſpectat:* and, *ad conſeruationem iurium coronæ noſtræ, & ad iura regia ne depereant, &c.*

When it reſpectes the common ſubiects, it is called, *lex terræ*; as in *magna charta ca.* 29. *Niſi per legale iudicium parium, vel per legem terræ.*

The common law is not originally *lex ſcripta.*

Yet, in all theſe caſes, whether it reſpectes the church, the crowne, or the ſubiects, it is comprehended vnder this generall tearme, the common lawes of *England:* which, although they bee for a great parte thereof reduced into writing; yet they are not originally *leges ſcriptæ.*

This I firſt learned of the late lord treaſurer *Burleigh* (whoſe honourable memorie *England* can neuer forget) and hearing it from him, I indeuored by my priuate ſtudie to ſatisfie my ſelfe thorowlie in it. And, whoſoeuer ſhall well conſider the lawes of *England*, which were before the Conqueſt (whereof wee haue ſome remnants and patches) or ſince the Conqueſt vntill *magna charta, anno* 9 *H.* 3. will make little doubt of it.

In *H.* 2. time *Glanuile* writeth thus; *leges* Anglicanas *licèt non ſcriptas, leges appellari non videtur abſurdum.*

And in *Hen.* 3. time *Bracton* writeth thus; *cùm autem ferè in omnibus regionibus vtantur legibus & iure ſcripto, ſola* Anglia *vſa eſt in ſuis finibus, iure non ſcripto & conſuetudine; in ea quidem, ex non ſcripto ius venit quod vſus comprobauit.*

But I may not agree with *Bracton*, that *ſola* Anglia *vſa eſt iure non ſcripto:* for I find that the graueſt, and the greateſt learned writers of the *ciuile lawe*, both auncient and of this our time, doe hould the ſame opinion, touching the ciuile lawe it ſelfe, for thus they write: *ex non ſcripto ius venit quod vſus approbauit.* And thus; *ius ciuile dictum ex non ſcripto natum eſt.* And, *ius non ſcriptum dicitur conſuetudo, non quod ſcripto perpetuò careat, hoc enim falſum eſt: nam & conſuetudines in memoriam conſtantiorem reducuntur in ſcripturam, vt cætera quoq. quæ ſine ſcriptura perficiuntur: ſed non ſcriptum ius eſt: id eſt, quòd à ſcriptura vis eius non cæpit nec pendeat.* So, hereby it may appeare how in this wee concurre with the ciuile lawe.

How the common law of *England* may be knowne. *Obiect.*

But hereupon theſe queſtioniſts moue an other queſtion, *viz.* If the common lawe be not written, how then ſhall it be knowen?

Reſponſ.

To this I aunſwer; it is the common cuſtome of the realme (as *Bracton* ſaieth, *ius venit quod vſus comprobauit*): and it ſtandeth vpon two maine pillers and principall parts, by which it is to bee learned and knowen.

Maximes and principles.

1. The firſt is, certaine knowne principles and maximes, and ancient cuſtomes, againſt which there neuer hath beene, nor ought to bee any diſpute. As in caſes of ſubiects; an eſtate in fee-ſimple, for life, for yeeres, dower, curteſie, &c. In caſes of the crowne, the female to inherite: the eldeſt ſole to bee preferred: no reſpecte of halfe blood: no tenant in dower, or by the courteſie of the crowne: no diſabilitie of the king's perſon by infancie, &c.

Reſponſa prudentum.

2. The ſecond is, where there be no ſuch principles, then, former iudgements giuen in like caſes: and theſe be but *arbitria iudicum, & reſponſa prudentum*, receiued, allowed, and put in practiſe and execution by the king's authoritie.

Of theſe *Bracton* ſpeaketh; *ego* H. de Bracton *animum erexi ad vetera iudicia iuſtorum perſcrutanda; facta ipſorum, conſilia, & reſponſa in vnam ſummam redigendo compilaui.*

Lambard *in explicatione verbi* Hyde.

And before the Conqueſt, king *Ethelbert* cauſed a booke to bee made, which was called *Decreta Iudiciorum:* and king *Alured* did the like, as maſter *Lambard*, a iudicious and learned obſeruer of antiquities, doth remember.

Of theſe alſo the iudges ſpeake *H.* 33. *H.* 6. *Moyle, fo.* 8. *we rule the law according to the auncient courſe. Aſhton, fol.* 9. *all our lawe is guided by vſe, and by ſtatute.* And *Pryſot* ſaieth, *fol.* 9. *there cannot be a poſitiue law, but ſuch as was iudged or made by ſtatute.* Wherein I note alſo that hee equalleth a iudgement with a ſtatute.

In 36 *H.* 6. *fol.* 25. *Forteſcue* reaſoneth thus; *the lawe is as I haue ſaide, and ſo hath beene alwaies ſince the lawe beganne.*

In 37 *H.* 6. *f.* 22. *Aſcue* reaſons thus; *ſuch a charter hath bin allowable in the time of our predeceſſours, which were as ſage and learned as wee bee.*

In *H.* 4. *Edw.* 4. *fol.* 41. *Markham* reaſoneth thus; *it is good for vs to doe as it hath bin vſed before this time, and not to keepe one way one day for one party, and another day the contrary for the other party: and ſo the former precedents be ſufficient for vs to follow:* and iudgement was giuen accordingly.

Anno 36. *H.* 6.

And in the former caſe 36 *H.* 6. *Forteſcue* ſaith further; *wee haue many courſes and formes which be houlden for lawe.*

Alſo euerie one of theſe foure principall courts, the *Chauncery, King's Bench, Common-Plees*, and *Eſchequer*, haue in many things ſeuerall courſes and formes which are obſerued for law, and that not onely in that proper court, but alſo in all courtes through the realme; whereof many examples bee remembred in the caſe of the Mines in *Plowden's Commentaries.*

In nouo caſu nouum remedium.

3. The third: but if there be no ſuch former iudgements, nor direct examples or precedents, then this rule hath a further extention, which is this.

There is a rule in the common lawe, that *in nouo caſu nouum remedium eſt apponendum. Et concordent clerici de breue faciendo, ita quod nullus recedat à* Cancellaria *ſine remedio:* for the *Chancery* is properly *officina iuſtitiæ & æquitatis*; where all original writs (which in ancient times were the grounds of all ſuites) are deuiſed and framed. And theſe *clerici* were graue and auncient men; ſkilfull, and long experienced in the courſe of the *Chancerie*; and called *clerici de prima forma:* and of late time *magiſtri* Cancellariæ; who in new and ſtrange caſes, beſides their owne knowledge and experience, had oftentimes conference with the graue iudges for the deuiſing and framing of new writtes when neede required. And this I take to bee the ſame which is in the ſtatute *W.* 2. *cap.* 24. *Et quotieſcunque de cætero euenerit in* Cancellaria, *quod in vno caſu reperitur breue, & in conſimili caſu, cadente ſub eodem iure & ſimili indigente remedio, non reperitur, concordent clerici de* Cancellaria *in breui faciendo, vel atterminent querentes in proximum parliamentum: et ſcribantur caſus in quibus concordare non poſſunt, & referant eos ad proximum parliamentum: et de conſenſu iuriſperitorum fiat breue, ne contingat de cætero, quòd curia regis deficiat conquerentibus in iuſticia perquirenda.*

St. *W.* 2. ca. 24. anno 13 *Ed.* 1.

Wherein I note theſe three thinges. Firſt, the clerkes are to agree; and if they agree, that is an end, and ſtandes for lawe, and then no referrement to the parliament. Second, if the clerks agree not, and ſo the caſe be referred to the parliament; then *de conſenſu iuriſperitorum fiat breue:* ſo *conſenſus iuriſperitorum* is the rule, and not the multitude of vulgar opinions. The third is, that iuſtice faile not them which complaine; which will often faile, if you ſtay vntill a parliament; for parliaments are not to be called for the wrong of a few priuate ſubiects, but for the great and vrgent affaires of the king and the realme.

Vbi non eſt directa lex &c.

I finde alſo a like rule in the ciuile lawe; *vbi non eſt directa lex ſtandum eſt arbitrio iudicis, vel producendum ad ſimilia.* And another ſaith, *de ſimilibus ad ſimilia iudicium & argumentatio recipiuntur.*

Rex ſolus iudicat, &c.

4. Beſides theſe, there is an other generall and certaine rule in the ciuile lawe, which I reſerue to the laſt parte of that which I meane to ſpeake in this matter.

So, leauing that vnto a more proper place, I will hereupon conclude, that if there bee no former iudgements, nor examples, nor precedents to bee found, then *concordia clericorum, & arbitrium iudicum* is to ſeeke out the true and ſolide reaſon; and thereupon to ground their iudgements in all new caſes: for it was truely ſaide by a learned gentleman of the lower houſe, *deficiente lege recurrendum eſt ad conſuetudinem: deficiente conſuetudine recurrendum ad rationem.* And ſo from the iudges we ſhall haue *reſponſa prudentum* to decide all ſuch new caſes and queſtions. And according to this rule, all ſuch new doubts and queſtions haue beene reſolued and decided by the graue iudges in former times.

A requeſt to the profeſſors of the ciuile lawe.

But here, before I proceede further, I am to make a ſuite, which is this:

That whatſoeuer I haue ſpoken, or ſhall happen to ſpeake of the ciuile lawe; or whatſoeuer I ſhall cite out of any writer of that law, I pray fauor of my maſters that profeſſe it. I acknowledge that lawe to be auncient and generall in many parts of the world; and I reuerence the profeſſors of it, as men of great learning, wiſedome, and iudgement. I profeſſe it not; I haue learned little of it; but in that little I haue found that in the reall and eſſentiall partes of iuſtice, the ciuile and common lawe doe in many things concurre, though they differ much in the forme and manner of proceeding. And that which I ſhall haue occaſion to produce of that lawe, will bee to ſhew how the common law and ciuile doe agree in one reaſon and iudgement in thoſe things which I ſhall ſpeake of.

Yet I muſt take libertie to ſay, that neither in *Spaine*, nor in *France* (thoſe two great monarchies) it is not generally receiued nor allowed as a concluding and binding law.

They take there the reaſon of it onelie as a direction to their proceeding and iudgement: but to produce or alleadge it as a concluding or binding law, was no leſſe than *capitis pæna.*

Blacwood ca. 10.

This I make not of my ſelfe; for, beſides common practiſe and experience, I haue an honeſt and ſubſtantiall witneſſe, maſter *Adam Blacwood* a *Scottiſhman*, a man of ſingular learning in the ciuile lawe, who defendeth in like manner the lawes of *Scotland*, as appeareth in his learned booke intituled, *Pro Regibus Apologia*, written by him againſt a ſeditious dialogue or libell made by *George Buchanan, de iure regni apud* Scotos, where he tells him, *aliud ſceptrum, aliud plectrum.* But it is not amiſſe to recite his owne words, which are thus; Philippus *cognomento* Pulcher, *cum* Lutetiæ *ſupremæ iuriſdictionis curiam inſtitueret, eam* Romano *iure ſolutam eſſe declarauit: in eamq. ſententiam vetus extat eius curiæ decretum, ne cauſarum patroni* Romanarum *legum auctoritatem patriæ legibus opponant. Sed cum illæ bono & æquo niti videntur & probabilem vtilitatis publicæ cauſam continere, nos earum vtimur haud imperio, ſed ratione, cui omnes homines naturæ præſcripto ſubijciuntur. Quin etſi quid aduerſus rationem legum* Romanarum *perperàm ac temerè iudicatum eſt, id earum multis pænis haud æſtimatur, ſed vel principis, vel ſuperioris magiſtratus arbitratu. Nam cùm in publici muneris partem admittimur, & conceptis verbis inauguramur, ſolemni ſacramento regiarum & municipalium legum atq. morum obſeruationem, nulla* Romani *iuris mentione, ſpondemus. Apud* Hiſpanos *capitis pænam ijs indictam legimus, qui* Romanarum *legum auctoritatem vel in foro laudarent, vel in puluere ſcholaſtico profiterentur. Sed ſi quid occurreret patrijs legibus ac moribus indefinitum quod iudicanti religionem adferret, vnicum erat eximendo ſcrupulo regis conſulendi remedium.* Alaricus Toloſæ *regnans, idem* Gothis *imperauit, vt ſi quis aduerſus ipſius leges ciuile* Romanorum *ius citaret, temerè factum morte lueretur.*

Recurrend. ad rationem, &c.

Quod non lego non credo.

Now to returne to that which I haue touched before, I ſay, that when there is no direct lawe, nor preciſe example, we muſt *recurrere ad rationem, & ad reſponſa prudentum:* for, although *quod non lego, non credo*, may bee a true and certaine rule in diuinitie; yet for interpretation of lawes, it is not alwaies ſo: for wee muſt diſtinguiſh betweene *fidem moralem*, and *fidem diuinam*, or elſe wee ſhall confound many things in the ciuile and politike gouernement of kingdomes and ſtates. For, the firſt precedent, which wee haue now, had no precedent when it began; but as *Tacitus* ſaith, *quæ nunc vetuſtiſſima creduntur noua fuerunt; & quod hodie exemplis tuemur, inter exempla futurum eſt.* And to thoſe that hould, that nothing is to bee done but by former examples, *Horace* ſpeaketh thus; *O imitatores ſeruum* *pecus:* and *Cicero* ſaith, *non exempla maiorum quærenda, ſed conſilium eſt eorum à quibus exempla nata ſunt explicandum.*

Thus hath iuſtice beene duely adminiſtred in *England*, and thereby the kings haue ruled, the people haue beene gouerned, and the kingdome hath flouriſhed for many hundred yeeres; and then no ſuch buſie queſtioniſts moued any quarrell againſt it.

Expoſition of ſtatutes.

Thus haue all doubts growing vpon *magna charta*, and *charta de foreſta*, made in king *Henry* the thirds time, and vpon the ſtatutes of *Weſtmin.* 1. *Weſtm.* 2. *Weſtm.* 3. and many other ſtatutes made in *Ed.* 1. time: and vpon *prærogatiua regis*, and many other ſtatutes made in *Ed.* 2. time, beene from time to time expounded; and ſo of later times, the ſtatutes of fines, of vſes, of willes, and many more.

Expoſition of lawes.

Thus alſo haue all doubts and caſes, whereof there was no ſtatute or poſitiue lawe, beene alwaies expounded: for ſuch are moſt of the caſes which wee haue in our yeere-bookes, and bookes of reports, which are in effect nothing but *reſponſa prudentum*, as iuſtice *Crooke* did truely ſay.

Lawes obſolete.

Vpon this reaſon it is, that ſome lawes, as well ſtatute lawe as common law, are obſolete and worne out of vſe: for, all humane lawes are but *leges temporis:* and the wiſedome of the iudges found them to bee vnmeete for the time they liued in, although very good and neceſſarie for the time wherein they were made. And therefore it is ſaide, *leges humanæ naſcuntur, vigent, & moriuntur, & habent ortum, ſtatum, & occaſum.*

Lawes changed.

By this rule alſo, and vpon this reaſon it is, that oftentimes auncient lawes are changed by interpretation of the iudges, as well in caſes criminall as ciuile.

In criminall caſes the law was *voluntas reputabitur pro facto*; but it is not ſo now, ſauing in treaſon onely.

In an appeale of maime *Britton, fol.* 48. ſaith, *ſoit le iudgement, que il perde autiel member, come il auer tolle a le plaintiſe*; but it is not ſo now.

In auncient time, one preſent, aiding, comforting, and aſſiſting to a murder, was taken to bee no principall, but an acceſſorie, as it appeareth *M.* 40 *Edw.* 3. *fol.* 42. & 40. *Li. Aſſ. p.* 8. & *p.* 25. But now in that caſe hee is iudged a principall. And ſo it was ruled by all the iuſtices *M.* 4 *H.* 7. 18. and ſo *Plowden* affirmeth the lawe to be, in his *Commentaries fol.* 99. & 100.

In ciuile cauſes in auncient time, the lawe was houlden, that hee in remainder in taile could not haue an action of waſte, nor be receiued vpon default of tenant for life: but afterwards, the lawe was often iudged otherwiſe; and ſo is the common experience and practiſe at this day.

In *anno* 40 *Ed.* 3. 28. *Fynchden*, chiefe iuſtice of the *Common Place*, ſaith, that in ancient time the vicar could not haue an action againſt the parſon; but hee ſaieth the contrarie is vſed at this day, which is the better.

In ancient time a diſſeiſee could not enter vpon the feoffee of the diſſeiſor, for ſauing of the warranty; but for many yeeres the lawe hath beene houlden otherwiſe, and ſo the common practiſe yet remaineth.

Conſtruction of words.

By this rule it is alſo, that words are taken and conſtrued, ſometimes by extenſion; ſometimes by reſtriction; ſometimes by implication; ſometimes a disjunctiue for a copulatiue; a copulatiue for a disjunctiue; the preſent tenſe for the future; the future for the preſent; ſometimes by equity out of the reach of the wordes; ſometime words taken in a contrary ſence; ſometime figuratiuely, as *continens pro contento,* and many other like: and of all theſe, examples be infinite, as well in the ciuile lawe as common lawe.

Iudges conſulted with the priuie counſell.

And oftentimes the reuerend iudges haue had a graue regarde in their proceeding, that before they would reſolue, or giue iudgement in ſuch new caſes, they deſired to conſult with the kings priuie counſell; as appeareth in diuerſe caſes in king *Edward* the third his time.

39 *E.* 3. *li. Aſ. p.* 1.

R. W. aſſaulted *Adam Brabſon* in preſence of the iuſtices of aſſiſe at *Winchester*, for which *A. B.* complained by bill before the ſaid iuſtices, alledging this offence to bee in deſpite of the king and his iuſtices, to his dammage of an hundred pounds. *R. W.* pleaded, not guiltie; and was found guiltie, and dammages taxed to tenne pounds. Thereupon the iudges awarded him to priſon in the ſheriſes keeping. And for the fine, and that which ſhould be further done for the king, for the aſſault done in the preſence of the iudges, they would haue the aduiſe of the kings counſell: for in a like caſe, becauſe *R. C.* did ſtrike a iurour at *Weſtminſter*, which paſſed in an enqueſt againſt one of his friends; it was adiudged by all the counſell, that his right hand ſhould be cut off, and his lands and goods forfeited to the king. Theſe be the words in the booke.

M. 19 *Ed.* 3. iudgement 174.

In this caſe I note three things.

1. The iudges conſulted with the counſell.

2. They haue a like caſe before when the counſell was alſo conſulted with, *viz. anno* 19 *E.* 3. and yet they would not proceede in this caſe before they had againe conſulted with the counſell.

3 That before *anno* 19 *Edw.* 3. there was no like caſe nor precedent for ſuch a iudgement; and therefore the iudges would not of themſelues pronounce that heauy iudgement before they had conferred with the counſell touching the ſame. And after they had the opinion and aduiſe of the kings counſell, they proceeded to that iudgement.

M. 39 *Ed.* 3. 35.

Thomas Vghtred knight brought a *forme-done* againſt a poore man and his wife; they came and yeelded to the demaundant, which ſeemed ſuſpitious to the court: whereupon they examined the matter, and ſtaied iudgement, becauſe it was ſuſpitious. And *Thorpe* ſaide, that in the like caſe of *Giles Blacket* it was ſpoken of in parliament: and wee were commaunded, that when any like caſe ſhould come, we ſhould not go to iudgement without good aduiſe. Wherefore ſue to the counſell, and as they will haue vs to doe, wee will; and otherwiſe not, in this caſe.

M. 40 *Ed.* 3. 34.

Greene and *Thorpe* were ſent by the iudges to the kings counſel (where there were 24 biſhops and earles) to demand of them, whether by the ſtatute 14 *Ed.* 3. *ca.* 6. a word may be amended in a writ, aſwell as a letter or a ſillable; for, the ſtatute ſpeakes but of a letter or a ſillable: and it was anſwered, that it may well be amended: for, there cannot be a word without a ſillable; and that it was a nice queſtion of ſo ſage men.

Thus *arbitria iudicum* and *reſponſa prudentum* haue beene receiued, allowed, and reuerenced in all times as poſitiue lawe; and ſo it muſt be ſtill; for, otherwiſe much miſchiefe and great inconuenience will enſue. For new caſes happen euery day: no lawe euer was, or euer can be made, that can prouide remedie for all future caſes, or comprehend all circumſtances of humane actions which iudges are to determine. Therefore, when ſuch happen, and complaint is made; what ſhall iudges doe? Shall they giue no remedie to the partie grieued? Shall they ſtay for a parliament? *Interim patitur iuſtus.* They muſt therefore follow *dictamen rationis*; and ſo giue ſpeedie iuſtice. And in many matters of materiall circumſtances they muſt guide themſelues by diſcretion.

Iudges to be directed by reaſon and diſcretion.

As in iudging vpon preſumptions; to diſcerne which be *præſumptiones temerariæ*, which *probabiles*, which *violentæ*.

So for time; what is a conuenient time, and what not.

So for waſte; what is waſte puniſhable, and what not.

So for tenders of money; what is a conuenient place for tender of mony, and what not: and what is a lawfull tender, and what not.

So for diſparagement; what is a diſparagement, and what not: and ſo of other the like caſes, which are infinite.

Obiect. That the common lawe is vncerten.

If it be ſaid (for ſo ſome haue ſaid) that if this be thus, then the common lawe of *England* is vncerten; and ſo the rule of iuſtice, by which the people are gouerned, is too pliable, and too weake, and vncerten.

Reſponſ.

By the ſame reaſon it may be ſaid, that all the lawes of all nations are vncerten: for, in the ciuile lawe, which is taken to be the moſt vniuerſall and generall lawe in the world, they hould the ſame rule and order in all caſes which be out of the direct words of the lawe; and ſuch caſes be infinite: for as I ſaide, new caſes ſpring euery day, as malice and fraude increaſeth. 'And ſince the *Roman* empire beganne, moſt of their lawes bee either *edicta principum*, or *arbitria iudicum*, or *reſponſa prudentum*. And in their iudgements they are guided by arreſts and former iudgements, as may appeare in the books of many that haue collected ſuch arreſts. And they attribute ſo much to ſuch former iudgements, that as *Pryſot* equalleth them to a poſitiue lawe, ſo they hould, that *ſententia facit ius, & res iudicata pro veritate accipitur, & legis interpretatio legis vim obtinet.*

Nay (which is more vncerten) ſometimes they relie vpon doctours opinions deliuered in their prelections and treatiſes. And when they finde them varying, and differing one from another (as ſometimes they doe) then they preferre that which is *communior opinio:* and ſo in good reaſon they may: for, *pluralitas idem ſentientium ſemper ſuperat*; *quia faciliùs inuenitur quod à pluribus quæritur.*

But to conclude this point, I would aſke of theſe noueliſts, what they would haue done in *Sibill Belknappes* caſe, if they had liued in *Henry* the fourths time?

M. 2 *H.* 4. 7.

Sir *Robert Belknappe*, that reuerend and learned iudge, of whom ſundrie noble and worthy perſons, and ſome now of great and eminent place in *England*, are deſcended, was baniſhed out of the realme, *(relegatus in Vaſconiam)* not for any deſert or offence of his, but by the might of his potent enemies, and malice of the time. The lady his wife continued in *England*; ſhe was wronged; ſhe brought a writ in her owne name alone, not naming her husband. Exception was taken againſt it, becauſe her husband was liuing; and it was adiudged good, and ſhee recouered; and the iudge *Markeham* ſaid;

Ecce modo mirum quòd fœmina fert breue regis,
Non nominando virum coniunctum robore legis.

Here was a rare and a new caſe, yet it was not deferred vntill a parliament: it was iudged, and her wrong was righted by the common law of *England*, and that *ex arbitrio iudicum, & ex reſponſis prudentum*; and yet it was counted *mirum* with an *ecce.*

Now to apply this to *R. Caluines* caſe. His caſe is rare and new: ſo was that. There is no direct law for him in preciſe and expreſſe tearmes; there was neuer iudgement before touching any borne in *Scotland*, ſince king *Iames* beganne his happie raigne in *England*; hee is the firſt that is brought in queſtion: ſo there was no direct lawe for *Sibill Belknap* to ſue in her owne name without her huſband, who was then liuing; nay rather there was direct lawe againſt it. Yet by the lawe of *England* ſhee had iudgement to recouer with an *ecce modo mirum:* ſo by the lawe of *England* iudgement ought to bee giuen for *Robert Caluine*, but not with an *ecce modo mirum*; but vpon ſtrong arguments deduced *à ſimilibus*, and *ex dictamine rationis.*

But before I come to thoſe arguments, I wil vſe a few words more touching ſome rules which I haue read for the interpretation of lawes.

Note foure formes of interpretation of lawes.

There is a graue and learned writer in the ciuile law that ſetteth downe foure waies and formes of interpretation of lawes: that is, firſt, *interpretatio hiſtorica*; ſecondly, *etymologica*; thirdly, *analogica*; fourthly, *practica.*

In the argument of this caſe all theſe formes haue beene vſed, and largely handled: and the two firſt be thoſe that ſeeme but light to me, and therefore in mine opinion haue beene too much ſtoode vpon, and ouerweighed.

Hiſtorica.

For the hiſtoricall interpretation, it is alwaies darke, obſcure, and vncerten, of what kingdome, countrey, or place ſoeuer you ſpeake; I doe alwaies and onely except the diuine hiſtories written in the Bible.

Liuy ſaith, *in tanta rerum vetuſtate multi temporis errores implicantur.*

Saint *Auguſtine* ſpeaking of the ſuppoſed bookes of *Henoch* ſaieth, *libri iſti ob nimiam antiquitatem reijciuntur.*

Wherefore, for this parte let this ſuffice, whether in the beginning there were one or ſeuerall kingdomes in *Great Britaine*; or one or ſeueral

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monarches and kings of theſe two great and famous kingdomes in *Great Britaine*. The king our ſoueraïgne is lawfully and lineally deſcended of the firſt great monarchs and kings of both the kingdomes; and that by ſo long a continued line of lawfull diſcent, as therein he exceedeth all the kings that the world now knoweth; and therefore to inquire further of hiſtoricall knowledge in this caſe, I hould it needeleſſe.

Etymologica.

For the etymologicall interpretation, there hath beene very much ſaied, euen as much as wit and art could deuiſe. There haue beene alleadged manie definitions, deſcriptions, diſtinctions, differences, diuiſions, ſubdiuiſions, alluſion of wordes, extenſion of wordes, conſtruction of wordes; and nothing left vnſearched to finde what is *ligeantia*, *allegiantia*, *fides*, *obedientia*, *ſubiectio*, *ſubditi*; and who bee *aborigines*, *indigenæ*, *alienigenæ*, *aduenticij*, *denizati*, *&c.* And much of this hath beene drawne out of ſome writers of the ciuile lawe; amongſt whome the etymologicall interpretation of the words *ligeus*, and *ligeantia*, is as vncerten and doubtfull, as it is with our common lawyers; and ſo vpon any of theſe there cannot be any certen rule found for iudges to iudge by, eſpecially in new and rare caſes.

As for definition, *Vlpian* teacheth vs, *omnis definitio in iure ciuili eſt periculoſa:* and it is ſaid, that *definitio eſt duplex: propria, quæ conſtat ex genere, & differentia: impropria, quæ & deſcriptio vocatur, & eſt quælibet rei deſignatio:* ſo definition and deſcription are often confounded, and both vncerten. Then, ſince both be vncerten and dangerous, I will leaue both, and ſeeke a more certen rule to iudge by.

As for etymologie of words, I agree with him which ſaieth, it is *leuis & fallax, & plerumque ridicula.* It is a pedant grammarians fault. *Marcus Varro* and others haue beene noted for it. And if you examine the examples which ſome doe bring, you will perceiue how ridiculous and vaine it is. So this rule will not ſerue to finde out that which wee ſeeke for. Theſe bee but *tendiculæ verborum, & aucupationes ſyllabarum*, as one calleth them: it may haue ſome vſe, and ſerue a turne in ſchooles, but it is too light for iudgements in lawe, and for the ſeates of iuſtice.

Aquinas ſetteth downe a more certen rule, *in vocibus videndum, non tàm à quo, quam ad quid ſumantur.* And words ſhould be taken *ſenſu currenti:* for vſe and cuſtome is the beſt expoſitor both of lawes and wordes, *quem penes arbitrium & ius & norma loquendi.*

Wherefore, of the many and diuerſe diſtinctions, diuiſions, and ſubdiuiſions, that haue beene made in this caſe, I will ſay no more but, *confuſum eſt quicquid in puluerem ſectum eſt:* and will conclude with biſhop *Juel*; *a man may wander and miſſe his way in miſts of diſtinctions.*

Ligeantia ſenſu currenti eſt vinculum fidei &c.

Then leauing theſe hiſtoricall and etymologicall interpretations, and theſe curious and ſubtile diſtinctions and diuiſions, I ſay, *ligeantia*, or *allegiantia*, vnderſtood *ſenſu currenti*, is *vinculum fidei & obedientiæ*, as iuſtice *Daniel* ſaid well. And hee that is borne in any of the kings dominions, and vnder the kings obedience, is the kings liege ſubiect, and borne *ad fidem regis* (for that is the proper and ancient word which the lawe of *England* hath vſed; *ad fidem regis* Angliæ, *ad fidem regis* Franciæ) and therefore hee cannot bee a ſtranger or *alien* to the king, or in any of his kingdomes; and by conſequence, is inhabled to haue lands in *England*, and to ſue, and be ſued in any reall action for the ſame.

And *ligeantia* hath ſometimes a more large extenſion: for, hee that is an *alien* borne out of the kings dominions, vnder the obedience of another king, if hee dwell in *England*, and be protected by the king and his lawes, hee oweth to the king the duetie of *allegeance*; and ſo hee is *ligatus regi*, and *ligeus regis:* and if hee commit treaſon, the indictment ſhall bee *contra ligeantiæ ſuæ debitum*, as it was in *Shirley* the *Frenchmans* caſe: yet is hee not the kings ſubiect: for, hee was not borne *ad fidem regis.* But, this is not that ligeance which wee muſt finde: for, in a true and lawfull ſubiect, there muſt bee *ſubiectio, fides, & obedientia*; and thoſe cannot bee ſeuered, no more than true faith and charitie in a true Chriſtian. And hee that hath theſe three *à natiuitate*, is *ligeus regis*, and cannot bee a ſtranger or *alien* to the king, or in his kingdomes. And that it is ſo, may be proued by the rule of the other two interpretations of lawe; that is, *analogica, & practica.*

Analogica.

King *Iames* hath now the kingdomes of *England*, *Scotland*, and *Ireland*, and the iſles of *Gernſey* and *Ierſey* by diſcent; all theſe bee his dominions, and vnder his ſubiection and obedience.

King *Henry* the ſecond had *England* and *Normandy* by diſcent from his mother *Mawd* the empreſſe; and *Aniow* and *Maine* by diſcent from his father *Geffery Plantagenet*; and *Ireland* by conqueſt.

Henry the third had *England* and *Ireland* by diſcent from his grandfather *Henry* the ſecond; and *Aquitany* by diſcent from his grand-mother queene *Elenor*, wife to king *Henry* the ſecond, and daughter to the duke of *Aquitany.*

Edward the firſt had all the ſame by diſcent; and parte of *Scotland* by conqueſt.

Edward the ſecond and *Edward* the third had all the ſame by diſcent alſo: and beſides, *Edward* the third claimed all *France* by diſcent from his mother queene *Iſabell*, and had the moſt part of it in poſſeſſion; and ſo had *Henry* the fift and *Henry* the ſixt alſo.

Now if in theſe kings times, ſubiectes borne in thoſe countries, being then vnder their obedience, were no aliens, but capable of landes in *England:* and if at this time ſubiects borne in *Ireland*, or *Gernſey* and *Ierſey*, be no aliens, but capable of lands in *England*; then, by an analogicall interpretation, why ſhould not ſubiectes borne in *Scotland* be at this time in like degree? For, in proportion, and in likeneſſe, and conueniencie, there can bee no difference at all.

Practica: & ſic ad ſimilia.

But whether the ſubiects borne in thoſe countries in the time of thoſe kings were then capable of lands in *England* as naturall ſubiects; or were deemed aliens, is the queſtion: and therein *interpretatio practica* is to bee conſidered; and ſo the caſe is brought to be examined *per ſimilia.* And in diuinitie *praxis ſanctorum eſt interpres præceptorum.*

Now then the queſtion is, whether the kings ſubiects of *England* and *Scotland*, that be *poſt-nati*, may be reſembled to the kings ſubiects of *Ireland*, and the iſles of *Gerneſey*, *&c.* as now they bee; and to the ſubiectes of *Normandie*, *Aniow*, and *Gaſcoyne*, and parte of *Scotland* in former times, when the ſame were the dominions, and vnder the obedience of the king of *England:* for I ſpeake alwaies, and would be vnderſtoode of kingdomes and dominions in poſſeſſion, and vnder obedience, and not of thoſe whereunto the king hath right, but hath no poſſeſſion or obedience. I houlde, that in all points materiall concerning this queſtion they are alike, though not in all things: (for, then it were *idem*, and not *ſimile:*) and this can not bee better vnderſtoode, than by examining the obiections to the contrary: which in ſubſtance may bee reduced to foure in number.

Ireland. Obiect. 1.

Firſt for *Ireland*, it was gotten by conqueſt, and the conquerour may impoſe what lawes hee will vpon them: but it is otherwiſe of kingdomes comming by diſcent.

Reſponſ.

This is a conceipted difference, and lacks the foundation of reaſon, and hath not the true parts of a difference: for thoſe that are borne in *Ireland*, and thoſe that are borne in *Scotland*, are all alike for their birth within the kings dominions, and are borne vnder the like ſubiection and obedience to the king, and haue the like bond; nay, euen the ſame bond of *allegiance*; that is, they are borne *ad fidem regis.*

Beſides, where it is ſaid, the conquerour may impoſe what lawes hee will: then conſider how it was in the *interim* before king *Iohn* gaue lawes to *Ireland.*

Nay, which is more, I aſke whether the conquerour of *Ireland* can giue new lawes to *England*, and make *Iriſhmen* to bee as naturall borne ſubiectes in *England* (if their birth-right doe not giue it them) which before the Conqueſt they were not? For, that is properly the queſtion. But if any difference bee, the caſe of deſcent is the ſtronger: for, (as iuſtice *Yeluerton* ſaide) that is by an vndoubted title made by lawe; the other by a doubtfull title wonne by the ſword.

France.

But leaue *Ireland* gotten by conqueſt; what ſay you to the great kingdome of *France*; which *Edward* the third had firſt in right by lawfull deſcent, and after in poſſeſſion by triumphant conqueſt; and which *Henry* the ſixt held after in poſſeſſion by deſcent? Was euer doubt made, whether the ſubiects borne there ſo long as it was in ſubiection and obedience to the king, were capable of landes in *England?*

I will now turne the caſe, and aſke another queſtion; if king *Iames* our ſoueraigne had firſt beene king of *England* by lawfull deſcent (as now hee is) and after *Scotland* had deſcended vnto him, ſhould not the ſubiects of *Scotland* (I ſpeake ſtill of *poſt-nati)* haue beene iudged as naturall ſubiects in *England*, as thoſe of *France* were in *Edward* the thirds time?

Then, he hauing now both kingdomes by lineall, true, and lawfull deſcent, it can make no difference touching the capacitie of ſubiects, which kingdome deſcended to him firſt, and which ſecond; but both are to him alike. And it is cleere, *poſt-nati* in *England* are now capable and inheritable in *Scotland*, though ſome haue made a cauſeleſſe and needeleſſe doubt of it: and ſo on the other ſide thoſe of *Scotland* are in *England.*

Normandy and Aquitany. Obiect. 2.

It is ſaid, *Normandie* and *Aquitanie* were no monarchies or kingdomes, but dukedomes or ſeigniories in *France*, and holden of the crowne of *France*, and therefore not to bee reſembled to *Scotland*, which is an ancient and abſolute kingdome.

Reſponſ.

This obiection reacheth not to the reaſon of our queſtion: for, bee they kingdomes, bee they ſeigniories, yet the ſubiectes borne there, were borne out of the kingdome of *England*, and ſo in that reſpect aliens: but in that they were borne within the kings dominions, and vnder his ſubiection and obedience, they were no aliens, but liege and naturall borne ſubiectes to the king; and ſo capable and inheritable in *England.*

I ſay beſides, the dukes of *Normandie* and *Aquitany* were abſolute princes, and had ſoueraigne power in thoſe countries, although they did not beare the name of kings; as at this time the duke of *Sauoy*; the duke of *Florence*; the duke and ſtate of *Venice*; and of late, the great duke of *Ruſſia*; the duke of *Burgundy*; the archduke of *Auſtria*, *&c.*

So the difference in ſtile and name makes no difference in ſoueraignty: for, king *Henry* the eight had as abſolute ſoueraigntie in *Ireland*, when his ſtile was lord of *Ireland*, as when hee changed his ſtile, and was called, *king of Ireland.*

And, to ſay, that the tenure of the crowne of *Fraunce* ſhould giue any priuiledge to them of *Normandie* and *Aquitanie* in *England* is a ſtrange conceipt; it might rather bee obiected againſt them. But, as I ſaied before, they were borne within the kings dominions, and vnder his obeiſance, and therefore as ſubiects borne in *England.*

And if men may beleeue ſome auncient ſtories, *Aquitany* and *Normandy* had ſometimes kings, and were kingdoms of themſelues: and not depending nor ſubiect to the crowne of *France:* and the kingdome of *France* was then a ſmall portion of *Gallia*, and but a little one, in compariſon of that which it is at this day. And ſome ſay, that there were foure and twentie kings in *Gaule:* but as the kings of *France* increaſed in power and ſtrength, they ſubdued their neighbor-princes, and ſo that kingdome grew to that greatneſſe that now it is at; euen as the *heptarchie* in *England* was diſſolued, and made an intire kingdome, when one of the kings mightier than the reſt ſubdued his neighbors.

The crowne and great ſeale of England. Obiect. 3.

It is ſaied further, that *Normandy* and *Aquitany* were ſubiects to the crowne of *England*; and to the great ſeale of *England*; but ſo is not *Scotland: ergo &c.*

Reſponſ.

This ſtandeth not wel with that which was obiected before; that they were but ſeigniories houlden of the crowne of *Fraunce.* And it is true, that before *Edward* the thirds time, thoſe kings of *England*, that held thoſe great ſeigniories, did acknowledge, that they held the ſame of the crowne of *Fraunce.*

But theſe obiections be light, and not worth the time that hath beene ſpent about them. The ſoueraignetie is in the perſon of the king; the crowne is but an enſigne of ſoueraignety; the inueſture and coronation are but ceremonies of honour, and maieſtie; the king is an abſolute and perfect king before he be crowned, and without thoſe ceremonies.

The ſeale is to be altered and changed at the will and pleaſure of the king: hee may haue one, he may haue many, as pleaſeth him. The king did vſe queene *Elizabeths* ſeale, for diuerſe moneths after his comming into *England*; queene *Elizabeth* vſed king *Philips* & queene *Maries* ſeale for a time; and queene *Marie* vſed king *Edwards* ſeale. And all that was ſo done, was well and lawfully done. Many things were done by auncient kings of *England* before the Conqueſt by their ſignature, and ſigne manuell without anie ſeale at all; and ſome ſuch ſince the Conqueſt alſo: as graunts made by *Maude* the empreſſe to *Albericke de Vere*, and others.

The king may by his great ſeale commaund all his ſubiectes that bee vnder his obedience, whereſoeuer they bee in the world: ſo he did in *Normandie*; ſo he did in *Aquitany*; ſo hee did in that part of *Scotland* that he had in poſſeſſion. And in 24 *Edw.* 1. his iudges kept ordinary courts of iuſtice there: and I haue ſeene the records of *placita exercitus regis apud* Edinburgh, *apud* Roxburgh, *apud S.* Iohns-towne, *&c. in* Scotia. So hee may commaund his ſubiects, if they be in *France*, *Spaine*, *Rome*, or *Turkie*, or the *Indies*. And for ſeuerall ſeales the earle of *Cheſter* had a ſpeciall ſeale for that his auncient county palatine. The duke of *Lancaſter* had a ſpeciall ſeale for his new countie palatine. And after, when theſe counties came to the kinges poſſeſſion, the kinges continued ſeuerall ſeales in them both for the adminiſtration of iuſtice; but as ſubordinate to the great ſeale of *England*.

And I make little doubt, but if the king ſhall now commaund any of his ſubiects of *Scotland* vnder his great ſeale of *England*, they will (as they ought) duetifully obey him. As in king *Edward* the 1. *Edward* the 2. and *Edward* the 3. times, they commanded many of the lordes of that parte of *Scotland* which then was vnder their obedience.

I finde, that in 13 *Edw.* 2. *quarto die* Iunij, the king *conſtituit* Adomarum de Valentia *comitem* Pembrochiæ *cuſtodem regni ſui*; *ac locum ſuum tenentem quamdiu rex in partibus tranſmarinis moram fecerit.* And the next day, *viz. die* louis *quinto die* Iunij, *rex ordinauit, quod magnum ſigillum ſuum remaneret clauſum in aliquo loco ſecuro, dum rex eſſet in partibus tranſmarinis: et ordinauit quoddam aliud paruum ſigillum interim pro regimine regni, ad breuia, &c. conſignanda, ſub teſte* Adomari de Valentia *comitis* Pembroch. *Nota*, heere was a petty ſeale *pro regimine regni*, wherein are compriſed commiſſions for iuſtice, *mandatoria, & ad breuia conſignanda*; which is for *remedialia*, as they are termed.

Seueral lawes. Obiect. 4.

It is ſaide, that *Scotland* hath lawes that are proper for that kingdome, and that they are not ſubiect to the lawes of *England*, and ſo *è contra.*

And laſtly it was ſaide, that in *England* euery perſon was within the iuriſdiction of ſome leete, and at the age of twelue yeares euery one is to bee ſworne in the leete to bee foiall and loiall to the king of *England*; that is, to the lawes of *England* (for ſo hee vnderſtoode loiall): but *poſt-nati* in *Scotland* can not be ſo; and that they haue an other forme of oathe in *Scotland: ergo, &c.*

Reſponſ.

For this laſt parte, of the oathe in the leete, the lord chiefe baron did cleere it ſo plainely, as more needes not to be ſaid. This is *legalis ligeantia*, it is not *alta ligeantia* by birth, which is that which we haue now in queſtion.

The hiſtoricall diſcourſe that hath bin made of leetes, of law-dayes, of *decenna*, *decennarij*, of the tenne-mens tale, and the oathe of all male children of twelue yeeres, *&c.* taken at the leete, is no newes indeede, it is very olde.

Lambard in explicatione verbi centuria.

Maſter *Lambard* hath it all, and more too, at large *in explicatione verborum* in the word *centuria*; it was before the Conqueſt.

But it maketh nothing to this naturall allegeance and ſubiection of birth; it is not *alta ligeantia* by birth-right; it is but *legalis ligeantia* by policie: and *Fitzherbert* calleth it *ſwearing to the lawe.*

And if that were the onely bond and marke of allegeance, many are out of it, and ſo at libertie. As, children vnder twelue yeeres; yet ſometimes they may commit treaſon and felony; where, *malitia ſupplet ætatem.* So women of all ſortes; yet they may bee ſhrewd and daungerous traitours; and if they bee women nobly borne, or widowes that were wiues to noble men, they ſhall be tried *per pares.*

Alſo noble men of all ſortes, who are neither bound to attend the leete, nor to take that oathe, as appeereth by *Britton cap.* 29. treating of the court called *the ſhirifes turne*, out of which the leete ſeemeth to be extracted: for, whatſoeuer is not preſented in the leete may be preſented and puniſhed in the *ſhirifs turne.* And M. *Kitchin* citeth *Britton* in this point for the leete; and alleadgeth alſo the ſtatute of *Marlebridge cap.* 10. to the ſame purpoſe.

And at this day the view of francke-pleges, and the putting in of francke-pleges, and the *decennarij*, are but bare names of things paſt, the vſe and ſubſtance is obſolete and gone.

And, as it was ſaide, few in this place haue put in ſuch pleges, or taken that oath, and yet I truſt wee are good ſubiects, and beare true faith and allegeance.

But this hath beene ſo fully anſwered and cleered by the lord chiefe baron, and the lord *Coke*, chiefe iuſtice of the *Common Pleas*, as I doe wrong to ſpend time in it.

But touching the ſeuerall lawes; I ſay, that ſeuerall lawes can make no difference in matter of ſoueraigntie; and in the bond of allegeance and obedience to one king: and ſo it concludeth nothing for the point in queſtion.

Normandy and *Aquitany* had ſeuerall lawes differing from the lawes of *England*: ſo had *Fraunce* in king *Edward* the 3. and *Henry* the 6. his time.

Ireland, before king *Iohns* time, continued their auncient lawes, and ſo, for the moſt part, haue done euer ſince.

Gerneſey and *Ierſey* haue yet at this day ſeuerall lawes, which, for the moſt part, were the auncient lawes and cuſtomes of *Normandie.*

Wales had, and in many things yet haue ſeuerall lawes: ſo for the county palatine of *Cheſter* alſo.

Yet theſe neuer were, nor muſt not be cantelled and cut off from their allegeance and obedience to the king; nor the kings ſubiects borne there be incapable of lands and inheritaunce in *England*: for where there is but one ſoueraigne, all his ſubiects borne in all his dominions bee borne *ad fidem regis*; and are bound to him by one bond of faith and allegeance: and in that, one is not greater nor leſſer than an other: nor one to bee preferred before another: but all to bee obedient alike; and to be ruled alike; yet under ſeuerall lawes and cuſtomes. And as Saint *Gregorie* ſayeth of the church, *in una fide nihil officit eccleſiæ ſanctæ diuerſa conſuetudo.* So I will conclude for this point, that diuerſitie of lawes and cuſtomes makes no breach of that vnitie of obedience, faith, and allegeance which all liege ſubiects owe to their liege king and ſoueraigne lord. And as none of them can be aliens to the king, ſo none of them can bee aliens or ſtrangers in any of his kingdomes or dominions; nor aliens or ſtrangers one to another, no more than a *Kentiſh-man* to a *Cheſhire-man*; or *è contra.*

And therefore all, that haue bin borne in any of the kinges dominions ſince hee was king of *England*, are capable and inheritable in all his dominions without exception.

Defect of triall.

And as to the other parte of the obiection, that there will be defect of triall; for, things done in *Scotland*, cannot bee tried in *England*; I ſay, that that maketh little to our preſent queſtion, whether *poſt-nati* in *Scotland* be aliens in *England*, and not capable of landes in *England*: but it trencheth to caſt ſome aſperſion vpon the common lawe of *England*; that it is not ſufficient to giue iuſtice to the kinges ſubiectes for lacke of ſufficient meanes of triall of queſtions of fact But to this baron *Altham* gaue ſo full an aunſweare, as more cannot bee ſaied: and ſo hee did both cleare the doubt, and did vphould the ſufficiencie of the lawe of *England* in that behalfe. And it ſeemeth ſtrange, that this ſhould now bee found out to bee obiected againſt *Scotland*, ſince it was neuer heeretofore obiected for *France*, *Normandie*, *Aquitany*, nor is at this day for *Ireland*, *Gerneſey*, and *Ierſey*, *&c.* whereas all ſtand vpon the ſame reaſon for the point of triall. But the wiſedome of the lawe of *England* hath beene ſuch, as there neuer failed certen rules for triall of all queſtions in fact; and thoſe were fitted and adapted to the matter which was to bee tried. And therefore, whoſoeuer doth diligently obſerue it, hee ſhall finde in the courſe and practiſe of the lawes of *England* aboue twenty ſeuerall formes of trialls: as by battell; by iurie, and that in diuerſe kindes; by wager of lawe; by proofes; by examination; by inſpection; by certificates of diuerſe kindes; and by manie other wayes: and leſt there ſhould bee any defect in that behalfe, the law hath prouided ſeuerall formes of *ioyning of iſſues*; and in that, hath ſpeciall regard of things done out of the realme, as euerie ſtudent may ſee in the bookes of reports.

Thus I haue paſſed theſe foure obiections, and therefore for this part I conclude, that if *argumentum à ſimili* were euer good and concludent in lawe, my lords the iudges haue prooued this caſe by ſo many plaine and direct examples, and like caſes, and by ſo manie ſtrong arguments and ſolide reaſons drawne out of booke caſes, out of ſtatutes, out of the true rules and forme of pleading, and out of ancient records and precedents, ſome produced by M. Atturney, and many moe remembred by the iudges, as no one thing can bee more plainely exemplified, nor appeare more like to an other, than this caſe is to thoſe caſes which they haue remembred.

Recurrend. ad rationem.

But if examples and arguments *à ſimili* doe faile, then it remaineth *recurrere ad rationem*; and what reaſon that ought to bee, and how to bee vnderſtoode, is to be conſidered: for, it is ſaid, that *lex eſt ratio ſumma, iubens ea quæ facienda ſunt, & prohibens contraria.* So it muſt be the depth of reaſon, not the light and ſhallow diſtempered reaſons of common diſcourſers walking in *Powles*, or at ordinaries, in their feaſting and drinking, drowned with drincke, or blowne away with a whiffe of tobacco. *Lucretius* noteth, that in many there is *rationis egeſtas*: and Saint *Gregory* ſaith, *qui in factis Dei rationem non videt, infirmitatem ſuam conſiderans cùr non videat, rationem videt*: for, although reaſon and knowledge bee infinite, yet no man can haue more of it than hee is capable of: euery man muſt receiue it, and keepe it in his owne veſſell; he cannot borrow his neighbours braine-pan to put it in. And therefore it is not without cauſe, that one of the graueſt and beſt learned lawyers of our age, and a priuie counſellor to one of the greateſt monarches of *Europe*, deſcribeth thoſe that ſhould bee interpreters of lawes by foure ſpeciall qualities, that is, 1. *Ætate graues*, 2. *Eruditione præſtantes*, 3. *Vſu rerum prudentes*, 4. *Publica authoritate conſtituti*: ſo, there muſt be grauitie, there muſt be learning, there muſt be experience, and there muſt be authoritie: and if any one of theſe want, they are not to be allowed to be interpreters of the lawe.

Hopperus *de vera iuris prudentia pag.* 118.

How all theſe qualities concurre in theſe reuerend iudges, whom wee haue heard in this preſent caſe, I will ſpare to ſpeake what I thinke: for, *Chryſoſtome* teacheth mee, *qui laudatur in facie, flagellatur in corde.*

Hopperus *ibid. page* 119.

In ſeeking out this depth of reaſon, the ſame author giueth a caution, which is this; *vitium quod in hoc genere fugi debet eſt, ne, ſi rationem non inuenias, mox legem ſine ratione eſſe clames.* And in 36 *H.* 6. *Forteſcue* ſaieth the ſame in effect, which is thus; *we haue many courſes and formes which bee houlden for lawe, and haue beene houlden and vſed becauſe of reaſon*; *and notwithſtanding the reaſon be not ready in memory, yet by ſtudy and labour a man may finde it.*

Now when wee come to examine by reaſon, whether *poſt-nati* in *Scotland* ſhall be diſabled as aliens, or ſhall be capable of lands in *England*, as naturall borne ſubiects there; wee are firſt to conſider what is the reaſon whie aliens in the dominions, and vnder the obedience of other forraine princes, are not capable of landes in *England*. And ſurely, the true reaſon is, that which was noted by baron *Altham*; and hath ſince beene ofte remembred, *viz.* the danger that might thereby come to the king and the common-weale: ſpecially by drawing hither too great multitudes of them: for ſo the treaſure of the realme might bee tranſported by them into other forraine kingdomes and countries; whereby it might bee vſed againſt the king, and to the preiudice of the ſtate: and beſides, they might vnder-hand practiſe ſedition and rebellion in the kingdome, and cauſe many other daungers and inconueniences. But that reaſon cannot ſerue againſt *poſt-nati* in *Scotland*, now that there is but one king of both the kingdomes, no more than it can ſerue againſt thoſe that are borne in *Ireland*, or *Gerneſey*, or *Ierſey:* and therefore in reaſon they are as capable of landes in *England*, as the kings ſubiects of *Ireland*, and *Gerneſey*, and *Ierſey* are.

Obiections.

Againſt this, there haue alſo beene many obiections made, and reaſons deuiſed, that ſeeme witty, and haue ſome ſhew of probability to proue, that *poſt-nati* in *Scotland* are aliens, and ought not in reaſon to bee capable of landes in *England*, *videlicet*.

1. That *England* and *Scotland* were two ancient ſeuerall kingdomes vnder ſeuerall kings, and ſeuerall crownes.

2. That they continue yet ſeuerall kingdomes.

3. That they haue yet ſeuerall lawes, ſeuerall ſeales, ſeuerall crownes, and ſeuerall kings: for, it is ſaid, though king *Iames* be king of both, and hath but one naturall body, yet in iudgement of law, he is in reſpect of his two ſeuerall kingdomes, as two ſeuerall kings, and the ſubiects of each ſeuerall kingdome are bound to him by diſtinct allegeance, according to the ſeuerall lawes of the kingdome where they were borne.

And all this is grounded vpon this rule or fiction in lawe: *quando duo iura concurrunt in vna perſona, æquum eſt ac ſi eſſent in diuerſis.*

And vpon this ground is this new form of pleading deuiſed, which the defendants haue vſed in this caſe, ſuch as cannot be found in any record, euer to haue beene pleaded before; and may as well ſerue againſt the kinges ſubiectes of *Ireland*, as againſt the *poſt-nati* of *Scotland*. And ſithence in former times the like forme of pleading was neuer ſeene againſt any of the kings of *Englandes* ſubiects, which were borne in any of his dominions out of *England*, as in *Normandie* or *Aquitanie*, or in *France* (I meane ſuch part of it as was in the kinges poſſeſſion, and in ſubiection and obedience to him, and not in that parte of *France* which his enemies helde) it may be probably inferred, that it was then generally houlden, that neither ſuch a forme of pleading, nor the matter it ſelfe was ſufficient in lawe to diſable anie ſuch plaintiſe: for, againſt *French-men* that were not vnder the kings obedience wee finde it often pleaded. And as thoſe that were not ſubiects to the king, nor borne vnder his obedience, did then preſume to bring ſuites and actions in *England*; ſo it can not bee thought, but that the king hauing then ſo large and ample dominions beyond the ſeas, as *Normandy* and *Aquitany*, and many other partes of *France*, ſome of his ſubiects borne there, had cauſe to haue, and did bring the like ſuites in *England.* And ſithence no ſuch plea is found to haue beene then vſed againſt them, it can not in lawe and reaſon bee now allowed againſt the *poſt-nati* in *Scotland:* for, I may ſay as *Aſcue* ſaied in 37 *H.* 6. *Our predeceſſors were as ſage and learned as we be.*

P. 23 Elizab. Dyer 376.

And I ſee not, but that in this caſe a good argument may bee reaſonably deduced from the negatiue, as it was in the caſe reported by the great learned, and moſt graue and reuerend iudge ſir *Iames Dyer*, chiefe iuſtice of the *Common Pleas*, *anno* 23 *Elizab.* The queſtion there, was, whether an erroneous iudgement giuen in *Rie*, which is a member of the cinque-portes, might bee reuerſed in the *Kinges Bench*, or *Common Place* at *Weſtminſter*; and it was thus reſolued; *ſed pro eo quod nullum tale breue in* Regiſtro, *nec in aliquibus præcedentibus curiarum prædictarum inueniri potuerat, dominus cancellarius* Bromley *per opinionem capitalium iuſticiariorum vtriuſque banci denegauit tale breue concedere.* And ſo iuſtice *Fenners* argument houldeth well, *viz.* there is in this caſe no lawe to exclude the complainant, *ergo* hee is a liege and a naturall borne ſubiect.

But the forme of pleading in the time of king *Ed.* 1. in *Cobledickes* caſe, which was cited out of *Hengham*, (and the booke ſhewed heere by the lord chiefe iuſtice *Coke)* is ſo direct and plaine for this our queſtion, as nothing can be more plaine: and therefore I thinke it not amiſſe to report it againe.

That caſe was in effect and ſubſtaunce, thus:

A woman brought a writte of *ayel* againſt *Roger Cobledicke*, and declared of the ſeiſin of *Roger* her grand-father, and conueied the diſcent to *Gilbert* her father; and from him to the demaundant, as his daughter and heire. The tenant pleaded, that the demaundant was a *French-woman*, and not of the ligeance nor of the fidelitie of *England*; and demaunded iudgement if ſhee ought to haue the action againſt him. This plea was houlden to bee inſufficient; and thereupon the tenant amended his plea, and pleaded further, that the demaundant was not of the ligeance of *England*, nor of the fidelitie of the king; and demaunded iudgement, &c. And againſt that plea none exception was taken, but thereupon the demaundant prayed licence to depart from her writ. By this it appeareth plainely, that the firſt plea, alleadging that ſhe was a *French-woman*, and not of the ligeance, nor of the fidelitie of *England*, was inſufficient (and ſo declared by *Berreford* the chiefe iuſtice); for, there can bee no fidelitie nor allegeance due to *England*, reſpecting the land and ſoile without a ſoueraigne and king. But the ſecond plea alledging, that ſhee was not of the ligeance of *England*, nor of the fidelitie of the king, was good and ſufficient: for, to the king fidelitie and allegeance is due; and therefore, ſince ſhee failed in that, ſhe was not to be anſwered: and thereupon ſhe praied licence to departe from her writte, and ſo ſhe left her ſuite.

Stat. 14 *E.* 3. That the realme of *England* ſhall not be ſubiect to *France.*

Now, for the reaſons which haue beene drawne and ſtrained out of the ſtatute *an.* 14 *Edw.* 3. if they bee well examined, they ſerue little for this point which we haue in hand.

It is to be conſidered, at what time, and vpon what occaſion that ſtatute was made. King *Edward* the third being right heire to the crowne and kingdome of *Fraunce* by deſcent from his mother, and hauing ſpent many yeeres for the recouering of the ſame, reſolued to take vpon him the name and ſtile of *king of France*; being aduiſed thereunto by them of *Flaunders*. Hereupon he did take the ſtile of *king of Fraunce*; and altered his ſeale and his armes; and after a while, placed the armes of *France* before the ancient armes of *England*, as they are borne at this day. This gaue occaſion for the making of this ſtatute: for ſome people *(aſcun gentes*, ſaith the ſtatute) ſeeing this change, and conſidering the large and ample extent, and the magnificence of that great kingdome, beganne to doubt that the king would make his imperiall ſeate there; and conceiued thereby, that the kingdome of *England*, being the leſſer, ſhould bee in ſubiection of the king and kingdome of *France*, being the greater, and to bee gouerned and ruled by a vice-roy, or deputy, as they ſaw *Ireland* was. And though in the kings ſtile, *England* was placed before *France*, yet they ſawe the armes of *France* marſhalled before the armes of *England*; though at the firſt bearing thereof ſome ſay it was not ſo.

To cleere this doubt, and to take away this feare from the ſubiects of *England*, was this ſtatute made, as doth plainely appeare by the wordes of the ſtatute it ſelfe.

Now if you will make an apt and proper application of that caſe then betweene *England* and *Fraunce*, to this our caſe now, betweene *Scotland* and *England*, it muſt be thus:

1. *Edw.* 3. then king of *England* (being the leſſer) had afterwardes the kingdome of *France* (being the greater) by deſcent, and tooke the ſtile of *king of France.*

King *Iames* king of *Scotland* (beeing the leſſer) hath afterward the kingdome of *England* (being the greater) by deſcent, and taketh the ſtile of *king of England.*

2. King *Ed.* 3. altered his ſeale, and his armes, and placed the armes of *Fraunce* before the armes of *England.*

King *Iames* hath changed his ſeale, and his armes in *England*, and hath placed the armes of *England* before the armes of *Scotland.*

3. It was then doubted, that king *Edw.* 3. would remoue his court out of *England*, the leſſer, and keepe his imperiall ſeate and ſtate in *France*, the greater.

King *Iames* hath indeede remooued his court out of *Scotland*, the leſſer, and doth in his royall perſon (with the queene and prince, and all his children) keepe his imperiall ſeate in *England*, the greater.

4. In al theſe the caſes agree; but yet one difference there is, and that is in the ſtile: for king *Ed.* 3. in his ſtile placed *England*, the leſſer, being his ancient kingdome, before *France*, the greater, being newly deſcended vnto him.

But king *Iames* in his ſtile placeth *England*, the greater, though newly deſcended vnto him, before *Scotland*, the leſſer, being his ancient kingdome.

5. Now, this being thus; perhappes *Scotland* might out of this example haue conceiued the like doubt againſt *England*, as *England* did then againſt *France:* but as there was then no doubt made, whether the kings ſubiects borne in *England* ſhould be capable of lands in *France*; ſo, out of this ſtatute, and vpon this example no doubt can bee inferred, whether the kings ſubiects now borne in *Scotland*, ſhall be capable of lands in *England.*

But, all theſe obiections, and the ground whereupon they are framed, *viz. quando duo iura &c.* haue beene ſo thorowly and profoundly examined, and ſo learnedly and fully anſwered and cleered by the iudges, as I make no doubt but all wiſe and indifferent hearers be well ſatisfied therein.

And if there bee any ſo poſſeſſed with a preiudicate opinion againſt trueth, and reaſon, that will ſay in their owne heartes, *licèt perſuaſeris non perſuadebis*; and ſo, either ſerpent-like ſtop their eares, or elſe wilfully abſent themſelues, becauſe they would not heare the weakneſſe and abſurdities of their owne conceipts laied open and confuted: if there bee any ſuch I ſay (as I truſt there bee but few, and yet I feare there bee ſome) I would they had learned of *Tertullian*, that *veritas docendo ſuadet, non ſuadendo docet.* And I wiſh that they bee not found among the number of thoſe to whome Saint *Paul* ſaieth, *ſi quis ignorat, ignoret:* and Saint *Iohn* in the Apocalips, *qui ſordidus eſt, ſordeſcat adhuc.* And I will exhort with Saint *Paul: qui tenet, teneat*, and not wauer or doubt by ſuch weake arguments and obiections.

A dangerous diſtinction betweene the king and the crowne.

But in this new learning, there is one part of it ſo ſtrange, and of ſo daungerous conſequent, as I may not let it paſſe, *viz.* that the king is as a king diuided in himſelfe; and ſo as two kings of two ſeuerall kingdomes; and that there be ſeuerall allegeances, and ſeuerall ſubiections due vnto him reſpectiuely in regarde of his ſeuerall kingdomes, the one not participating with the other.

This is a daungerous diſtinction betweene the king and the crowne, and betweene the king and the kingdome: it reacheth too farre; I wiſh euery good ſubiect to beware of it. It was neuer taught, but either by traitours, as in *Spencers* bill in *Edward* the ſeconds time (which baron *Snig*, and the lord chiefe baron, and lord *Coke* remembred) or by treaſonable papiſts, as *Harding* in his confutation of the apologie maintaineth, that kings haue their authority by the poſitiue lawe of nations, and haue no more power, than the people hath, of whome they take their temporall iuriſdiction; and ſo *Ficlerus Simanca*, and others of that crew. Or by ſeditious ſectaries and puritans, as *Buchannan de iure regni apud* Scotos, *Penry*, *Knox*, and ſuch like. For, by theſe, and thoſe that are their followers, and of their faction, there is in their pamphlets too much ſuch traiterous ſeede ſowne.

Abſurdities in this dangerous diſtinction.

But leauing this, I will adde a little more, to prooue, that in reaſon *Robert Caluine*, and other like *poſt-nati* in *Scotland*, ought by lawe to be capable of landes in *England:* and for that, I wil remember one rule more which is certen and faileth not, and ought to bee obſerued in all interpretation of lawes; and that is, *ne quid abſurdum, ne quid illuſorium admittatur.*

But, vpon this ſubtile and dangerous diſtinction of faith and allegeance due to the king, and of faith and allegeance due to the crowne, and to the kingdome (which is the onely baſis and fundamentall maine reaſon to diſable the plaintiſe, and all *poſt-nati)* there follow too many groſſe, and fowle abſurdities, whereof I will touch ſome few, and ſo conclude, that in lawe and reaſon this ſubtile, but abſurd and dangerous diſtinction, ought not to be allowed.

This bond of allegeance, whereof wee diſpute, is *vinculum fidei*; it bindeth the ſoule and conſcience of euery ſubiect ſeuerally and reſpectiuely, to be faithfull and obedient to the king: and as a ſoule or conſcience cannot bee framed by policie; ſo faith and allegeance cannot bee framed by policie, nor put into a politike bodie. An oath muſt be ſworne by a naturall bodie; homage and fealtie muſt be done by a naturall bodie, a politike body cannot doe it.

Now then, ſince there is but one king, and ſoueraigne, to whome this faith and allegeance is due by all his ſubiects of *England* and *Scotland*, can any humane policie diuide this one king, and make him two kings? Can *cor regis* Angliæ be *in manu Domini*, and *cor regis* Scotiæ not ſo? Can there bee warres betweene the king of *England* and the king of *Scotland*, or betweene the kingdome of *England* and the kingdome of *Scotland*, ſo long as there is but one king? Can the king of *England* now ſend an army roial into *Scotland* againſt the king of *Scotland?* Can there bee any letters of marke or repriſall now graunted by the king of *England*, againſt the ſubiects of the king of *Scotland?* Can there bee any protections now, *quia profecturus in exercitu* Iacobi *regis* Angliæ *in* Scotiam? Nay ſhortly, can any man bee a true ſubiect to king *Iames* as king of *England*, and a traitor or rebell to king *Iames* as king of *Scotland?* Shall a foote breadth, or an inch breadth of ground, make a difference of birth-right of ſubiects borne vnder one king; nay, where there are not any certen bounds or limites knowne at all, but an imaginarie partition wall, by a conceipted fiction in lawe? It is enough to propound theſe and ſuch like queſtions, whereof many more might be remembred: they carry a ſufficient and plaine anſweare in themſelues: *magis docet qui prudentèr interrogat.*

As the king nor his heart cannot bee diuided, for hee is one entire king ouer all his ſubiectes, in which ſoeuer of his kingdomes or dominions they were borne, ſo hee muſt not bee ſerued nor obeyed by halues; he muſt haue intire and perfect obedience of his ſubiects: for, *ligientia* (as baron *Heron* ſaied well) muſt haue foure qualities; it muſt bee 1. *pura & ſimplex:* 2. *integra & ſolida:* 3. *vniuerſalis non localis:* 4. *permanens, continua, & illæſa.* Diuide a man's heart, and you loſe both parts of it, and make no heart at all; ſo hee that is not an intire ſubiect, but halfe faced, is no ſubiect at all; and hee, that is borne an intire and perfect ſubiect, ought by reaſon and lawe to haue all the freedomes, priuiledges, and benefites pertaining to his birth-right in all the kinges dominions; and ſuch are all the *poſt-nati* in *England* and *Scotland.* And the inconuenience of this imaginary locall allegeance hath beene ſo lately, and ſo fully declared by the lorde chiefe iuſtice *Coke*, as more needes not bee ſaied in it.

In ſome ſpeciall caſes there ſometime may bee a king of ſubiects without land in poſſeſſion, as iuſtice *Fenner* noted in the gouernement which *Moſes* had ouer the people of *Iſrael* in the wilderneſſe; and as in the caſe which ſir *Iohn Popham* the late lord chiefe iuſtice did put in the parliament. If a king and his ſubiects bee driuen out of his kingdome by his enemies, yet notwithſtanding hee continueth ſtill king ouer thoſe ſubiects, and they are ſtill bound vnto him by their bond of allegeance, whereſoeuer he and they bee. But there can not bee a king of land without ſubiects: for, that were but *imperium in belluas*, and, *rex & ſubditi ſunt relatiua.*

Rex ſolus iudicat, &c. I ſaied there was an other generall rule for expounding of lawes, which I reſerued to bee laſt ſpoken of. I will now but touch it; for, I will not ſtand to examine by humane reaſons, whether kings were before lawes, or lawes before kinges; nor how kings were firſt ordained; nor whether the kings or the people did firſt make lawes; nor the ſeuerall conſtitutions and frames of ſtates and common-weales; nor what *Plato* or *Ariſtotle* haue written of this argument. They were men of ſinguler learning and wiſedome; but wee muſt conſider the time, and the countrie, in which they liued, and in all their great learning they lacked the true learning of the knowledge of God. They were borne and liued in *Greece*, and in popular ſtates: they were enemies, or at leaſt miſlikers of all monarchies; yet one of them diſdained not to bee a ſeruant or mercenarie hireling to a monarch. They accompted all the world barbarous, but their owne countrey of *Greece:* their opinions therefore are no canons to giue lawes to kinges and kingdomes, no more than ſir *Thomas Moores Vtopia*, or ſuch pamphlets as wee haue at euerie marte.

Prou. c. 8. I beleeue him that ſaieth, *per me reges regnant, & principes iuſta decernunt*; and I make no doubt, but that as God ordained kings, and hath giuen lawes to kings themſelues, ſo hee hath authorized and giuen power to kings to giue lawes to their ſubiects; and ſo kings did firſt make lawes, and then ruled by their lawes, and altered and changed their lawes from time to time, as they ſawe occaſion, for the good of themſelues, and their ſubiects.

And this power they haue from God Almighty; for, as Saint *Auguſtine* ſaieth, *in hoc reges Deo ſeruiunt ſicut eis diuinitùs præcipitur, in quantum ſunt reges, ſi in ſuo regno bona iubeant, mala prohibeant, non ſolum quæ pertinent ad humanam ſocietatem, verumetiam quæ ad diuinam religionem.*

And I hould *Thomas Aquinas* his opinion to be good, *rex ſolutus à legibus quòad vim coactiuam, ſubditus eſt legibus quòad vim directiuam propria voluntate.* And for this opinion there is a ſtronger authoritie, euen from God himſelfe in *Eccleſiaſtes, c. 8. ver. 2. ego os regis obſeruo; et præcepta iuramenti Dei:* and *ver. 4. ſermo illius poteſtate plenus eſt: nec dicere ei quiſquam poteſt, quare ita facias?*

Now beeing led a little from the common lawe to the ciuile lawe, I finde in the ciuile lawe a direct text, warranting that generall rule which I reſerued to this place, which is this; *inter æquitatem iuſque interpoſitam interpretationem nobis ſolis & licet & oportet inſpicere.* Cod. 1. *li. tit.* 14. *le.* 1.

Ibidem *le.* 12. And another like text in theſe words, *ſententia principis ius dubium declarans, ius facit quòad omnes.* And ſome graue and notable writers in the ciuile lawe ſay, *rex eſt lex animata:* ſome ſay, *rex eſt lex loquens:* ſome others ſay, *interpretantur legem conſuetudo & princeps:* another ſaieth, *rex ſolus iudicat de cauſa à iure non definita.*

And as I may not forget Saint *Auguſtines* words, which are theſe; *generale pactum eſt ſocietatis humanæ regibus ſuis obtemperare:* ſo I may not wrong the iudges of the common lawe of *England* ſo much as to ſuffer an imputation to bee caſt vpon them, that they, or the common lawe doe not attribute as great power and authoritie to their ſoueraignes the kinges of *England*, as the *Romane* lawes did to their emperours: *(a)* for, *Bracton*, the chiefe iuſtice in the time of king *Henry* the third, hath theſe direct wordes, *de chartis regijs & factis regum, non debent, nec poſſunt iuſticiarij nec priuatæ perſonæ diſputare. Nec etiam, ſi in illa dubitatio oriatur, poſſunt eam interpretari. Et in dubijs & obſcuris, vel ſi aliqua dictio duos contineat intellectus, domini regis erit expectanda interpretatio & voluntas; cum eius ſit interpretari cuius eſt condere.* And *Britton* in the time of king *Ed.* 1. writeth as much in effect.

So as now if this queſtion ſeem difficult, that neither direct law, nor examples and precedents, nor application of like caſes, nor diſcourſe of reaſon, nor the graue opinion of the learned and reuerend iudges, can reſolue it, here is a true and certen rule, how both by the ciuile lawe, and the ancient common lawe of *England* it may and ought to be decided: that is, by ſentence of the moſt religious, learned, and iudicious king that euer this kingdome or iſland had.

But this caſe is ſo cleare as this needeth not at all.

And in this I would not be miſ-vnderſtoode, as though I ſpake of making of new lawes, or of altering the lawes now ſtanding; I meane not ſo, but I ſpeake only of interpretation of the lawe in new queſtions and doubts, as now in this preſent caſe: neither doe I meane hereby to derogate any thing from the high court of parliament; (farre be it from my thought) it is the great councell of the kingdome, wherein euery ſubiect hath intereſt. And to ſpeake of the conſtitution or forme of it, or how, or when it was firſt begunne, is for buſie queſtioniſts; it ought to bee obeyed and reuerenced, but not diſputed; and it is at this time impertinent to this queſtion.

But certen it is, it hath beene the wiſedome of the kinges of this realme to reſerue in themſelues that ſupreame power to call their nobles, clergie, and commons together, when they ſawe great and vrgent cauſes; and by that great councell to make edicts and ſtatutes for the weale of their people, and ſafetie of the kingdome and ſtate, as in *anno* 10 *Edw.* 3. the aſſembly at *Nottingham* for the great wars in *France:* and in *anno* 20 *H.* 3. *Prouiſiones* Merton, which I remembred before.

Obiect. of inconueniencie and frugalitie. There haue beene made ſome obiections of inconueniencie, as for bearing of ſcot and lot, and ſuch other charges; and ſome out of frugalitie, that the king ſhall loſe his profit of making denizens, and ſuch like. Theſe are ſo light as I leaue them to the winde; they are neither fit for parliament, nor councell, nor court.

Obiect. vpon diffidence. Another argument and reaſon againſt the *poſt-nati* hath beene lately made out of diffidence and miſtruſt, that they will come into *England ſans* number, and ſo as it were to ſurcharge our common; and that this may be in *ſecula ſeculorum.* I know not well what this meanes. The nation is ancient, noble, and famous; they haue many honourable and woorthie noblemen and gentlemen, and many wiſe and worthie men of all degrees and qualities; they haue lands and faire poſſeſſions in *Scotland.* Is it therefore to bee ſuppoſed, or can it in reaſon bee imagined, that ſuch multitude *ſans* number will leaue their natiue ſoile, and all tranſport themſelues hither? Hath the *Iriſh* done ſo, or thoſe of *Wales*, or of the iſles of *Man, Gerneſey*, and *Ierſey?* Whie ſhould we then ſuſpect it now more for *Scotland?*

Nay, doe you ſuppoſe that the kinge of *England* will euer ſuffer ſo great a parte of his dominions, and ſo great and famous a kingdome as *Scotland* is to be diſpeopled? It is a doubt imagined without any foundation or ground of reaſon. But if it were to bee doubted, the twelue iudges that haue concurred in opinion, and that late worthy iudge *Popham*, had as great cauſe to feare it as any others. They are wiſe; they are learned; they haue faire poſſeſſions and good eſtates; they haue poſteritie to care for as others haue.

Yet, admit it bee a matter worth the doubting of, what is that to the young *poſt-nati* that are not like in many yeares to come hither in ſuch number? Shall we vpon this cauſleſſe feare depriue them of their lawfull birth-right?

Haue wee ſeene in theſe fiue yeeres paſt anie more of them than this one alone that haue gotten any lands in *England?* And this little that he hath is ſo ſmall and poore a portion, that his purchaſe is not great, and therefore no iuſt cauſe of offence to any.

Ante nati. Nay, if you looke vpon the *ante-nati*, you ſhall find no ſuch confluence hither, but ſome few (and very few in reſpect of that great and populous kingdome) that haue done long and worthie ſeruice to his maieſtie, haue, and ſtill doe attend him, which I truſt no man miſlikes: for, there can bee none ſo ſimple, or childiſh (if they haue but common ſenſe) as to thinke that his maieſty ſhould haue come hither alone amongſt vs, and haue left behinde him in *Scotland*, and as it were caſte off, all his ould and worthie ſeruants.

And if theſe noble and worthie gentlemen of *Scotland*, I meane the *ante-nati* be louingly and brotherly entertained amongſt vs, with mutuall loue and beneuolence, that ſo we may *coaleſcere*, and be vnited together, by marriage, and otherwiſe (as in ſome particular caſes wee ſee it already happily begunne) no doubt God will bleſſe this vnion of both theſe nations, and make them, and the king, and *Great Britaine* to be famous through the world; and feared and redoubted of our enemies, and of all that wiſh vs ill: for, *vis vnita fortior, & concordia multos facit vnum.* But what may follow vpon ſuch arguments of diffidence and ſuſpition, which ſeeme but to hinder vnion, and to breede diſcord and diſſention I will not ſpeake. Let euery wiſe man conſider it well: for, *humana conſilia caſtigantur vbi cæleſtibus ſe præferunt.* And remember Saint *Paules* caution, *ſi inuicem mordetis, videte ne ab inuicem conſumamini.*

And for the reſemblance that hath bin made of this caſe of *poſt-nati* (but indeed for the vnion of both kingdomes) with the houſwifes cutting of her cloth by a threede, I will ſay but this, that if ſhee cut her peece of cloth in length aſwell as in breadth, all the threeds will bee cutte, and the cloth marred. And this cutting in this our caſe, is, to cutte all aſwell in length as in breadth, euen through all the kinges dominions; and ſo will rent aſunder the whole frame of the vnion, and cut in peeces all the threeds of allegeance.

(a) This language is ſurely very unguarded. Editor.

A queſtion, how long this ſuſpition and diſ-vnion ſhall continue ?

But now I wil aſke this queſtion: how long ſhall this ſuſpition and doubt continue ? Shall there bee a diſ-vnion for euer ? If it bee ſaied, no, but vntill the lawes and cuſtomes of both kingdomes bee made one and the ſame : then I aſke ; how, and when ſhall that be done ? And it may bee, that the conſtitutions of the countries bee ſuch as there can hardely in all things bee ſuch an abſolute and perfect reconciling or vniting of lawes as is fancied. Is it yet ſo betweene *England* and *Wales*, or betweene *Kent* and *Cornewall*, or betweene many other parts of this kingdome ? I ſay no; and I ſpeake it confidently and truely, it is not ſo, nor well can be ſo. Therefore let *England* and *Scotland* be in like degree now, as *England* and *Wales* were for many hundred yeeres, and in many things are yet ſtill ; and yet let vnion and loue increaſe amongſt vs, euen *in ſecula ſeculorum*. Let vs not be ſuch as St. *Bernard* noteth, *amant quod non decet, timent quod non oportet, dolent vanè, gaudent vaniùs.* And let vs no longer make queſtion, whether ſeuerall lawes and cuſtomes bee markes of ſeperation and diſ-vnion, or of ſeuerall allegeances; for certainely they are not.

Bernard.

Obiection vpon diuination.

One other reaſon remaines againſt theſe *poſt-nati*, and that is out of a prouident foreſight, or as it were a propheſying : what if a ſeperation of theſe kingdomes fall hereafter ?

Reſponſ.

Of this I can ſay but *abſit omen.* It is *potentia remota* (as iuſtice *Williams* ſaied) and I truſt in God *remotiſſima :* and I will euer pray to God that it neuer fall ſo, vntill the king of all kinges reſume all ſcepters and kingdomes into his owne hands. And let vs take heede of ſinnes of ingratitude and diſobedience ; and remember, that *Adam* and *Eue* were puniſhed, *non propter pomum, ſed propter vetitum.* And for ſuch prophets, let the prophet *Ezechiel ca.* 13. anſwer them, *væ prophætis inſipientibus, qui ſequuntur ſpiritum ſuum, & nihil vident.* And the prophet *Eſay* ſpeaketh to all ſuch with an other *væ, væ illis qui diſpergunt.*

Now then, as M. Solicitor beganne with ſeeking out the truth ; ſo I will conclude with *Eſdras* words, *magna eſt veritas & præualet :* and with this further, *eatenus rationandum donec veritas inueniatur : cùm inuenta eſt veritas, figendum ibi iudicium : et in victoria veritatis, ſoli veritatis inimici pereunt.*

The concluſion.

Thus I haue heere deliuered my concurrence in opinion with my lordes the iudges, and the reaſons that induce and ſatisfie my conſcience, that *Ro. Caluine*, and all the *poſt-nati* in *Scotland*, are in reaſon, and by the common lawe of *England*, naturall-borne ſubiects within the allegeance of the king of *England* ; and inhabled to purchaſe and haue free-hould and inheritance of lands in *England* ; and to bring reall actions for the ſame in *England.*

For, if they haue not this benefit by this bleſſed and happie vnion, then are they in no better caſe in *England*, than the king of *Spaines* ſubiects borne in *Spaine, &c.* And ſo by this vnion they haue gotten nothing : what they haue loſt iuſtice *Yeluerton* did well note.

And therefore I muſt giue iudgement in the *Chancerie*, that the defendants there ought to make direct anſwer to *Ro. Caluines* bill for the lands and euidences for which he complaines.

T. Elleſmere, Canc.

XVII. *Proceedings againſt Mr.* JAMES WHITELOCKE, *in the* Star-Chamber, *in* June, 10 Jam. I. 1613. *for a Contempt of the King's Prerogative.*

[*Mr.* Whitelocke, *the ſubject of this proſecution, is ſuppoſed to have been the ſame gentleman, as afterwards became ſir* James Whitelocke, *the judge of that name, and father of Mr.* Bulſtrode Whitelocke, *the famous writer of the* Memorials. *See the note in vol.* 3. *of lord* Bacon's *works, laſt 4to ed. p.* 471. *He appears to have been proſecuted ſimply for giving a private verbal opinion as a barriſter, on a point of prerogative, againſt the crown, to ſir* Robert Manſell ; *who, being treaſurer of the navy and vice-admiral, had conſulted Mr.* Whitelocke, *on the legality of a commiſſion iſſued by king* James *for examining into and reforming the diſorders and abuſes of the navy.* Ibid. *At the ſame time, ſir* Robert Manſell *was himſelf charged, for queſtioning the prerogative of the crown, and animating the lord-admiral againſt the commiſſion.* Ibid. *ſame page, and the note in page* 472. *The hearing was at* Whitehall *before the lords of the council, with the intervention of lord chief juſtice* Coke, *lord chief baron* Tanfield, *and the maſter of the rolls ; the king's attorney and ſolicitor ſpeaking againſt Mr.* Whitelocke, *and Mr.* Henry Montagu *the king's ſerjeant againſt ſir* Robert Manſell. Ibid. *Both humiliated themſelves ; in conſequence of which they were recommended to the crown as proper objects of pardon, and were accordingly enlarged on the terms of ſubſcribing a ſubmiſſion.* Ibid. & Reliq. Wotton, *p.* 421. *3d ed. there cited. The following ſpeech of lord* Bacon, *who was at this time attorney-general, is the only remnant we meet with of the proceedings in the caſe, excluſive of the circumſtances before-mentioned. The ſpeech ſeems imperfect, it ending abruptly. What there is of it, though not without paſſages characteriſtic of lord* Bacon's *nervous eloquence and curioſity of argument, is in our opinion far from ſtating any thing like a juſt ground of proſecution. In the preſent age it would be deemed a monſtrous doctrine to aſſert, that lawyers were not at liberty to give opinions to their clients on queſtions of prerogative. Little apology can be made for ſuch a doctrine even in lord* Bacon's *time ; for it was ever lawful for the ſubject to conteſt queſtions of prerogative in the king's courts ; and if it was ſo, how could it be contrary to law to take the advice of council on ſuch ſubjects ? Indeed lord* Bacon *profeſſes not to controvert the right of aſking and giving counſel in law. But then he qualifies this right by a diſtinction ; for he exempts and gives a privilege to high commiſſions of regimen and caſes of ſtate ; a deſcription ſo large and indefinite, that, if it ſhould be acquieſced in, it would leave few acts of the crown, on which a lawyer could ſafely give an opinion. Particular delicacy and caution certainly ought to be uſed, where the prerogative of the crown is drawn into queſtion ; and it may be poſſible for a lawyer to exerciſe the right of giving opinions ſo indecently and licentiouſly, as to render himſelf reſponſible criminally. But then the crime ariſes from the abuſe, not from the want of the right. It may alſo be poſſible to put a caſe ſo ſtrong, as to be beyond the line of a profeſſional opinion. Thus if a private lawyer ſhould be conſulted, whether the king had a right to the crown, who can doubt that he would anſwer ſuch a queſtion at his peril ? But the queſtion, on which Mr.* Whitelocke *gave his opinion, was not of this kind, being on a commiſſion from the crown, the legality of which it was competent to the ſubject to controvert, and conſequently to take legal advice about. On the whole, the true rule ſeems to be, that a barriſter may give his opinion on every queſtion, however relative to the king or his prerogative, which the ſubject may conteſt with the crown in a court of juſtice ; but that in exerciſing this right he muſt keep ſo within the bounds of an opinion, as not under the color of it to obtrude either private or public ſcandal. In reſpect to Mr.* Whitelocke's *particular caſe, the ſubject of the opinion he gave ſeems perfectly unexceptionable ; nor could it be an offence, that his opinion was againſt the extent of the prerogative, or that it was erroneous. The only ground then, on which he could be criminally reſponſible, was for ſome licentious and extraneous matter introduced into the opinion ; in reſpect to which no judgment can now be deciſively formed, as the words of the opinion do not appear ; though as far as a conjecture may be made from lord* Bacon's *manner of obſerving on the opinion, it was equally innocent both in ſubject and language.*]

Speech of the attorney-general ſir Francis Bacon, *from the 3d volume of the laſt 4to edition of his works, page* 471.

My lords,

THE offence wherewith Mr. *Whitelocke* is charged, (for as to ſir *Robert Manſell*, I take it to my part only to be ſorry for his error) is a contempt of a high nature, and reſting upon two parts : on the one, a preſumptuous and licentious cenſure and defying of his majeſty's prerogative in general ; the other, a ſlander and traducement of one act or emanation hereof, containing a commiſſion of ſurvey and reformation of abuſes in the office of the navy.

This offence is fit to be opened and ſet before your lordſhips, as it hath been well begun, both in the true ſtate and in the true weight of it. For as I deſire, that the nature of the offence may appear in its true colours ; ſo, on the other ſide, I deſire, that the ſhadow of it may not darken or involve any thing that is lawful, or agreeable with the juſt and reaſonable liberty of the ſubject.

Firſt, we muſt and do agree, that the aſking and taking, and giving of counſel in law is an eſſential part of juſtice; and to deny that, is to ſhut the gate of juſtice, which in the *Hebrews* commonwealth was therefore held in the gate, to ſhew all paſſage to juſtice muſt be open: and certainly counſel in law is one of the paſſages. But yet, for all that, this liberty is not infinite and without limits.

If a jeſuited papiſt ſhould come, and aſk counſel (I put a caſe not altogether feigned) whether all the acts of parliament made in the time of queen *Elizabeth* and king *James* are void or no; becauſe there are no lawful biſhops ſitting in the upper houſe, and a parliament muſt conſiſt of lords ſpiritual and temporal and commons; and a lawyer will ſet it under his hand, that they be all void, I will touch him for high treaſon upon this his counſel.

So, if a puritan preacher will aſk counſel, whether he may ſtile the king defender of the faith, becauſe he receives not the diſcipline and preſbytery; and the lawyer will tell him, it is no part of the king's ſtile, it will go hard with ſuch a lawyer.

Or if a tribunitious popular ſpirit will go and aſk a lawyer, whether the oath and band of allegiance be to the kingdom and crown only, and not to the king, as was *Hugh Spenſer*'s caſe, and he deliver his opinion as *Hugh Spenſer* did; he will be in *Hugh Spenſer*'s danger.

So as the privilege of giving counſel proveth not all opinions: and as ſome opinions given are traiterous; ſo are there others of a much inferior nature, which are contemptuous. And among theſe I reckon Mr. *Whitelocke*'s; for as for his loyalty and true heart to the king, God forbid I ſhould doubt it.

Therefore let no man miſtake ſo far, as to conceive, that any lawful and due liberty of the ſubject for aſking counſel in law is called in queſtion, when points of diſloyalty or of contempt are reſtrained. Nay, we ſee it is the grace and favour of the king and his courts, that if the caſe be tender, and a wiſe lawyer in modeſty and diſcretion refuſeth to be of council, for you have lawyers ſometimes too nice as well as too bold, they are then ruled and aſſigned to be of council. For certainly counſel is the blind man's guide; and ſorry I am with all my heart, that in this caſe the blind did lead the blind.

For the offence, for which Mr. *Whitelocke* is charged, I hold it great, and to have, as I ſaid at firſt, two parts; the one a cenſure, and, as much as in him is, a circling, nay a clipping, of the king's prerogative in general: the other, a ſlander and depravation of the king's power and honour in this commiſſion.

And for the firſt of theſe, I conſider it again in three degrees: firſt, that he preſumed to cenſure the king's prerogative at all. Secondly, that he runneth into the generality of it more than was pertinent to the preſent queſtion. And laſtly, that he hath erroneouſly, and falſely, and dangerouſly given opinion in derogation of it.

Firſt, I make a great difference between the king's grants and ordinary omiſſions of juſtice, and the king's high commiſſions of regiment, or mixed with cauſes of ſtate.

For the former, there is no doubt but they may be freely queſtioned and diſputed, and any defect in matter or form ſtood upon, though the king be many times the adverſe party.

But for the latter ſort, they are rather to be dealt with, if at all, by a modeſt, and humble intimation or remonſtrance to his majeſty, and his council, than by bravery of diſpute or peremptory oppoſition.

Of this kind is that properly to be underſtood, which is ſaid in *Bracton*, *de chartis et factis regiis non debent, aut poſſunt, juſtitiarii aut privatæ perſonæ diſputare; ſed tutius eſt, ut expectetur ſententia regis.*

And the king's courts themſelves have been exceeding tender and ſparing in it; ſo that there is in all our law, not three caſes of it. And in that very caſe of 24 *Ed.* 3 Aſſ. *pl. s.* which Mr. *Whitelocke* vouched, where as it was a commiſſion to arreſt a man, and to carry him to priſon, and to ſeize his goods without any form of juſtice or examination preceding; and that the judges ſaw it was obtained by ſurreption; yet the judges ſaid they would keep it by them, and ſhew it to the king's council.

But Mr. *Whitelocke* did not adviſe his client to acquaint the king's council with it, but preſumptuouſly giveth opinion, that it is void. Nay, not ſo much as a clauſe or paſſage of modeſty, as that he ſubmits his opinion to cenſure: that it is too great a matter for him to deal in; or this is my opinion, which is nothing, *&c.* But *illotis manibus*, he takes it into his hands, and pronounceth of it, as a man would ſcarcely do of a warrant of a juſtice of peace, and ſpeaks like a dictator, that *this is law*, and *this is againſt law*, *&c.*

XVIII. *Proceedings againſt* MARY *Counteſs of* SHREWSBURY, *before a ſelect Council, for a Contempt in refuſing to anſwer fully before the Privy Council, or to ſubſcribe her Examination.* Trin. 10 Jam. I. 1614.

[*The occaſion, of examining lady* Shrewſbury *before the privy council, was her conduct in reſpect to the marriage of lady* Stuart. *This latter lady was firſt-couſin to* James *the firſt; for ſhe was the daughter of* Charles *earl of* Lenox, *the younger brother of* James's *father lord* Darnley. *Her mother was* Elizabeth *daughter of ſir* William Cavendiſh. *The counteſs of* Shrewſbury *was aunt to lady* Arabella, *being ſiſter to her mother. A marriage took place between lady* Arabella *and ſir* William Seymour, *who at the Reſtoration recovered the dukedom of* Somerſet *for his family. Being a marriage with one ſo nearly related in blood to the king, and without his conſent, it was deemed an offence againſt the royal prerogative, on which account lady* Arabella *and her huſband were impriſoned; the former in a private houſe at* Lambeth, *the latter in the* Tower. *But both eſcaped from their confinement with a view to retire abroad; and the counteſs of* Shrewſbury *was taken into cuſtody as privy and acceſſary to the eſcape of lady* Arabella. *On being examined by the privy-council, the counteſs refuſed to diſcover what ſhe knew of the affair of the marriage and eſcape, or to ſubſcribe her examination; and for this refuſal ſhe was brought before a ſelect council, whoſe proceedings on the occaſion are the ſubject of the following caſe.—What we ſhall firſt lay before the reader is lord* Coke's *account of the caſe, from his twelfth* Report. *Lord* Bacon's *ſpeech, which is next given, was firſt printed in the* Cabala, *but is here taken from the laſt edition of his works, vol.* 3. *p.* 265. *For further particulars, relative to the marriage of lady* Arabella Stuart, *and the proceedings againſt her, ſir* William Seymour *her huſband, and lady* Shrewſbury, *the curious reader may conſult* Winwood's Memorials of State. *See vol.* 3. *p.* 117. 119. 201. 279. 280. 281. 454.

Extract from lord Coke's *twelfth* Report, *ſerjeant* Wilſon's *edition, page* 94.

Trin. 10 *Jac.* 1.

Of contempts. See 1 *Hawk. ch.* 21. *per tot. ch.* 22. *ſect.* 2, 3, 4. *ch.* 23. *ſect.* 1, 2, 3, *&c. ch.* 24. *ſect.* 2, 3, 4. 2 *Hawk. ch.* 10. *ſect.* 15, 17, 19.

IN this term, before a ſelect council at *York-houſe*; *ſcil.* the lord chancellor, the archbiſhop, the duke of *Lenox*, the earl of *Northampton*, lord privy ſeal, the earl of *Suffolk*, lord chamberlain, the earl of *Worceſter*, the earl of *Pembroke*, viſcount *Erſkin*, viſcount *Rochford*, the lord *Zouch*, the lord *Knolls*, the lord *Wootton*, the chancellor of the *Exchequer*, the chancellor of the duchy, *Fleming* chief juſtice of the *King's Bench*, *Philips* maſter of the rolls, *Coke* chief juſtice of the *Common Pleas*, and *Tanfield* chief baron.

The counteſs of *Shrewſbury* (the wife of *Gilbert* earl of *Shrewſbury*) then priſoner in the *Tower*, was brought before the ſaid lords, and by the attorney and ſolicitor of the king was charged with a high and great contempt of dangerous conſequence; for they declared that the lady *Arbella*, being of the blood royal, had married *Seymour*, ſecond ſon of the earl of *Hertford*, without privity or aſſent of the king, for which contempt the ſaid *Seymour* was committed to the *Tower*, and had eſcaped and fled beyond the ſeas; the lady *Arbella* being under reſtraint eſcaped alſo, and embarked herſelf upon the ſea, and was taken before ſhe got over; of which flight of the ſaid lady *Arbella*, the ſaid counteſs, being her aunt, very well knew and abetted, as is directly proved by *Crompton*, and not denied by the lady *Arbella*: and admit it, that the lady *Arbella* had no evil intent againſt the king (who had always a great and ſpecial care of her, and was very bountiful unto her, until her marriage with the ſaid *Seymour*, which was the *pomum vetitum*:) yet when ſhe fled, and when ſhe ſhould be environed with evil ſpirits, *cum perverſis perverti poſſit*, and when ſhe ſhall be in another ſphere, ſhe will not move within the ſame orb.

Acceſſorium innocenti.

Q. If illegal? *Quid poſſit non eſt.*

Quid proſunt legi? And the lords of the privy council, knowing the *arcana imperii*, did ſhew divers perilous conſequences, and the rather for this, that the ſaid counteſs is an obſtinate popiſh recuſant, and as was ſaid, perverted alſo the lady *Arbella*.

Now the charge was in two points.

1. That the ſaid counteſs of *Shrewſbury*, by commandment of the king, being called to the council-table, before the lords of the council at *Whitehall*, and there being required by the lords to declare her knowledge touching the ſaid points, and to diſcover what ſhe knew concerning them, for the ſafety of the king, and quiet of the realm; ſhe anſwered, that ſhe would not make any particular anſwer; and being again aſked by the king's command by the council at *Lambeth*, and being charged again to anſwer to the ſaid point, ſhe refuſed for two cauſes.

Univoca æquivoca.

Particulare ad generale.

1. For that ſhe had made a raſh vow that ſhe would not declare any thing in particular touching the ſaid points; and for that (as ſhe ſaid) it was better to obey God than man.
2. She ſtood upon her privilege of nobility, *ſcil.* to anſwer only when ſhe was called judicially before her peers; for that ſuch privilege was allowed (as ſhe ſaid) to *William* earl of *Pembroke*, and to the lord *Lumley*.

2. The ſecond point of her charge was, that when ſuch anſwer which ſhe had made was put in writing, and read to her, yet ſhe refuſed to ſubſcribe to it.

Which denial to diſcover and diſcharge her conſcience in a caſe which toucheth the ſafety of the king, and quiet of the realm, was urged by the king's council to be a great and high contempt, and that nobility hath not any ſuch privilege as is alleged, nor any ſuch allowance as was ſuppoſed; and that raſh and illegal vows make not an excuſe, and that this precedent being now upon the ſtage, was of very dangerous conſequence: and the ſaid counteſs hearing the charge, yet perſiſted in her obſtinate refuſal, for the ſame reaſons and cauſes upon which ſhe had inſiſted before: and the lord chancellor began, and the archbiſhop, and all the other lords began with the firſt, and adjudged it a great and high contempt, and the lord chancellor ſaid, that that was againſt the law of *England*, with which all the lords agreed.

And that no ſuch allowance was given to the ſaid earl of *Pembroke*, or to the lord *Lumley* in reſpect of their privilege of nobility, but that they were *voces populi, & ideo non audiendæ*: and the lord archbiſhop principally proved, that as well the contempt, as the ſaid raſh vow was againſt the law of God, which he and the earl of *Northampton* principally proved by divers texts and examples in holy ſcripture.

And the effect of all that which the three juſtices ſaid, was, that after the ſentences of all the learned, prudent, and honourable perſonages and counſellors of eſtate, they might well be ſilent; but in regard that *ſilentium in ſenatu eſt vitium*, they would ſpeak ſomething briefly, *viz.*

That three things in this caſe are to be well conſidered.

1. Whether the refuſals aforeſaid of the ſaid counteſs were offences in law againſt the king, his crown and dignity.
2. What manner of proceeding this is, and whether it was juſtifiable by precedent or reaſon.
3. What is the demerit of the offences, and how puniſhable.

As to the firſt, it was reſolved by the juſtices and maſter of the rolls, that the denying to be examined was a high and great contempt in law, againſt the king, his crown and dignity; and that if it ſhould be permitted, it would be an occaſion of many high and dangerous deſigns againſt the king and the realm, which cannot be diſcovered: and upon hope of impunity it will be an encouragement to offenders, as *Fleming* juſtice ſaid, to enterprize dangerous attempts. *Nemo tenetur, &c.*

And the maſter of the rolls ſaid, that it was not any privilege of nobility, to refuſe to be examined in this caſe, no more than of any ſubject.

Alſo, if one that is noble, and a peer of the realm, be ſued in the *Star-Chamber*, or in *Chancery*, they ought to anſwer upon their oaths, (a) and may be examined in the *Star-Chamber* upon interrogatories upon their oaths: and if one who is noble be produced as a witneſs between party and party, he ought to be ſworn, or otherwiſe his teſtimony is of no value; and ſo is the common experience in the ſaid courts: and the chief juſtice ſaid, that foraſmuch as where order is neglected, confuſion will follow, he would recite ſome of the honourable privileges which the law of *England* (more than any other law) attribute to the nobility of *England* in legal proceedings; and they will not be impertinent, but give a great light to the caſe now in hand. *Quære* the ex *officio* oath 12 *Co.* 26 27.

(1.) If a baron, viſcount, earl, or other lord of parliament and peer of the realm be plaintiff in any action, and the defendant will plead that the plaintiff is not a baron, viſcount, earl, *&c.* as he is named in the writ, this ſhall not be tried at the common law by jury, who may be corrupted, nor by witneſſes, as in the *Star-Chamber*, or *Chancery*, who may be ſuborned; but it ſhall be tried by the record in *Chancery*, which imports by itſelf ſolid truth; ſo great regard hath the law to the trial of their honour and dignity, *&c.* Parliament caſes, 3, *&c.* 2 *Salk.* 509, 510.

(2.) Their perſons have many honourable privileges in law.

1. At the ſuit of a ſubject their bodies ſhall not be arreſted, neither *capias* nor *exigent* lieth againſt them.

(a) But in 1628, the houſe of lords came to a reſolution, declaring it to be the antient right of the nobility of this kingdom and the lords of the upper houſe of parliament, to anſwer in all courts as defendants upon *proteſtation of honour* only. *Journ. Dom. Proc.* 6. *May*, 1628. This reſolution was in conſequence of an order, made about two years before by the *Star-chamber* againſt the earl of *Lincoln*, to anſwer a bill on oath; though this order had paſſed after great deliberation, and was founded on an unanimous opinion of the lords of the privy council, and of all the judges except *Doderridge* who was abſent. See the earl of *Lincoln*'s caſe, *W. Jo.* 152. *Hutt.* 87. *Cro. Cha.* 64. In 1640, the lords renewed the declaration of this privilege in anſwering as defendants without oath, with an explanation, that it extended to all anſwers and examinations on interrogatories, in all cauſes as well criminal as civil, and in all courts and commiſſions, and alſo to the widows and dowagers of temporal peers. *Journ. Dom. Proc.* 31. *Dec.* 1640. The preſent practice of our courts of equity conforms to this order of the lords. EDITOR.

2. For the honour and reverence which the law gives to nobility, their bodies are not ſubject to torture *in cauſâ criminis læſæ majeſtatis* (a).
3. They are not to be ſworn in aſſiſes, juries, or other inqueſts.
4. If any ſervant of the king, named in the cheque-roll, compaſs or intend to kill any lord of parliament, or other lord of the king's council, this is felony.
5. In the *Common Pleas*, a lord of parliament ſhall have knights returned on his jury.
6. He ſhall have day of grace.
7. A lord of parliament ſhall not be tried in caſe of treaſon, felony, or miſpriſion of them, but by thoſe who are noble and peers of the realm.
8. In trial of a peer, the lords of parliament ſhall not ſwear, but they give their judgment *ſuper fidem et ligeantiam domino regi debitam*, ſo that their faith and allegiance ſtands in equipoiſe with an oath in the caſe of a common perſon in trial of life: and the writs of parliament, directed to the lords of parliament, are *ſub fide & ligeantia, &c.*

And the reaſon and cauſe, that the king gives them many other privileges, is for this, becauſe all honour and nobility is derived from the king as the true fountain: and the king honours with nobility, for two cauſes.

1. *Ad conſulendum*, and for that reaſon he gives them a robe.
2. *Ad defendendum regem et regnum*, and for that cauſe he gives them a ſword.

And foraſmuch as they derive their dignities, accompanied with all thoſe honourable privileges, from the king, to deny to anſwer, being required thereto by the king, to ſuch points as concern the ſafety of the king and quiet of the realm, is a high contempt and diſobedience, accompanied with great ingratitude.

This denial is *contra ligeantiam ſuam debitam*, againſt the faith and allegiance of a perſon noble, due to the king, and which the law greatly eſteems.

And that this denying is againſt her faith and allegiance appears by the ancient oath of allegiance, which is imprinted in the heart of every ſubject, *ſcil. ero verus & fidelis, et veritatem præſtabo domino regi de vitâ et membro, et de terreno honore, ad vivendum et moriendum contra omnes gentes, &c. Et ſi cognoſcam aut audiam de aliquo damno aut malo quod domino regi evenire poterit, quod non revelato, &c.* And this oath of allegiance is common to all ſubjects, as well thoſe of the nobility as commonalty. But the law hath greater account of the faith and allegiance of a nobleman, than of one of the commons, for this, that the breach of their allegiance is more dangerous to the king and eſtate, for *corruptio optimorum eſt peſſima*; and for this reaſon, the counteſs by her allegiance was bound, without being demanded, to reveal to the king what ſhe knows concerning the premiſes, upon which great miſchief may happen to the king and the realm. But being commanded by the king to declare her knowledge, the denying of it doth greatly aggravate the offence.

Qui contemnit præceptum, contemnit præcipientem.

Command and obedience are the ligament of government, and *ligeantia eſt legis eſſentia*; for without allegiance and obedience, the law cannot proceed.

As to the ſecond point, *viz.* concerning the manner of this proceeding.

1. Privative, it is not to fine and impriſon, or inflict corporal puniſhment upon the counteſs; for fine and impriſonment ought to be aſſeſſed in ſome court judicially.
2. Poſitive, the fine is *ad monendum*, or at the moſt *ad minandum*; it is *ad inſtruendum non ad deſtruendum*.

Vide the earl of *Eſſex*'s caſe, 42 & 43 *Eliz.* 424.

This ſelected council is to expreſs what puniſhment this offence juſtly deſerved, if it be judicially proceeded within the *Star-Chamber*; for which reaſon this manner of proceeding is out of the mercy and grace of the king againſt this honourable lady, that ſhe ſeeing her offence may ſubmit herſelf to the king, without any puniſhment in any court judicially.

If ſentence ſhall be given in the *Star-Chamber* according to juſtice, you the lords ſhall be agents in it: but in this manner according to the mercy of the king, the king is only agent; the law hath put rules and limits to the juſtice of the king, but not unto his mercy, that is tranſcendant and without any limits of the law; *et ideo proceſſus iſte eſt regalis plane & rege dignus.*

Alſo inaſmuch as the allegiance and obedience of the ſubject, is the beſt flower in his imperial garland, to the intent, that it may neither be blaſted, nor impaired by this dangerous example, to the prejudice of his royal prerogative and poſterity, this proceeding hath been thought neceſſary: and this is fortified by the precedent of the earl of *Eſſex*, againſt whom ſuch proceedings were in this very place, *anno* 42 and 43 *Eliz. reg.*

And as to the laſt point it was reſolved by all *quaſi una voce*, that if a ſentence ſhould be given in the *Star-Chamber* judicially, ſhe ſhould be fined twenty thouſand pounds, and impriſoned during the king's pleaſure. *Vide* 12 *Co.* 69, *&c.*

Hoc in terrorem, ſed quære quid inde venit?

(a) It is ſurpriſing, that doctrine ſo reflecting on the law of *England* ſhould eſcape from one of lord *Coke*'s character. His language as attorney-general at the trials of the earls of *Eſſex* and *Southampton* implies the ſame obnoxious tenet. But in his third *Inſtitute* he gives it as his opinion moſt deciſively, that all tortures of accuſed perſons are contrary to our law; and to prove it cites lord-chancellor *Forteſcue*'s famous book *de laudibus legum* Angliæ, where he argues for a preference of our law to the civil law from the latter's allowance of torture. 3 *Inſt.* 35. In the caſe of *Felton*, for the murder of the duke of *Buckingham*, the judges were unanimous, that *Felton* could not be tortured by the rack; for *no ſuch puniſhment*, ſaid they, *is known or allowed by our law.* 1 *Ruſh.* 638. 639. As to the inſtances of torture collected by a moſt reſpectable writer of the preſent time, they only prove an irregularity of practice. *Barringt. Ant. Stat.* 4th *ed.* 33. 88. 395. EDITOR.

Speech of ſir Francis Bacon, *from vol.* 3. *of his works, laſt* 4to *edit. page* 265:

YOUR lordſhips do obſerve the nature of this charge: my lady of *Shrewſbury*, a lady wiſe, and that ought to know what duty requireth, is charged to have refuſed, and to have perſiſted in refuſal to anſwer, and to be examined in a high cauſe of ſtate, being examined by the council-table, which is a repreſentative body of the king. The nature of the cauſe, upon which ſhe was examined, is an eſſential point, which doth aggravate and increaſe this contempt and preſumption; and therefore of neceſſity with that we muſt begin.

How graciouſly and parent-like his majeſty uſed the lady *Arabella* before ſhe gave him cauſe of indignation, the world knoweth.

My lady notwithſtanding, extremely ill-adviſed, tranſacted the moſt weighty and binding part and action of her life, which is her marriage, without acquainting his majeſty; which had been a neglect even to a mean parent; but being to our ſovereign, and ſhe ſtanding ſo near to his majeſty as ſhe doth, and then chooſing ſuch a condition as it pleaſed her to chooſe, all parties laid together, how dangerous it was, my lady might have read it in the fortune of that houſe wherewith ſhe is matched; for it was not unlike the caſe of Mr. *Seymour*'s grandmother.

The king nevertheleſs ſo remembered he was a king, as he forgot not he was a kinſman, and placed her only *ſub libera cuſtodia.*

But now did my lady accumulate and heap up this offence with a far greater than the former, by ſeeking to withdraw herſelf out of the king's power into foreign parts.

That this flight or eſcape into foreign parts might have been ſeed of trouble to this ſtate, is a matter whereof the conceit of a vulgar perſon is not uncapable.

For although my lady ſhould have put on a mind to continue her loyalty, as nature and duty did bind her; yet when ſhe was in another ſphere, ſhe muſt have moved in the motion of that orb, and not of the planet itſelf: and God forbid the king's felicity ſhould be ſo little, as he ſhould not have envy and enviers enough in foreign parts.

It is true, if any foreigner had wrought upon this occaſion, I do not doubt but the intent would have been, as the prophet ſaith, *they have conceived miſchief, and brought forth a vain thing.* But yet your lordſhips know that it is wiſdom in princes, and it is a watch they owe to themſelves and to their people, to ſtop the beginnings of evils, and not to deſpiſe them. *Seneca* ſaith well, *non jam amplius levia ſunt pericula, ſi levia videantur*; dangers ceaſe to be light, becauſe by deſpiſing they grow and gather ſtrength.

And accordingly hath been the practice both of the wiſeſt and ſtouteſt princes to hold for matter pregnant of peril, to have any near them in blood to fly into foreign parts. Wherein I will not wander; but take the example of king *Henry* the ſeventh, a prince not unfit to be paralleled with his majeſty. I mean not the particular of *Perkin Warbeck*, for he was but an idol or a diſguiſe; but the example I mean, is that of the earl of *Suffolk*, whom the king extorted from *Philip* of *Auſtria*. The ſtory is memorable, that *Philip*, after the death of *Iſabella*, coming to take poſſeſſion of his kingdom of *Caſtile*, which was but matrimonial to his father-in-law *Ferdinando* of *Aragon*, was caſt by weather upon the coaſt of *Weymouth*, where the *Italian* ſtory ſaith, king *Henry* uſed him in all things elſe as a prince, but in one thing as a priſoner; for he forced upon him a promiſe to reſtore the earl of *Suffolk* that was fled into *Flanders*. And yet this I note was in the 21ſt year of his reign, when the king had a goodly prince at man's eſtate, beſides his daughters, nay, and the whole line of *Clarence* nearer in title; for that earl of *Suffolk* was deſcended of a ſiſter of *Edward* the fourth. So far off did that king take his aim. To this action of ſo deep conſequence, it appeareth, you, my lady of *Shrewſbury*, were privy, not upon foreign ſuſpicions or ſtrained inferences, but upon vehement preſumptions, now clear and particular teſtimony, as hath been opened to you; ſo as the king had not only reaſon to examine you upon it, but to have proceeded with you upon it as for a great contempt; which if it be reſerved for the preſent, your ladyſhip is to underſtand it aright, that it is not defect of proof, but abundance of grace that is the cauſe of this proceeding; and your ladyſhip ſhall do well to ſee into what danger you have brought yourſelf. All offences conſiſt of the fact which is open, and the intent which is ſecret. This fact of conſpiring in the flight of this lady may bear a hard and gentler conſtruction; if upon overmuch affection to your kinſwoman, gentler; if upon practice or other end, harder. You muſt take heed how you enter into ſuch actions; whereof if the hidden part be drawn unto that which is open, it may be your overthrow; which I ſpeak not by way of charge, but by way of caution.

For that which you are properly charged with, you muſt know that all ſubjects, without diſtinction of degrees, owe to the king tribute and ſervice, not only of their deed and hand, but of their knowledge and diſcovery.

If there be any thing that imports the king's ſervice, they ought themſelves undemanded to impart it; much more if they be called and examined, whether it be of their own fact or of another's, they ought to make direct anſwer. Neither was there ever any ſubject brought in cauſes of eſtate to trial judicial, but firſt he paſſed examination; for examination is the entrance of juſtice in criminal cauſes; it is one of the eyes of the king's politic body; there are but two, information and examination; it may not be endured that one of the lights be put out by your example.

Your excuſes are not worthy your own judgment; raſh vows of lawful things are to be kept, but unlawful vows not; your own divines will tell you ſo. For your examples, they are ſome erroneous traditions. My lord of *Pembroke* ſpake ſomewhat that he was unlettered, and it was but when he was examined by one private counſellor, to whom he took exception. That of my lord *Lumley* is a fiction; the preeminences of nobility I would hold with to the laſt grain; but every day's experience is to the contrary. Nay, you may learn duty of lady *Arabella* herſelf, a lady of the blood, of an higher rank than yourſelf, who declining, and yet that but by requeſt neither, to declare of your fact, yieldeth ingenuouſly to be examined of her own. I do not doubt but by this time you ſee both your own error, and the king's grace in proceeding with you in this manner.

XIX. *The Caſe of Mr.* OLIVER ST. JOHN, *on an Information* ore tenus, *in the* Star-Chamber, 15 April, 1615, *for writing and publiſhing a Paper againſt a Benevolence, collected under Letters of the Privy-Council.*

[*All that we have in print of the proceedings on this caſe is lord* Bacon*'s ſpeech as attorney-general and proſecutor. See* 2 Bacon*'s works, laſt 4to edit.* 583. *The paper which was the ground of the proſecution is in the* Cabala. *See page* 332, *of 2d part, 3d edit. The judgment of the court was that Mr.* St. John *ſhould pay a fine of* 5000 *l. and be impriſoned during the king's pleaſure. See the note in* 3 Bacon, *laſt 4to edit.* 267. *and the* Introduc. *to* Bac. Lett. *by* Stevens. *p.* xxiii. *The caſe appears to have been proſecuted with great anxiety; for according to a letter from lord* Bacon *to the king, lord chancellor* Egerton, *who from the infirmities of age was then on the point of reſigning the great ſeal, expreſſed a wiſh to attend the hearing, and ſo make it the concluſion of his ſervices.* 3 Bac. 264. *The grand argument of lord* Bacon *in favour of the benevolence was, that it was without compulſion. If in the repreſentation of the conduct of a rival and enemy, lord* Bacon *can be truſted, lord* Coke, *then chief juſtice of the* King's Bench, *at firſt gave it as his opinion, that the king could not ſo much as move any of his ſubjects for a benevolence, but afterwards retracted in the* Star-Chamber, *and there delivered the law in favour of it ſtrongly.* Ibid. 483. 274.

In our introductory note to the caſe of impoſitions, benevolences were enumerated as one of the devices of extra-parliamentary taxation. Ante, *page* 29. *As ſuch the ſtatute of* 1 R. 3. *c.* 2. *ſtiles them an unlawful invention, and annuls them for ever. But the benevolences, mentioned in this ſtatute, are deſcribed to have been ſo in name only, and to have been taken by coercion. Still therefore it was inſiſted, that gifts to the crown out of parliament, if really voluntary, were lawful. So lord* Bacon *argued in the following caſe; ſo in the ſame ſenſe lord* Coke *is ſtated to have declared the law; ſo lord* Coke *himſelf gives his opinion in his notes on benevolences in the 12th* Report; *and ſo according to him all the judges reſolved in the 40th of* Elizabeth. 12 Co. 119. *Lord* Coke *lays a ſtreſs on the ſtatute of* 10 Hen. 7. *c.* 10. *which, after reciting that many of the king's ſubjects had ſeverally granted to him diverſe ſums of money of their free wills and benevolence, and that ſome of theſe were in arrear, provides a remedy for compelling the payment. See* Raſtall*'s edit. of the* Statutes. *This ſtatute, it muſt be confeſſed, ſeems to give a legiſlative ſanction to ſuch benevolences as were really free offerings. But there is a later ſtatute, with words ſtrongly importing, that benevolences to the crown, though voluntary, cannot regularly be made out of parliament. The ſtatute we mean is the* 13 Cha. 2. *c.* 4. *which authoriſes the king to iſſue commiſſions under the great ſeal, for receiving voluntary ſubſcriptions for the ſupply of his occaſions; but limits commoners to* 200 *l. and peers to* 400 *l. a-piece, and alſo the time for ſubſcribing, and concludes with declaring, that no commiſſions or aids of this nature can be iſſued out or levied but by authority of parliament. This in effect concurs with lord* Coke*'s firſt opinion in Mr.* St. John*'s caſe, as repreſented by lord* Bacon; *the aim of the ſtatute being to condemn benevolences by the ſolicitation of commiſſions from the crown, and ſo to ſupply the defect of the ſtatute of* Richard *the third and of the* Petition of Right, *both of which point at compulſive benevolences. The inducement to ſuch a declaration of the law probably was an idea, that a formal ſolicitation from the crown muſt neceſſarily operate, on the minds of thoſe to whom it was addreſſed, with an influence almoſt equal to compulſion.—Thus at length it ſeems to be ſettled by the legiſlature, not only that compulſive benevolences are unlawful, but that all commiſſions from the crown to ſollicit and receive voluntary gifts are alſo unconſtitutional.*]

Letter from Mr. Oliver St. John *to the Mayor of* Marlborough, *which was the ſubject of the proſecution; taken from the* Cabala, *3d edition, part* 2. *page* 332.

AS I think, this kind of benevolence is againſt law, reaſon and religion.

1. The law is in the ſtatute called *magna charta*, 9 *H.* 3. *cap.* 29. that no free-man be any way deſtroy'd, but by laws of the land. Secondly, beſides that the ſaid ſtatute of *magna charta* is by all princes ſince eſtabliſhed and confirmed, it is, in the ſpecial caſe of voluntary or free grants, enacted and decreed 25 *E.* 1. *cap.* 5. that no ſuch be drawn into cuſtom: and *cap.* 6. that henceforth be taken no ſuch aids, taſks, free grants, or prizes, but by aſſent of all the realm, and for the good of the ſame. And in *primo R.* 3. *cap.* 2. that the ſubjects and commons in this realm, from henceforth ſhall in no wiſe be charged by any charge or impoſition called a benevolence, or any ſuch like charge; and that ſuch exactions, called a benevolence, ſhall be damned and annulled for ever.

Firſt, it is not only without, but againſt reaſon, that the commons, in their ſeveral and particulars, ſhould be relievers or ſuppliers of his majeſty's wants, who neither know his wants, nor the ſums that may be raiſed to ſupply the ſame.

Secondly, it is againſt reaſon, that the particular and ſeveral commons, diſtracted, ſhould oppoſe their judgement and diſcretion to the judgement and diſcretion of the wiſdom of their land aſſembled in parliament, who have there denied any ſuch aid.

It argueth in us want of love and due reſpect of our ſovereign lord and king, which ought to be in every of us towards each other, which is, to ſtay every one which we ſee falling, and reduce the current. What proſperity can be expected to befall either our king or nation, when the king ſhall, haply out of ignorance, or ('tis I hope) out of forgetfulneſs or headineſs, commit ſo great a ſin againſt his God, as is the violating of his great and ſolemn oath taken at his coronation, for the maintaining of his lawes, liberties and cuſtoms of this noble realm; and his ſubjects, ſome for fear, ſome in pride, ſome to pleaſe others, ſhall joyn hands to forward ſo unhappy an atchievement? Can he any way more highly offend the divine majeſty (whom he then invocated?) As alſo, can he then give unto another *Hen.* 4. (if ſuch an one ſhould riſe up, which God forbid) a greater advantage? Let thoſe articles put up againſt *R.* 2. be looked on, it will appear, that the breach of laws, infringing the liberties, and failing in this oath, were the main blemiſhes wherewith he could diſtain and ſpot the honour of that good and gentle prince; who indeed was rather by others abuſed, than of himſelf miſchievouſly any way diſpoſed.

2. As very irreligiouſly and uncharitably, we help forward the king's majeſty in that grievous ſin of perjury; ſo into what an helliſh danger we plunge ourſelves, even ſo many of us as contribute, is to be learned out of the ſeveral curſes and ſentences of excommunication given out againſt all ſuch givers, and, namely, the two following, *viz.* the great curſe given out, the 36 *H.* 3. againſt all breakers of the liberties and cuſtoms of the realm of *England*, with their abettors, councellours and executioners; wherein, by the ſentence of *Boniface* archbiſhop of *Canterbury*, and the chief part of all the biſhops of this land, are *ipſo facto* excommunicated. And that of 24 *Ed.* 1. denounced immediately upon the acts made againſt ſuch benevolence, free grants and impoſitions, had, and taken without common aſſent; which, becauſe it is not ſo large as that former, I will ſet down as our books deliver the ſame.

"In the name of the Father, Son, and Holy Ghoſt, *Amen.* Whereas our ſovereign lord the king, to the honour of God, and of the holy church, and for the common profit of the realm, hath granted, for him and his heirs for ever, theſe articles above written: *Robert* archbiſhop of *Canterbury*, primate of all *England*, admoniſh'd all his province, once, twice, and thrice, becauſe that ſhortneſs will not ſuffer ſo much delay, as to give knowledge to all the people of *England* of theſe preſents in writing. We, therefore, enjoyn all perſons, of what eſtate ſoever they be, that they, and every of them, as much as in them is, ſhall uphold and maintain thoſe articles granted by our ſovereign lord the king in all points; and all thoſe that, in any point, do reſiſt, or break thoſe ordinances, or go about it by word or deed, openly or privately, by any manner of pretence or colour. We therefore, the ſaid archbiſhop, by our authority in writing expreſſed, do excommunicate and accurſe, and from the body of our Lord Jeſus Chriſt, and from all the company of Heaven, and from all the ſacraments of the holy church, do ſequeſter and exclude."

Sir, hearing that to-morrow the juſtices will be here about this buſie work of benevolence, wherein you have both ſent unto, and talked with me, and thinking that it may be, you would deliver up the names of the non-givers: foraſmuch as, I think, I ſhall ſcarcely be at home to make my further anſwer, if I ſhould be called for, I pray you, both hereby to underſtand my mind yourſelf, and if cauſe ſo require, to let the juſtices perceive as much. So leaving others to their own conſciences, whereby in that laſt and dreadful day they ſhall ſtand or fall before him who will reward every man according to his deeds, I commend you to the grace of the Almighty, and reſt

Your loving neighbour and friend,

Oliver St. John.

Speech of ſir Francis Bacon *as attorney-general, addreſſed to the court of* Star-Chamber, *from his works, vol. 2. p. 583.*

My lords,

I SHALL inform you *ore tenus*, againſt this gentleman Mr. *I. S.* a gentleman, as it ſeems, of an ancient houſe and name; but, for the preſent, I can think of him by no other name, than the name of a great offender. The nature and quality of his offence, in ſum, is this. This gentleman hath, upon advice, not ſuddenly by his pen, nor by the ſlip of his tongue; not privately, or in a corner, but publicly, as it were, to the face of the king's miniſters and juſtices, ſlandered and traduced the king our ſovereign, the law of the land, the parliament, and infinite particulars of his majeſty's worthy and loving ſubjects. Nay, the ſlander is of that nature, that it may ſeem to intereſt the people in grief and diſcontent againſt the ſtate: whence might have enſued matter of murmur and ſedition. So that it is not a ſimple ſlander, but a ſeditious ſlander, like to that the poet ſpeaketh of,—*calamoſque armare veneno.* A venomous dart that hath both iron and poiſon.

To open to your lordſhips the true ſtate of this offence, I will ſet before you, firſt, the occaſion whereupon Mr. *I. S.* wrought: then the offence itſelf in his own words: and laſtly, the points of his charge.

My lords, you may remember that there was the laſt parliament an expectation to have had the king ſupplied with treaſure, although the event failed. Herein it is not fit for me to give opinion of an houſe of parliament, but I will give teſtimony of truth in all places. I ſerved in the lower houſe, and I obſerved ſomewhat. This I do affirm, that I never could perceive but that there was in that houſe a general diſpoſition to give, and to give largely. The clocks in the houſe perchance might differ; ſome went too faſt, ſome went too ſlow; but the diſpoſition to give was general: ſo that I think I may truly ſay, *ſolo tempore lapſus amor.*

This accident happening thus beſides expectation, it ſtirred up and awaked in divers of his majeſty's worthy ſervants and ſubjects of the clergy, the nobility, the court, and others here near at hand, an affection loving and chearful, to preſent the king ſome with plate, ſome with money, as free-will offerings, a thing that God Almighty loves, a chearful giver: what an evil eye doth I know not. And, my lords, let me ſpeak it plainly unto you: God forbid any body ſhould be ſo wretched as to think that the obligation of love and duty, from the ſubject to the king, ſhould be joint and not ſeveral. No, my lords, it is both. The ſubject petitioneth to the king in parliament. He petitioneth likewiſe out of parliament. The king on the other ſide gives graces to the ſubject in parliament: he gives them likewiſe, and poureth them upon his people out of parliament; and ſo no doubt the ſubject may give to the king in parliament, and out of parliament. It is true the parliament is *intercurſus magnus*, the great intercourſe and main current of graces and donatives from the king to the people, from the people to the king: but parliaments are held but at certain times; whereas the paſſages are always open for particulars; even as you ſee great rivers have their tides, but particular ſprings and fountains run continually.

To proceed therefore: as the occaſion, which was the failing of ſupply by parliament, did awake the love and benevolence of thoſe that were at hand to give; ſo it was apprehended and thought fit by my lords of the council to make a proof whether the occaſion and example both, would not awake thoſe in the country of the better ſort to follow. Whereupon, their lordſhips deviſed and directed letters unto the ſheriffs and juſtices, which declared what was done here above, and wiſhed that the country might be moved, eſpecially men of value.

Now, my lords, I beſeech you give me favour and attention to ſet forth and obſerve unto you five points. I will number them, becauſe other men may note them; and I will but touch them, becauſe they ſhall not be drowned or loſt in diſcourſe, which I hold worthy the obſervation, for the honour of the ſtate and confuſion of ſlanderers; whereby it will appear moſt evidently what care was taken, that that which was then done might not have the effect, no nor the ſhew, no nor ſo much as the ſhadow of a tax; and that it was ſo far from breeding or bringing in any ill precedent or example, as contrariwiſe it is a corrective that doth correct and allay the harſhneſs and danger of former examples.

The firſt is, that what was done was done immediately after ſuch a parliament, as made general profeſſion to give, and was interrupted by accident: ſo as you may truly and juſtly eſteem it, *tanquam poſthuma proles parliamenti*, as an after-child of the parliament, and in purſuit, in ſome ſmall meaſure, of the firm intent of a parliament paſt. You may take it alſo, if you will, as an advance or proviſional help until a future parliament; or as a gratification ſimply without any relation to a parliament; you can no ways take it amiſs.

The ſecond is, that it wrought upon example, as a thing not deviſed or projected, or required; no nor ſo much as recommended, until many, that were never moved nor dealt with, *ex mero motu*, had freely and frankly ſent in their preſents. So that the letters were rather like letters of news, what was done at *London*, than otherwiſe: and we know *exempla ducunt, non trahunt*; examples they do but lead, they do not draw nor drive.

The third is, that it was not done by commiſſion under the great ſeal; a thing warranted by a multitude of precedents, both ancient, and of late time, as you ſhall hear anon, and no doubt warranted by law: ſo that the commiſſions be of that ſtile and tenour, as that they be to move and not to levy: but this was done by letters of the council, and no higher hand or form.

The fourth is, that theſe letters had no manner of ſhew of any binding act of ſtate: for they contain not any ſpecial frame or direction how the buſineſs ſhould be managed; but were written as upon truſt, leaving the matter wholly to the induſtry and confidence of thoſe in the country; ſo that it was an *abſque compoto*; ſuch a form of letters as no man could fitly be called to account upon.

The fifth and laſt point is, that the whole carriage of the buſineſs had no circumſtance compulſory. There was no proportion or rate ſet down, not ſo much as by way of a wiſh; there was no menace of any that ſhould deny; no reproof of any that did deny; no certifying of the names of any that had denied. Indeed, if men could not content themſelves to deny, but that they muſt cenſure and inveigh, nor to excuſe themſelves, but they muſt accuſe the ſtate, that is another caſe. But I ſay, for denying, no man was apprehended, no nor noted. So that I verily think, that there is none ſo ſubtle a diſputer in the controverſy of *liberum arbitrium*, that can with all his diſtinctions faſten or carp upon the act, but that there was free-will in it.

I conclude therefore, my lords, that this was a true and pure benevolence; not an impoſition called a benevolence, which the ſtatute ſpeaks of; as you ſhall hear by one of my fellows. There is a great difference, I tell you, though *Pilate* would not ſee it, between *rex* Judæorum, and *ſe dicens regem* Judæorum. And there is a great difference between a benevolence and an exaction called a benevolence, which the duke of *Buckingham* ſpeaks of in his oration to the city; and defineth it to be not what the ſubject of his good-will would give, but what the king of his good-will would take. But this, I ſay, was a benevolence wherein every man had a prince's prerogative, a negative voice; and this word, *excuſe moy*, was a plea peremptory. And therefore I do wonder how Mr. *I. S.* could foul or trouble ſo clear a fountain. Certainly it was but his own bitterneſs and unſound humours.

Now to the particular charge. Amongſt other countries, theſe letters of the lords came to the juſtices of *D—ſhire*, who ſignified the contents thereof, and gave directions and appointments for meetings concerning the buſineſs, to ſeveral towns and places within that county: and amongſt the reſt, notice was given unto the town of *A.* The mayor of *A.* conceiving that this Mr. *I. S.* being a principal perſon, and a dweller in that town, was a man likely to give both money and good example, dealt with him to know his mind. He intending, as it ſeems, to play prizes, would give no anſwer to the mayor in private, but would take time. The next day then being an appointment of the juſtices to meet, he takes occaſion, or pretends occaſion to be abſent, becauſe he would bring his papers upon the ſtage: and thereupon takes pen in hand, and inſtead of excuſing himſelf, ſits down and contriveth a ſeditious and libellous accuſation againſt the king and ſtate, which your lordſhips ſhall now hear, and ſends it to the mayor: and withal, becauſe the feather of his quill might fly abroad, he gives authority to the mayor to impart it to the juſtices, if he ſo thought good. And now, my lords, becauſe I will not miſtake or miſ-repeat, you ſhall hear the ſeditious libel in the proper terms and words thereof.

[Here the papers were read.]

My lords, I know this paper offends your ears much, and the ears of any good ſubject; and ſorry I am that the times ſhould produce offences of this nature: but ſince they do, I would be more ſorry they ſhould be paſſed without ſevere puniſhment: *non tradite factum*, as the verſe ſays, altered a little, *aut ſi tradatis, facti quoque tradite pœnam.* If any man have a mind to diſcourſe of the fact, let him likewiſe diſcourſe of the puniſhment of the fact.

In this writing, my lords, there appears a monſter with four heads, of the progeny of him that is the father of lyes, and takes his name from ſlander.

The firſt is a wicked and ſeditious ſlander; or, if I ſhall uſe the ſcripture phraſe, a blaſpheming of the king himſelf; ſetting him forth for a prince perjured in the great and ſolemn oath of his coronation, which is as it were the knot of the diadem; a prince that ſhould be a violator and infringer of the liberties, laws, and cuſtoms of the kingdom; a mark for an *Henry* the fourth; a match for a *Richard* the ſecond.

The ſecond is a ſlander and falſification, and wreſting of the law of the land groſs and palpable: it is truly ſaid by a civilian, *tortura legum peſſima*, the torture of laws is worſe than the torture of men.

The third is a ſlander and falſe charge of the parliament, that they had denied to give to the king; a point of notorious untruth.

And the laſt is a ſlander and taunting of an infinite number of the king's loving ſubjects, that have given towards this benevolence and free contribution; charging them as acceſſary and co-adjutors to the king's perjury. Nay, you leave us not there, but you take upon you a pontifical habit, and couple your ſlander with a curſe; but thanks be to God we have learned ſufficiently out of the ſcripture, that *as the bird flies away, ſo the cauſeleſs curſe ſhall not come.*

For the firſt of theſe, which concerns the king, I have taken to myſelf the opening and aggravation thereof; the other three I have diſtributed to my fellows.

My lords, I cannot but enter into this part with ſome wonder and aſtoniſhment, how it ſhould come into the heart of a ſubject of *England* to vapour forth ſuch a wicked and venomous ſlander againſt the king, whoſe goodneſs and grace is comparable, if not incomparable, unto any of the kings his progenitors. This therefore gives me a juſt and neceſſary occaſion to do two things: the one, to make ſome repreſentation of his majeſty; ſuch as truly he is found to be in his government, which Mr. *I. S.* chargeth with violation of laws and liberties: the other, to ſearch and open the depth of Mr. *I. S.* his offence. Both which I will do briefly; becauſe the one, I cannot expreſs ſufficiently; and the other, I will not preſs too far.

My lords, I mean to make no panegyric or laudative; the king delights not in it, neither am I fit for it: but if it were but a counſellor or nobleman, whoſe name had ſuffered, and were to receive ſome kind of reparation in this high court, I would do him that duty as not to paſs his merits and juſt attributes, eſpecially ſuch as are limited with the preſent caſe, in ſilence: for it is fit to burn incenſe where evil odours have been caſt and raiſed. Is it ſo that king *James* ſhall be ſaid to be a violator of the liberties, laws, and cuſtoms of his kingdoms? Or is he not rather a noble and conſtant protector and conſervator of them all? I conceive this conſiſteth in maintaining religion and the true church; in maintaining the laws of the kingdom, which is the ſubject's birth-right; in temperate uſe of the prerogative; in due and free adminiſtration of juſtice, and conſervation of the peace of the land.

For religion, we muſt ever acknowledge in the firſt place, that we have a king that is the principal conſervator of true religion through the Chriſtian world. He hath maintained it not only with ſceptre and ſword, but likewiſe by his pen; wherein alſo he is potent.

He hath awaked and re-authorized the whole party of the reformed religion throughout *Europe*; which through the inſolency and divers artifices and inchantments of the adverſe part, was grown a little dull and dejected: he hath ſummoned the fraternity of kings to enfranchiſe themſelves from the uſurpation of the ſee of *Rome*: he hath made himſelf a mark of contradiction for it.

Neither can I omit, when I ſpeak of religion, to remember that excellent act of his majeſty, which though it were done in a foreign country, yet the church of God is one, and the contagion of theſe things will ſoon paſs ſeas and lands: I mean, in his conſtant and holy proceeding againſt the heretic *Vorſtius*, whom, being ready to enter into the chair, and there to have authorized one of the moſt peſtilent and heatheniſh hereſies that ever was begun, his majeſty by his conſtant oppoſition diſmounted and pulled down. And I am perſuaded there ſits in this court one whom God doth the rather bleſs for being his majeſty's inſtrument in that ſervice.

I cannot remember religion and the church, but I muſt think of the ſeed-plots of the ſame, which are the univerſities. His majeſty, as for learning amongſt kings, he is incomparable in his perſon; ſo likewiſe hath he been in his government a benign or benevolent planet towards learning: by whoſe influence thoſe nurſeries and gardens of learning, the univerſities, were never more in flower nor fruit.

For the maintaining of the laws, which is the hedge and fence about the liberty of the ſubject, I may truly affirm it was never in better repair. He doth concur with the votes of the nobles; *nolumus leges* Angliæ *mutare*. He is an enemy of innovation. Neither doth the univerſality of his own knowledge carry him to neglect or paſs over the very forms of the laws of the land. Neither was there ever king, I am perſuaded, that did conſult ſo oft with his judges, as my lords that ſit here know well. The judges are a kind of council of the king's by oath and ancient inſtitution; but he uſeth them ſo indeed; he confers regularly with them upon their returns from their viſitations and circuits: he gives them liberty, both to inform him, and to debate matters with him; and in the fall and concluſion commonly relies on their opinions.

As for the uſe of the prerogative, it runs within the ancient channels and banks. Some things that were conceived to be in ſome proclamations, commiſſions, and patents, as overflows, have been by his wiſdom and care reduced; whereby, no doubt, the main channel of his prerogative is ſo much the ſtronger. For evermore overflows do hurt the channel.

As for adminiſtration of juſtice between party and party, I pray obſerve theſe points. There is no news of great ſeal or ſignet that flies abroad for countenance or delay of cauſes; protections rarely granted, and only upon great ground, or by conſent. My lords here of the council and the king himſelf meddle not, as hath been uſed in former times, with matters of *meum* and *tuum*, except they have apparent mixture with matters of eſtate, but leave them to the king's courts of law or equity. And for mercy and grace, without which there is no ſtanding before juſtice, we ſee, the king now hath reigned twelve years in his white robe, without almoſt any aſperſion of the crimſon dye of blood. There ſits my lord *Hobart*, that ſerved attorney ſeven years. I ſerved with him. We were ſo happy, as there paſſed not through our hands any one arraignment for treaſon; and but one for any capital offence, which was that of the lord *Sanquhar*; the nobleſt piece of juſtice, one of them, that ever came forth in any king's time.

As for penal laws, which lie as ſnares upon the ſubjects, and which were as a *nemo ſcit* to king *Henry* VII; it yields a revenue that will ſcarce pay for the parchment of the king's records at *Weſtminſter*.

And laſtly for peace, we ſee manifeſtly his majeſty bears ſome reſemblance of that great name, *a prince of peace*: he hath preſerved his ſubjects during his reign in peace, both within and without. For the peace with ſtates abroad, we have it *uſque ad ſatietatem*: and for peace in the lawyers phraſe, which count treſpaſſes, and forces, and riots, to be *contra pacem*; let me give your lordſhips this token or taſte, that this court, where they ſhould appear, had never leſs to do. And certainly there is no better ſign of *omnia bene*, than when this court is in a ſtill.

But, my lords, this is a ſea of matter; and therefore I muſt give it over, and conclude, that there was never king reigned in this nation that did better keep covenant in preſerving the liberties and procuring the good of his people: ſo that I muſt needs ſay for the ſubjects of *England*,

O fortunatos nimium ſua ſi bona nôrint;

as no doubt they do both know and acknowledge it; whatſoever a few turbulent diſcourſes may, through the lenity of the time, take boldneſs to ſpeak.

And as for this particular, touching the benevólence, wherein Mr. *I. S.* doth aſſign this breach of covenant, I leave it to others to tell you what the king may do, or what other kings have done; but I have told you what our king and my lords have done: which, I ſay and ſay again, is ſo far from introducing a new precedent, as it doth rather correct, and mollify, and qualify former precedents.

Now, Mr. *I. S.* let me tell you your fault in few words: for that I am perſuaded you ſee it already, though I woo no man's repentance; but I ſhall, as much as in me is, cheriſh it where I find it. Your offence hath three parts knit together:

Your ſlander,
Your menace, and
Your compariſon.

For your ſlander, it is no leſs than that the king is perjured in his coronation oath. No greater offence than perjury; no greater oath than that of a coronation. I leave it; it is too great to aggravate.

Your menace, that if there were a *Bullingbroke*, or I cannot tell what, there were matter for him, is a very ſeditious paſſage. You know well, that howſoever *Henry* the fourth's act, by a ſecret providence of God, prevailed, yet it was but an uſurpation; and if it were poſſible for ſuch a one to be this day, wherewith it ſeems your dreams are troubled, I do not doubt, his end would be upon the block; and that he would ſooner have the ravens ſit upon his head at *London-Bridge*, than the crown at *Weſtminſter*. And it is not your interlacing of your 'God forbid,' that will ſalve theſe ſeditious ſpeeches: neither could it be a forewarning, becauſe the matter was paſt and not revocable, but a very ſtirring up and incenſing of the people. If I ſhould ſay to you, for example, 'if 'theſe times were like ſome former times, of king *Henry* VIII. or ſome 'other times which God forbid, Mr. *I. S.* it would coſt you your life;' I am ſure you would not think this to be a gentle warning, but rather that I incenſed the court againſt you.

And for your compariſon with *Richard* II. I ſee, you follow the example of them that brought him upon the ſtage, and into print, in queen *Elizabeth*'s time, a moſt prudent and admirable queen. But let me intreat you, that when you will ſpeak of queen *Elizabeth* or king *James*, you would compare them to king *Henry* VII. or king *Edward* I. or ſome other parallels, to which they are alike. And this I would wiſh both you and all to take heed of, how you ſpeak ſeditious matter in parables, or by tropes or examples. There is a thing in an indictment called an inuendo; you muſt beware how you beckon or make ſigns upon the king in a dangerous ſenſe. But I will contain myſelf and preſs this no farther. I may hold you for turbulent or preſumptuous; but I hope you are not diſloyal: you are graciouſly and mercifully dealt with. And therefore having now opened to my lords, and, as I think, to your own heart and conſcience, the principal part of your offence, which concerns the king, I leave the reſt, which concerns the law, parliament, and the ſubjects that have given, to Mr. Serjeant and Mr. Solicitor.

XX. *The Caſe of Duels; or Proceedings in the* Star-Chamber, *againſt Mr.* WILLIAM PRIEST *for writing and ſending a Challenge, and Mr.* RICHARD WRIGHT *for carrying it,* 26 Jan. 11 Jam. I. 1615.

[*The following ſpeech of lord* Bacon *as attorney-general in this caſe, and the decree of the court, are taken from the laſt edition of his works. See vol.* 2. *p.* 563.]

Charge of ſir Francis Bacon, *the king's attorney-general.*

My lords,

I THOUGHT it fit for my place, and for theſe times, to bring to hearing before your lordſhips ſome cauſe touching private duels, to ſee if this court can do any good to tame and reclaim that evil, which ſeems unbridled. And I could have wiſhed that I had met with ſome greater perſons, as a ſubject for your cenſure; both becauſe it had been more worthy of this preſence, and alſo the better to have ſhewed the reſolution myſelf hath to proceed without reſpect of perſons in this buſineſs. But finding this cauſe on foot in my predeceſſor's time, and publiſhed and ready for hearing, I thought to loſe no time in a miſchief that groweth every day: and beſides, it paſſes not amiſs ſometimes in government, that the greater ſort be admoniſhed by an example made in the meaner, and the dog to be beaten before the lion. Nay, I ſhould think, my lords, that men of birth and quality will leave the practice, when it begins to be vilified, and come ſo low as to barber-ſurgeons and butchers, and ſuch baſe mechanical perſons.

And for the greatneſs of this preſence, in which I take much comfort, both as I conſider it in itſelf, and much more in reſpect it is by his majeſty's direction, I will ſupply the meanneſs of the particular cauſe, by handling of the general point: to the end, that by the occaſion of this preſent cauſe, both my purpoſe of proſecution againſt duels, and the opinion of the court, without which I am nothing, for the cenſure of them, may appear, and thereby offenders in that kind may read their own caſe, and know what they are to expect; which may ſerve for a warning until example may be made in ſome greater perſon: which I doubt the times will but too ſoon afford.

Therefore before I come to the particular, whereof your lordſhips are now to judge, I think it time beſt ſpent to ſpeak ſomewhat.

Firſt, of the nature and greatneſs of this miſchief.

Secondly, of the cauſes and remedies.

Thirdly, of the juſtice of the law of *England*, which ſome ſtick not to think defective in this matter.

Fourthly, of the capacity of this court, where certainly the remedy of this miſchief is beſt to be found.

And fifthly, touching mine own purpoſe and reſolution, wherein I ſhall humbly crave your lordſhips aid and aſſiſtance.

For the miſchief itſelf, it may pleaſe your lordſhips to take into your conſideration, that when revenge is once extorted out of the magiſtrates hands, contrary to God's ordinance, *mihi vindicta, ego retribuam*, and every man ſhall bear the ſword, not to defend, but to aſſail; and private men begin once to preſume to give law to themſelves, and to right their own wrongs; no man can foreſee the danger and inconveniencies that may ariſe and multiply thereupon. It may cauſe ſudden ſtorms in court, to the diſturbance of his majeſty, and unſafety of his perſon. It may grow from quarrels to bandying, and from bandying to trooping, and ſo to tumult and commotion; from particular perſons to diſſenſion of families and alliances; yea, to national quarrels, according to the infinite variety of accidents, which fall not under foreſight. So that the ſtate by this means ſhall be like to a diſtempered and imperfect body, continually ſubject to inflammations and convulſions.

Beſides, certainly, both in divinity and in policy, offences of preſumption are the greateſt. Other offences yield and conſent to the law that it is good, not daring to make defence, or to juſtify themſelves; but this offence expreſsly gives the law an affront, as if there were two laws, one a kind of gown-law, and the other a law of reputation, as they term it. So that *Paul*'s and *Weſtminſter*, the pulpit and the courts of juſtice, muſt give place to the law, as the king ſpeaketh in his proclamation, of ordinary tables, and ſuch reverend aſſemblies: the year-books and ſtatute-books muſt give place to ſome *French* and *Italian* pamphlets, which handle the doctrine of duels, which if they be in the right, *tranſeamus ad illa*, let us receive them, and not keep the people in conflict and diſtraction between two laws.

Again, my lords, it is a miſerable effect, when young men full of towardneſs and hope, ſuch as the poets call Auroræ *filii*, ſons of the morning, in whom the expectation and comfort of their friends conſiſteth, ſhall be caſt away and deſtroyed in ſuch a vain manner. But much more it is to be deplored when ſo much noble and genteel blood ſhould be ſpilt upon ſuch follies, as, if it were adventured in the field in ſervice of the king and realm, were able to make the fortune of a day, and to change the fortune of a kingdom. So as your lordſhips ſee what a deſperate evil this is; it troubleth peace; it diſ-furniſheth war; it bringeth calamity upon private men, peril upon the ſtate, and contempt upon the law.

Touching the cauſes of it; the firſt motive, no doubt, is a falſe and erroneous imagination of honour and credit; and therefore the king, in his laſt proclamation, doth moſt aptly and excellently call them bewitching duels. For, if one judge of it truly, it is no better than a ſorcery that enchanteth the ſpirits of young men, that bear great minds with a falſe ſhew, *ſpecies falſa*; and a kind of ſatanical illuſion and apparition of honour againſt religion, againſt law, againſt moral virtue, and againſt the precedents and examples of the beſt times and valianteſt nations; as I ſhall tell you by and by, when I ſhall ſhew you that the law of *England* is not alone in this point.

But then the ſeed of this miſchief being ſuch, it is nouriſhed by vain diſcourſes, and green and unripe conceits, which nevertheleſs have ſo prevailed, as though a man were ſtaid and ſober-minded, and a right believer touching the vanity and unlawfulneſs of theſe duels; yet the ſtream of vulgar opinion is ſuch, as it impoſeth a neceſſity upon men of value to conform themſelves, or elſe there is no living or looking upon mens faces: ſo that we have not to do, in this caſe, ſo much with particular perſons, as with unſound and depraved opinions, like the dominations and ſpirits of the air which the ſcripture ſpeaketh of.

Hereunto may be added, that men have almoſt loſt the true notion and underſtanding of fortitude and valour. For fortitude diſtinguiſheth of the grounds of quarrels whether they be juſt; and not only ſo, but whether they be worthy; and ſetteth a better price upon mens lives than to beſtow them idly. Nay, it is weakneſs and diſ-eſteem of a man's ſelf, to put a man's life upon ſuch liedger performances. A man's life is not to be trifled away: it is to be offered up and ſacrificed to honourable ſervices, public merits, good cauſes, and noble adventures. It is in expence of blood as it is in expence of money. It is no liberality to make a profuſion of money upon every vain occaſion; nor no more it is fortitude to make effuſion of blood, except the cauſe be of worth. And thus much for the cauſes of this evil.

For the remedies, I hope ſome great and noble perſon will put his hand to this plough, and I wiſh that my labours of this day may be but forerunners to the work of a higher and better hand. But yet to deliver my opinion as may be proper for this time and place, there be four things that I have thought on, as the moſt effectual for the repreſſing of this depraved cuſtom of particular combats.

The firſt is, that there do appear and be declared a conſtant and ſettled reſolution in the ſtate to aboliſh it. For this is a thing, my lords, muſt go down at once, or not at all; for then every particular man will think himſelf acquitted in his reputation, when he ſees that the ſtate takes it to heart, as an inſult againſt the king's power and authority, and thereupon hath abſolutely reſolved to maſter it; like unto that which was ſet down in expreſs words in the edict of *Charles* IX. of *France* touching duels, that the king himſelf took upon him the honour of all that took themſelves grieved or intereſted for not having performed the combat. So muſt the ſtate do in this buſineſs; and in my conſcience there is none that is but of a reaſonable ſober diſpoſition, be he never ſo valiant, except it be ſome furious perſon that is like a firework, but will be glad of it, when he ſhall ſee the law and rule of ſtate diſintereſt him of a vain and unneceſſary hazard.

Secondly, care muſt be taken that this evil be no more cockered, nor the humour of it fed; wherein I humbly pray your lordſhips, that I may ſpeak my mind freely, and yet be underſtood aright. The proceedings of the great and noble commiſſioners martial I honour and reverence much, and of them I ſpeak not in any ſort. But I ſay the compounding of quarrels, which is otherwiſe in uſe by private noblemen and gentlemen, it is ſo punctual, and hath ſuch reference and reſpect unto the received conceits, what's before-hand, and what's behind-hand, and I cannot tell what, as without all queſtion it doth, in a faſhion, countenance and authorize this practice of duels, as if it had in it ſomewhat of right.

Thirdly, I muſt acknowledge, that I learned out of the king's laſt proclamation, the moſt prudent and beſt applied remedy for this offence, if it ſhall pleaſe his majeſty to uſe it, that the wit of man can deviſe. This offence, my lords, is grounded upon a falſe conceit of honour; and therefore it would be puniſhed in the ſame kind, *in eo quis rectiſſime plectitur, in quo peccat*. The fountain of honour is the king and his aſpect, and the acceſs to his perſon continueth honour in life, and to be baniſhed from his preſence is one of the greateſt eclipſes of honour that can be. If his majeſty ſhall be pleaſed that when this court ſhall cenſure any of theſe offences in perſons of eminent quality, to add this out of his own power and diſcipline, that theſe perſons ſhall be baniſhed and excluded from his court for certain years, and the courts of his queen and prince, I think there is no man, that hath any good blood in him, will commit an act that ſhall caſt him into that darkneſs, that he may not behold his ſovereign's face.

Laſtly, and that which more properly concerneth this court: we ſee, my lords, the root of this offence is ſtubborn; for it deſpiſeth death, which is the utmoſt of puniſhments; and it were a juſt but a miſerable ſeverity, to execute the law without all remiſſion or mercy, where the caſe proveth capital. And yet the late ſeverity in *France* was more, where, by a kind of martial law, eſtabliſhed by ordinance of the king and parliament, the party that had ſlain another was preſently had to the gibbet, inſomuch as gentlemen of great quality were hanged, their wounds bleeding, leſt a natural death ſhould prevent the example of juſtice. But, my lords, the courſe which we ſhall take is of far greater lenity, and yet of no leſs efficacy; which is to puniſh, in this court, all the middle acts and proceedings which tend to the duel, which I will enumerate to you anon, and ſo to hew and vex the root in the branches, which, no doubt, in the end will kill the root, and yet prevent the extremity of law.

Now for the law of *England*, I ſee it excepted to, though ignorantly, in two points.

The one, that it ſhould make no difference between an inſidious and foul murder, and the killing of a man upon fair terms, as they now call it.

The other, that the law hath not provided ſufficient puniſhment, and reparations, for contumely of words, as the lye, and the like.

But theſe are no better than childiſh novelties againſt the divine law, and againſt all laws in effect, and againſt the examples of all the braveſt and moſt virtuous nations of the world.

For firſt, for the law of God, there is never to be found any difference made in homicide, but between homicide voluntary, and involuntary, which we term miſadventure. And for the caſe of miſadventure itſelf, there were cities of refuge; ſo that the offender was put to his flight, and that flight was ſubject to accident, whether the revenger of blood ſhould overtake him before he had gotten ſanctuary or no. It is true that our law hath made a more ſubtle diſtinction between the will inflamed and the will adviſed, between manſlaughter in heat and murder upon prepenſed malice or cold blood, as the ſoldiers call it; an indulgence not unfit for a choleric and warlike nation; for it is true, *ira furor brevis*, a man in fury is not himſelf. This privilege of paſſion the ancient *Roman* law reſtrained, but to a caſe: that was, if the huſband took the adulterer in the manner. To that rage and provocation only it gave way, that an homicide was juſtifiable. But for a difference to be made in caſe of killing and deſtroying man, upon a fore-thought purpoſe, between foul and fair, and as it were between ſingle murder and vied murder, it is but a monſtrous child of this latter age, and there is no ſhadow of it in any law divine or human. Only it is true, I find in the ſcripture that *Cain* inticed his brother into the field and ſlew him treacherouſly; but *Lamech* vaunted of his manhood, that he would kill a young man, and if it were to his hurt: ſo as I ſee no difference between an inſidious murder and a braving or preſumptuous murder, but the difference between *Cain* and *Lamech*.

As for examples in civil ſtates, all memory doth conſent, that *Græcia* and *Rome* were the moſt valiant and generous nations of the world; and, that which is more to be noted, they were free eſtates, and not under a monarchy; whereby a man would think it a great deal the more reaſon that particular perſons ſhould have righted themſelves. And yet they had not this practice of duels, nor any thing that bare ſhew thereof: and ſure they would have had it, if there had been any virtue in it. Nay, as he ſaith, *fas eſt et ab hoſte doceri*. It is memorable, that is reported by a counſellor ambaſſador of the emperor's, touching the cenſure of the *Turks* of theſe duels. There was a combat of this kind performed by two perſons of quality of the *Turks*, wherein one of them was ſlain, the other party was convented before the council of baſhaws. The manner of the reprehenſion was in theſe words. 'How durſt you undertake to fight 'one with the other? Are there not Chriſtians enough to kill? Did you 'not know that whether of you ſhall be ſlain, the loſs would be the 'great ſeignior's?' So as we may ſee that the moſt warlike nations, whether generous or barbarous, have ever deſpiſed this wherein now men glory.

It is true, my lords, that I find combats of two natures authorized, how juſtly I will not diſpute as to the latter of them.

The one, when upon the approaches of armies in the face one of the other, particular perſons have made challenges for trial of valours in the field upon the publick quarrel.

This the *Romans* called *pugna per provocationem*. And this was never, but either between the generals themſelves, who were abſolute, or between particulars by licence of the generals; never upon private authority. So you ſee *David* aſked leave when he fought with *Goliah*; and *Joab*, when the armies were met, gave leave, and ſaid, ‘ let the young men play ‘ before us.’ And of this kind was that famous example in the wars of *Naples*, between twelve *Spaniards* and twelve *Italians*, where the *Italians* bare away the victory; beſides other infinite like examples worthy and laudable, ſometimes by ſingles, ſometimes by numbers.

The ſecond combat is a judicial trial of right, where the right is obſcure, introduced by the *Goths* and the northern nations, but more anciently entertained in *Spain*. And this yet remains in ſome caſes as a divine lot of battle, though controverted by divines, touching the lawfulneſs of it: ſo that a wiſe writer ſaith, *taliter pugnantes videntur tentare Deum, quia hoc volunt ut Deus oſtendat et faciat miraculum, ut juſtam cauſam habens victor efficiatur, quod ſæpe contra accidit.* But howſoever it be, this kind of fight taketh its warrant from law. Nay, the *French* themſelves, whence this folly ſeemeth chiefly to have flown, never had it but only in practice and toleration, and never as authoriſed by law; and yet now of late they have been fain to purge their folly with extreme rigour, in ſo much as many gentlemen left between death and life in the duels, as I ſpake before, were haſtened to hanging with their wounds bleeding. For the ſtate found it had been neglected ſo long, as nothing could be thought cruelty, which tended to the putting of it down.

As for the ſecond defect pretended in our law, that it hath provided no remedy for lyes and fillips, it may receive like anſwer. It would have been thought a madneſs amongſt the ancient lawgivers, to have ſet a puniſhment upon the lye given, which in effect is but a word of denial, a negative of another's ſaying. Any lawgiver, if he had been aſked the queſtion, would have made *Solon*'s anſwer: that he had not ordained any puniſhment for it, becauſe he never imagined the world would have been ſo fantaſtical as to take it ſo highly. The civilians, they diſpute whether an action of injury lie for it, and rather reſolve the contrary. And *Francis* the firſt of *France*, who firſt ſet on and ſtamped this diſgrace ſo deep, is taxed by the judgment of all wiſe writers for beginning the vanity of it; for it was he, that when he had himſelf given the lye and defy to the emperor, to make it current in the world, ſaid in a ſolemn aſſembly, ‘ that he was no honeſt man that would bear the lye:’ which was the fountain of this new learning.

As for words of reproach and contumely, whereof the lye was eſteemed none, it is not credible, but that the orations themſelves are extant, what extreme and exquiſite reproaches were toſſed up and down in the ſenate of *Rome* and the places of aſſembly, and the like in *Græcia*, and yet no man took himſelf fouled by them, but took them but for breath, and the ſtile of an enemy, and either deſpiſed them or returned them, but no blood ſpilt about them.

So of every touch or light blow of the perſon, they are not in themſelves conſiderable, ſave that they have got upon them the ſtamp of a diſgrace, which maketh theſe light things paſs for great matter. The law of *England*, and all laws, hold theſe degrees of injury to the perſon, ſlander, battery, maim, and death; and if there be extraordinary circumſtances of deſpite and contumely, as in caſe of libels, and baſtinadoes, and the like, this court taketh them in hand and puniſheth them exemplarily. But for this apprehenſion of a diſgrace, that a fillip to the perſon ſhould be a mortal wound to the reputation, it were good that men did hearken unto the ſaying of *Gonſalvo*, the great and famous commander, that was wont to ſay, a gentleman's honour ſhould be *de tela craſſiore*, of a good ſtrong warp or web, that every little thing ſhould not catch in it; when as now it ſeems they are but of cobweb-lawn or ſuch light ſtuff, which certainly is weakneſs, and not true greatneſs of mind, but like a ſick man's body, that is ſo tender that it feels every thing. And ſo much in maintenance and demonſtration of the wiſdom and juſtice of the law of the land.

For the capacity of this court, I take this to be a ground infallible: that whereſoever an offence is capital, or matter of felony, though it be not acted, there the combination or practice tending to that offence is puniſhable in this court as a high miſdemeanor. So practice to impoiſon, though it took no effect; waylaying to murder, though it took no effect; and the like; have been adjudged hainous miſdemeanors puniſhable in this court. Nay, inceptions and preparations in inferior crimes, that are not capital, as ſuborning and preparing of witneſſes that were never depoſed, or depoſed nothing material, have likewiſe been cenſured in this court, as appeareth by the decree in *Garnon*'s caſe.

Why then, the major propoſition being ſuch, the minor cannot be denied: for every appointment of the field is but combination and plotting of murder. Let them gild it how they liſt, they ſhall never have fairer terms of me in place of juſtice. Then the concluſion followeth, that it is a caſe fit for the cenſure of the court. And of this there be precedents in the very point of challenge.

It was the caſe of *Wharton*, plaintiff againſt *Ellekar* and *Acklam* defendants, where *Acklam*, being a follower of *Ellekar*'s, was cenſured for carrying a challenge from *Ellekar* to *Wharton*, though the challenge was not put in writing, but delivered only by word of meſſage; and there are words in the decree, that ſuch challenges are to the ſubverſion of government.

Theſe things are well known, and therefore I needed not ſo much to have inſiſted upon them, but that in this caſe I would be thought not to innovate any thing of my own head, but to follow the former precedents of the court, though I mean to do it more thoroughly, becauſe the time requires it more.

Therefore now to come to that which concerneth my part; I ſay, that by the favour of the king and the court, I will proſecute in this court in the caſes following.

If any man ſhall appoint the field, though the fight be not acted or performed.

If any man ſhall ſend any challenge in writing, or any meſſage of challenge.

If any man carry or deliver any writing or meſſage of challenge.

If any man ſhall accept or return a challenge.

If any man ſhall accept to be a ſecond in a challenge of either ſide.

If any man ſhall depart the realm, with intention and agreement to perform the fight beyond the ſeas.

If any man ſhall revive a quarrel by any ſcandalous bruits or writings, contrary to a former proclamation publiſhed by his majeſty in that behalf.

Nay, I hear there be ſome counſel learned of duels, that tell young men when they are before-hand, and when they are otherwiſe, and thereby incenſe and incite them to the duel, and make an art of it. I hope I ſhall meet with ſome of them too: and I am ſure, my lords, this courſe of preventing duels in nipping them in the bud, is fuller of clemency and providence, than the ſuffering them to go on, and hanging men with their wounds bleeding, as they did in *France*.

To conclude, I have ſome petitions to make firſt to your lordſhip, my lord chancellor, that in caſe I be advertiſed of a purpoſe in any to go beyond the ſea to fight, I may have granted his majeſty's writ of *ne exeat regnum* to ſtop him, for this giant beſtrideth the ſea, and I would take and ſnare him by the foot on this ſide; for the combination and plotting is on this ſide, though it ſhould be acted beyond ſea. And your lordſhip ſaid notably the laſt time I made a motion in this buſineſs, that a man may be as well *fur de ſe*, as *felo de ſe*, if he ſteal out of the realm for a bad purpoſe. As for the ſatisfying of the words of the writ, no man will doubt but he doth *machinari contra coronam*, as the words of the writ be, that ſeeketh to murder a ſubject; for that is ever *contra coronam et dignitatem.* I have alſo a ſuit to your lordſhips all in general, that for juſtice ſake, and for true honour's ſake, honour of religion, law, and the king our maſter, againſt this fond and falſe diſguiſe or puppetry of honour, I may in my proſecution, which, it is like enough, may ſometimes ſtir coals, which I eſteem not for my particular, but as it may hinder the good ſervice, I may, I ſay, be countenanced and aſſiſted from your lordſhips. Laſtly, I have a petition to the nobles and gentlemen of *England*, that they would learn to eſteem themſelves at a juſt price. *Non hos quæſitum munus in uſus*, their blood is not to be ſpilt like water or a vile thing; therefore that they would reſt perſuaded there cannot be a form of honour, except it be upon a worthy matter. But for this, *ipſi viderunt*, I am reſolved. And thus much for the general, now to the preſent caſe.

Decree of the Star-Chamber *againſt Duels.*

In Camera ſtellata coram concilio ibidem, 26 Januarii, 11 Jac. *regis.*

PRESENT,

George lord archbiſhop of *Canterbury.*
Thomas lord *Elleſmere*, lord chancellor of *England.*
Henry earl of *Northampton*, lord privy ſeal.
Charles earl of *Nottingham*, lord high admiral of *England.*
Thomas earl of *Suffolk*, lord chamberlain.
John lord biſhop of *London.*
Edward lord *Zouch.*
William lord *Knolles*, treaſurer of the houſhold.
Edward lord *Wotton*, comptroller.
John lord *Stanhope*, vice-chamberlain.
Sir *Edward Coke*, knight, lord chief juſtice of *England.*
Sir *Henry Hobart*, knight, lord chief juſtice of the *Common Pleas.*
Sir *Julius Cæſar*, knight, chancellor of the *Exchequer.*

THIS day was heard and debated at large the ſeveral matters of informations here exhibited by ſir *Francis Bacon*, knight, his majeſty's attorney-general: the one againſt *William Prieſt*, gentleman, for writing and ſending a letter of challenge, together with a ſtick, which ſhould be the length of the weapon: and the other againſt *Richard Wright*, eſquire, for carrying and delivering the ſaid letter and ſtick unto the party challenged, and for other contemptuous and inſolent behaviour uſed before the juſtices of the peace in *Surry* at their ſeſſions, before whom he was convented. Upon the opening of which cauſe, his highneſs's ſaid attorney-general did firſt give his reaſon to the court, why, in a caſe which he intended ſhould be a leading caſe for the repreſſing of ſo great a miſchief in the common-wealth, and concerning an offence which reigneth chiefly amongſt perſons of honour and quality, he ſhould begin with a cauſe which had paſſed between ſo mean perſons as the defendants ſeemed to be; which he ſaid was done, becauſe he found this cauſe ready publiſhed, and in ſo growing an evil, he thought good to loſe no time; whereunto he added, that it was not amiſs ſometimes to beat the dog before the lion; ſaying farther, that he thought it would be ſome motive for perſons of high birth and countenance to leave it, when they ſaw it was taken up by baſe and mechanical fellows; but concluded, that he reſolved to proceed without reſpect of perſons for the time to come, and for the preſent to ſupply the meanneſs of this particular caſe by inſiſting the longer upon the general point.

Wherein he did firſt expreſs unto the court at large the greatneſs and dangerous conſequence of this preſumptuous offence, which extorted revenge out of the magiſtrate's hands, and gave boldneſs to private men to be lawgivers to themſelves; the rather, becauſe it is an offence that doth juſtify itſelf againſt the law, and plainly gives the law an affront; deſcribing alſo the miſerable effect which it draweth upon private families, by cutting off young men, otherwiſe of good hope; and chiefly the loſs of the king and the commonwealth, by the caſting away of much good blood, which, being ſpent in the field upon occaſion of ſervice, were able to continue the renown which this kingdom hath obtained in all ages, of being eſteemed victorious.

Secondly, his majeſty's ſaid attorney-general did diſcourſe touching the cauſes and remedies of this miſchief that prevailed ſo in theſe times; ſhewing the ground thereof to be a falſe and erroneous imagination of honour and credit, according to the term which was given to thoſe duels by a former proclamation of his majeſty's, which called them bewitching duels, for that it was no better than a kind of ſorcery, which enchanteth the ſpirits of young men, which bear great minds, with a ſhew of honour in that which is no honour indeed; being againſt religion, law, moral virtue, and againſt the precedents and examples of the beſt times, and valianteſt nations of the world; which though they excelled for proweſs and military virtue in a public quarrel, yet know not what theſe private duels meant; ſaying farther, that there was too much way and countenance given unto theſe duels, by the courſe that is held by noblemen and gentlemen in compounding of quarrels, who uſe to ſtand too punctually upon conceits of ſatisfactions and diſtinctions, what is before-hand, and what behind-hand, which do but feed the humour: adding likewiſe, that it was no fortitude to ſhew valour in a quarrel, except there were a juſt and worthy ground of the quarrel; but that it was weakneſs to ſet a man's life at ſo mean a rate as to beſtow it upon trifling occaſions, which ought to be rather offered up and ſacrificed to honourable ſervices, public merits, good cauſes, and noble adventures. And as concerning the remedies, he concluded, that the only way was, that the ſtate would declare a conſtant and ſettled reſolution to maſter and put down this preſumption in private men, of whatſoever degree, of righting their own wrongs, and this to do at once; for that then every particular man would think himſelf acquitted in his reputation, when that he ſhall ſee that the ſtate takes his honour into their own hands, and ſtandeth between him and any intereſt or prejudice, which he might receive in his reputation for obeying. Whereunto he added likewiſe, that the wiſeſt and mildeſt way to ſuppreſs theſe duels, was rather to puniſh in this court all the acts of preparation, which did in any wiſe tend to the duels, as this of challenges and the like, and ſo to prevent the capital puniſhment, and to vex the root in the branches, than to ſuffer them to run on to the execution, and then to puniſh them capitally after the manner of *France*; where of late times gentlemen of great quality that had killed others in duel, were carried to the gibbet with their wounds bleeding, leſt a natural death ſhould keep them from the example of juſtice.

Thirdly, his majeſty's ſaid attorney-general did, by many reaſons which he brought and alledged, free the law of *England* from certain vain and childiſh exceptions, which are taken by theſe duelliſts. The one, becauſe the law makes no difference in puniſhment between an inſidious and foul murder, and the killing a man upon challenge and fair terms, as they call it. The other, for that the law hath not provided ſufficient puniſhment and reparation for contumely of words, as the lye, and the like. Wherein his majeſty's ſaid attorney-general did ſhew, by many weighty arguments and examples, that the law of *England* did conſent with the law of God and the law of nations in both thoſe points, and that this diſtinction in murder between foul and fair, and this grounding of mortal quarrels upon uncivil and reproachful words, or the like diſgraces, was never authoriſed by any law or ancient examples; but it is a late vanity crept in from the practice of the *French*, who themſelves ſince have been ſo weary of it, as they have been forced to put it down with all ſeverity.

Fourthly, his majeſty's ſaid attorney-general did prove unto the court by rules of law and precedents, that this court hath capacity to puniſh ſending and accepting of challenges, though they were never acted nor executed; taking for a ground infallible, that whereſoever an offence is capital or matter of felony, if it be acted and performed, there the conſpiracy, combination, or practice tending to the ſame offence, is puniſhable as a high miſdemeanor, although they never were performed. And therefore, that practice to impoiſon, though it took no effect, and the like, have been puniſhed in this court; and cited the precedent in *Garnon*'s caſe, wherein a crime of a much inferior nature, the ſuborning and preparing of witneſſes, though they never were depoſed, or depoſed nothing material, was cenſured in this court. Whereupon he concluded, that for as much as every appointment of the field is in law but a combination of plotting of a murder, howſoever men might gild it; that therefore it was a caſe fit for the cenſure of this court: and therein he vouched a precedent in the very point, that in a caſe between *Wharton* plaintiff, and *Ellekar* and *Acklam* defendants. *Acklam* being a follower of *Ellekar*, had carried a challenge unto *Wharton*; and although it were by word of mouth, and not by writing, yet it was ſeverely cenſured by the court; the decree having words, that ſuch challenges do tend to the ſubverſion of government. And therefore his majeſty's attorney willed the ſtanders-by to take notice that it was no innovation that he brought in, but a proceeding according to former precedents of the court, although he purpoſed to follow it more thoroughly than had been done ever heretofore, becauſe the times did more and more require it. Laſtly, his majeſty's ſaid attorney-general did declare and publiſh to the court in ſeveral articles, his purpoſe and reſolution in what caſes he did intend to proſecute offences of that nature in this court; that is to ſay, that if any man ſhall appoint the field, although the fight be not acted or performed; if any man ſhall ſend any challenge in writing or meſſage of challenge; if any man ſhall carry or deliver any writing or meſſage of challenge; if any man ſhall accept or return a challenge; if any man ſhall accept to be a ſecond in a challenge of either part; if any man ſhall depart the realm with intention and agreement to perform the fight beyond the ſeas; if any man ſhall revive a quarrel by any ſcandalous bruits or writings contrary to a former proclamation, publiſhed by his majeſty in that behalf; that in all theſe caſes his majeſty's attorney-general, in diſcharge of his duty, by the favour and aſſiſtance of his majeſty and the court, would bring the offenders, of what ſtate or degree ſoever, to the juſtice of this court, leaving the lords commiſſioners martial to the more exact remedies: adding farther, that he heard there were certain counſel learned of duels, that tell young men when they are before-hand, and when they are otherwiſe, and did incenſe and incite them to the duel, and made an art of it; who likewiſe ſhould not be forgotten. And ſo concluded with two petitions, the one in particular to the lord chancellor, that in caſe advertiſement were given of a purpoſe in any to go beyond the ſeas to fight, there might be granted his majeſty's writ of *ne exeat regnum* againſt him; and the other to the lords in general, that he might be aſſiſted and countenanced in this ſervice.

After which opening and declaration of the general cauſe, his majeſty's ſaid attorney did proceed to ſet forth the proofs of this particular challenge and offence now in hand, and brought to the judgment and cenſure of this honourable court; whereupon it appeared to this honourable court by the confeſſion of the ſaid defendant *Prieſt* himſelf, that he, having received ſome wrong and diſgrace at the hands of one *Hutcheſt*, did thereupon, in revenge thereof, write a letter to the ſaid *Hutcheſt*, containing a challenge to fight with him at ſingle rapier; which letter the ſaid *Prieſt* did deliver to the ſaid defendant *Wright*, together with a ſtick containing the length of the rapier, wherewith the ſaid *Prieſt* meant to perform the fight. Whereupon the ſaid *Wright* did deliver the ſaid letter to the ſaid *Hutcheſt*, and did read the ſame unto him; and after the reading thereof, did alſo deliver to the ſaid *Hutcheſt* the ſaid ſtick, ſaying, that the ſame was the length of the weapon mentioned in the ſaid letter. But the ſaid *Hutcheſt*, dutifully reſpecting the preſervation of his majeſty's peace, did refuſe the ſaid challenge, whereby no farther miſchief did enſue thereupon.

This honourable court, and all the honourable preſence this day ſitting, upon grave and mature deliberation, pondering the quality of theſe offences, they generally approved the ſpeech and obſervations of his majeſty's ſaid attorney-general, and highly commended his great care and good ſervice in bringing a cauſe of this nature to public puniſhment and example, and in profeſſing a conſtant purpoſe to go on in the like courſe with others: letting him know, that he might expect from the court all concurrence and aſſiſtance in ſo good a work. And thereupon the court did by their ſeveral opinions and ſentences declare, how much it imported the peace and proſperous eſtate of his majeſty and his kingdom to nip this practice and offence of duels in the head, which now did overſpread and grow univerſal, even among mean perſons, and was not only entertained in practice and cuſtom, but was framed into a kind of art and precepts: ſo that, according to the ſaying of the ſcripture, *miſchief* is *imagined like a law.* And the court with one conſent did declare their opinions: that by the ancient law of the land, all inceptions, preparations, and combinations to execute unlawful acts, though they never be performed, as they be not to be puniſhed capitally, except it be in caſe of treaſon, and ſome other particular caſes of ſtatute law, ſo yet they are puniſhable as miſdemeanors and contempts: and that this court was proper for offences of ſuch nature; eſpecially in this caſe, where the bravery and inſolency of the times are ſuch as the ordinary magiſtrates and juſtices, that are truſted with the preſervation of the peace, are not able to maſter and repreſs thoſe offences, which were by the court at large ſet forth, to be not only againſt the law of God, to whom, and his ſubſtitutes, all revenge belongeth, as part of his prerogative, but alſo againſt the oath and duty of every ſubject unto his majeſty, for that the ſubject doth ſwear unto him by the ancient law allegiance of life and member; whereby it is plainly inferred, that the ſubject hath no diſpoſing power over himſelf of life and member to be ſpent or ventured according to his own paſſions and fancies, inſomuch as the very practice of chivalry in juſts and tournays, which are but images of martial actions, appear by ancient precedents not to be lawful without the king's licence obtained. The court alſo noted, that theſe private duels or combats were of another nature from the combats which have been allowed by the law, as well of this land as of other nations for the trial of rights or appeals. For that thoſe combats receive direction and authority from the law; whereas theſe contrariwiſe ſpring only from the unbridled humours of private men. And as for the pretence of honour, the court much miſliking the confuſion of degrees which is grown of late, every man aſſuming unto himſelf the term and attribute of honour, did utterly reject and condemn the opinion, that the private duel, in any perſon whatſoever, had any grounds of honour; as well becauſe nothing can be honourable that is not lawful, and that it is no magnanimity or greatneſs of mind, but a ſwelling and tumour of the mind, where there faileth a right and ſound judgment; as alſo for that it was rather juſtly to be eſteemed a weakneſs, and a conſcience of ſmall value in a man's ſelf to be dejected ſo with a word or trifling diſgrace, as to think there is no re-cure of it, but by the hazard of life; whereas true honour in perſons that know their own worth is not of any ſuch brittle ſubſtance, but of a more ſtrong compoſition. And finally, the court, ſhewing a firm and ſettled reſolution to proceed with all ſeverity againſt theſe duels, gave warning to all young noblemen and gentlemen, that they ſhould not expect the like connivance or toleration as formerly have been, but that juſtice ſhould have a full paſſage without protection or interruption. Adding, that after a ſtrait inhibition, whoſoever ſhould attempt a challenge or combat, in caſe where the other party was reſtrained to anſwer him, as now all good ſubjects are, did by their own principles receive the diſhonour and diſgrace upon himſelf.

And for the preſent cauſe, the court hath ordered, adjudged, and decreed, that the ſaid *William Prieſt* and *Richard Wright* be committed to the priſon of the *Fleet*, and the ſaid *Prieſt* to pay five hundred pounds, and the ſaid *Wright* five hundred marks, for their ſeveral fines to his majeſty's uſe. And to the end, that ſome more public example may be made hereof amongſt his majeſty's people, the court hath further ordered and decreed, that the ſaid *Prieſt* and *Wright* ſhall at the next aſſizes, to be holden in the county of *Surry*, publickly in face of the court, the judges ſitting, acknowledge their high contempt and offence againſt God, his majeſty, and his laws, and ſhew themſelves penitent for the ſame.

Moreover, the wiſdom of this high and honourable court thought it meet and neceſſary, that all ſorts of his majeſty's ſubjects ſhould underſtand and take notice of that which hath been ſaid and handled this day touching this matter, as well by his highneſs's attorney-general, as by the lords judges, touching the law in ſuch caſes. And therefore the court hath enjoined Mr. Attorney to have ſpecial care to the penning of this decree, for the ſetting forth in the ſame ſummarily the matters and reaſons, which have been opened and delivered by the court touching the ſame; and nevertheleſs alſo at ſome time convenient to publiſh the particulars of his ſpeech and declaration, as very meet and worthy to be remembered and made known unto the world, as theſe times are. And this decree, being in ſuch ſort carefully drawn and penned, the whole court thought it meet, and ſo have ordered and decreed, that the ſame be not only read and publiſhed at the next aſſizes for *Surry*, at ſuch time as the ſaid *Prieſt* and *Wright* are to acknowledge their offences as aforeſaid; but that the ſame be likewiſe publiſhed and made known in all ſhires of this kingdom. And to that end the juſtices of aſſize are required by this honourable court to cauſe this decree to be ſolemnly read and publiſhed in all the places and ſittings of their ſeveral circuits, and in the greateſt aſſembly; to the end, that all his majeſty's ſubjects may take knowledge and underſtand the opinion of this honourable court in this caſe, and in what meaſure his majeſty and this honourable court purpoſeth to puniſh ſuch as ſhall fall into the like contempt and offences hereafter. Laſtly, this honourable court much approving that, which the right honourable ſir *Edward Coke*, knight, lord chief juſtice of *England*, did now deliver touching the law in this caſe of duels, hath enjoined his lordſhip to report the ſame in print, as he hath formerly done divers other caſes, that ſuch as underſtand not the law in that behalf, and all others, may better direct themſelves, and prevent the danger thereof hereafter.

XXI. *Caſe of Mr.* WILLIAM TALBOT, Hilary-Term, 11 Jam. I. *on an Information* ore tenus, *in the* Star-Chamber, *for maintaining a Power in the Pope to depoſe and kill Kings.*

[*In lord* Bacon's *works there is a ſpeech by him as attorney-general and proſecutor in this caſe.* 2 Bac. *laſt 4to ed.* 577. *According to the title of the ſpeech, the cauſe of the proſecution appears to have been this. Mr.* Talbot, *who was a counſellor at law of* Ireland, *being aſked, whether the doctrine of* Suarez *in reſpect to the depoſing and killing of kings excommunicated was true or not, anſwered, that he ſubmitted his opinion to the judgment of the* Roman *catholic church. This anſwer he ſubſcribed, and we preſume, that it was given on being examined before the privy-council; though that circumſtance is not expreſsly ſtated by lord* Bacon. *What the judgment of the* Star-Chamber *was, we do not find noticed.*]

Speech of ſir Francis Bacon *attorney-general, the laſt day of* Hilary-Term, 11 Jam. I.

My lords,

I BROUGHT before you the firſt ſitting of this term the cauſe of duels. But now this laſt ſitting I ſhall bring before you a cauſe concerning the greateſt duel which is in the Chriſtian world, the duel and conflict between the lawful authority of ſovereign kings, which is God's ordinance for the comfort of human ſociety, and the ſwelling pride and uſurpation of the ſee of *Rome in temporalibus*, tending altogether to anarchy and confuſion. Wherein if this pretence in the pope of *Rome*, by cartels to make ſovereign princes as the banditti, and to proſcribe their lives, and to expoſe their kingdoms to prey; if theſe pretences, I ſay, and all perſons that ſubmit themſelves to that part of the pope's power in the leaſt degree, be not by all poſſible ſeverity repreſſed and puniſhed, the ſtate of Chriſtian kings will be no other than the ancient torment deſcribed by the poets in the hell of the heathen; a man ſitting richly robed, ſolemnly attended, delicious fare, *&c.* with a ſword hanging over his head, hanging by a ſmall thread, ready every moment to be cut down by an accurſing and accurſed hand. Surely I had thought they had been the prerogatives of God alone, and of his ſecret judgments: *ſolvam cingula regum, I will looſen the girdles of kings*; or again, *he poureth contempt upon princes*; or, *I will give a king in my wrath, and take him away again in my diſpleaſure*; and the like. But if theſe be the claims of a mortal man, certainly they are but the myſteries of that perſon, which *exalts himſelf above all that is called God, ſupra omne quod dicitur Deus.* Note it well, not above God, though that in a ſenſe be true, but *above all that is called God*; that is, lawful kings and magiſtrates.

But, my lords, in this duel I find this *Talbot*, that is now before you, but a coward; for he hath given ground, he hath gone backward and forward; but in ſuch a faſhion, and with ſuch interchange of repenting and relapſing, as I cannot tell whether it doth extenuate or aggravate his offence. If he ſhall more publicly in the face of the court fall and ſettle upon a right mind, I ſhall be glad of it; and he that would be againſt the king's mercy, I would he might need the king's mercy: but nevertheleſs the court will proceed by rules of juſtice.

The offence, therefore wherewith I charge this *Talbot*, priſoner at the bar, is this in brief and in effect: that he hath maintained and maintaineth under his hand, a power in the pope for the depoſing and murdering of kings. In what ſort he doth this, when I come to the proper and particular charge, I will deliver it in his own words without preſſing or ſtraining.

But before I come to the particular charge of this man, I cannot proceed ſo coldly; but I muſt expreſs unto your lordſhips the extreme and imminent danger wherein our dear and dread ſovereign is, and in him we all, nay, all princes of both religions, for it is a common cauſe, do ſtand at this day, by the ſpreading and inforcing of this furious and pernicious opinion of the pope's temporal power: which though the modeſt ſort would blanch with the diſtinction of *in ordine ad ſpiritualia*, yet that is but an illuſion; for he, that maketh the diſtinction, will alſo make the caſe. This peril, though it be in itſelf notorious, yet becauſe there is a kind of dullneſs, and almoſt a lethargy in this age, give me leave to ſet before you two glaſſes, ſuch as certainly the like never met in one age; the glaſs of *France*, and the glaſs of *England*. In that of *France* the tragedies acted and executed in two immediate kings; in the glaſs of *England*, the ſame, or more horrible, attempted likewiſe in a queen and king immediate, but ending in a happy deliverance.

In *France*, *Henry* III. in the face of his army, before the walls of *Paris*, ſtabbed by a wretched *Jacobine* frier. *Henry* IV. a prince that the *French* do ſurname *the Great*, one that had been a ſaviour and redeemer of his country from infinite calamities, and a reſtorer of that monarchy to the ancient ſtate and ſplendor, and a prince almoſt heroical, except it be in the point of revolt from religion, at a time when he was as it were to mount on horſeback for the commanding of the greateſt forces that of long time had been levied in *France*, this king likewiſe ſtillettoed by a raſcal votary, which had been enchanted and conjured for the purpoſe.

In *England*, queen *Elizabeth*, of bleſſed memory, a queen comparable and to be ranked with the greateſt kings, oftentimes attempted by like votaries, *Sommerville*, *Parry*, *Savage*, and others, but ſtill protected by the watchman that ſlumbereth not. Again, our excellent ſovereign king *James*, the ſweetneſs and clemency of whoſe nature were enough to quench and mortify all malignity, and a king ſhielded and ſupported by poſterity; yet this king in the chair of majeſty, his vine and olive branches about him, attended by his nobles and third eſtate in parliament; ready in the twinkling of an eye, as if it had been a particular doomſday, to have been brought to aſhes, diſperſed to the four winds. I noted the laſt day my lord chief juſtice, when he ſpoke of this powder treaſon, he laboured for words; though they came from him with great efficacy, yet he truly confeſſed, and ſo muſt all men, that that treaſon is above the charge and report of any words whatſoever.

Now, my lords, I cannot let paſs, but in theſe glaſſes which I ſpeak of, beſides the facts themſelves and danger, to ſhew you two things: the one, the ways of God Almighty, which turneth the ſword of *Rome* upon the kings that are the vaſſals of *Rome*, and over them gives it power; but protecteth thoſe kings, which have not accepted the yoke of his tyranny, from the effects of his malice: the other, that, as I ſaid at firſt, this is a common cauſe of princes; it involveth kings of both religions; and therefore his majeſty did moſt worthily and prudently ring out the alarm-bell, to awake all other princes to think of it ſeriouſly, and in time. But this is a miſerable caſe the while, that theſe *Roman* ſoldiers do either thruſt the ſpear into the ſides of God's anointed, or at leaſt they crown them with thorns; that is, piercing and pricking cares and fears, that they can never be quiet or ſecure of their lives or ſtates. And as this peril is common to princes of both religions, ſo princes of both religions have been likewiſe equally ſenſible of every injury that touched their temporals.

Thuanus reports in his ſtory, that when the realm of *France* was interdicted by the violent proceedings of pope *Julius* the ſecond, the king, otherwiſe noted for a moderate prince, cauſed coins of gold to be ſtamped with his own image, and this ſuperſcription, *perdam nomen* Babylonis *è terra.* Of which *Thuanus* ſaith, himſelf had ſeen divers pieces thereof. So as this catholic king was ſo much incenſed at that time, in reſpect of the pope's uſurpation, as he did apply *Babylon* to *Rome*. *Charles* the fifth, emperor, who was accounted one of the pope's beſt ſons, yet proceeded in matter temporal towards pope *Clement* with ſtrange rigour; never regarding the pontificality, but kept him priſoner thirteen months in a peſtilent priſon; and was hardly diſſuaded by his council from having ſent him captive into *Spain*; and made ſport with the threats of *Froſberg* the *German*, who wore a ſilk rope under his caſſock, which he would ſhew in all companies; telling them that he carried it to ſtrangle the pope with his own hands. As for *Philip the Fair*, it is the ordinary example, how he brought pope *Boniface* the eighth to an ignominious end, dying mad and enraged; and how he ſtiled his reſcript to the pope's bull, whereby he challenged his temporals, *ſciat fatuitas veſtra*, not your beatitude, but your ſtultitude; a ſtile worthy to be continued in the like caſes; for certainly that claim is mere folly and fury. As for native examples here, it is too long a field to enter into them. Never kings of any nation kept the partition-wall between temporal and ſpiritual better in times of greateſt ſuperſtition. I report me to king *Edward* I. that ſet up ſo many croſſes, and yet croſſed that part of the pope's juriſdiction, no man more ſtrongly. But theſe things have paſſed better pens and ſpeeches: here I end them.

But now to come to the particular charge of this man, I muſt inform your lordſhips the occaſion and nature of this offence. There hath been publiſhed lately to the world a work of *Suarez* a *Portugueſe*, a profeſſor in the univerſity of *Coimbra*, a confident and daring writer, ſuch an one as *Tully* deſcribes in deriſion; *nihil tam verens, quam ne dubitare aliqua de re videretur*: one that fears nothing but this, leſt he ſhould ſeem to doubt of any thing. A fellow that thinks with his magiſtrality and gooſe-quill to give laws and menages to crowns and ſceptres. In this man's writing, this doctrine of depoſing or murdering kings ſeems to come to a higher elevation than heretofore; and it is more arted and poſitived than in others. For in the paſſages which your lordſhips ſhall hear read anon, I find three aſſertions which run not in the vulgar track, but are ſuch as wherewith mens ears, as I ſuppoſe, are not much acquainted. Whereof the firſt is, that the pope hath a ſuperiority over kings, as ſubjects, to depoſe them; not only for ſpiritual crimes, as hereſy and ſchiſm, but for faults of a temporal nature; foraſmuch as a tyrannical government tendeth ever to the deſtruction of ſouls. So by this poſition, kings of either religion are alike comprehended, and none exempted. The ſecond, that after a ſentence given by the pope, this writer hath defined of a ſeries, or ſucceſſion, or ſubſtitution of hangmen, or *bourreaux*, to be ſure, leſt an executioner ſhould fail. For he ſaith, that when a king is ſentenced by the pope to deprivation or death, the executioner who is firſt in place is he to whom the pope ſhall commit the authority, which may be a foreign prince, it may be a particular ſubject, it may be general, to the firſt undertaker. But if there be no direction or aſſignation in the ſentence ſpecial nor general, then, *de jure*, it appertains to the next ſucceſſor, a natural and pious opinion; for commonly they are ſons, or brothers, or near of kin, all is one, ſo as the ſucceſſor be apparent; and alſo that he be a catholic. But if he be doubtful, or that he be no catholic, then it devolves to the commonalty of the kingdom; ſo as he will be ſure to have it done by one miniſter or other. The third is, he diſtinguiſheth of two kinds of tyrants, a tyrant in title, and a tyrant in regiment; the tyrant in regiment cannot be reſiſted or killed without a ſentence precedent by the pope; but a tyrant in title may be killed by any private man whatſoever. By which doctrine he hath put the judgment of kings titles, which I will undertake are never ſo clean but that ſome vain quarrel or exception may be made unto them, upon the fancy of every private man; and alſo couples the judgment and execution together, that he may judge him by a blow, without any other ſentence.

Your lordſhips ſee what monſtrous opinions theſe are, and how both theſe beaſts, the beaſt with ſeven heads, and the beaſt with many heads, pope and people, are at once let in, and ſet upon the ſacred perſons of kings.

Now to go on with the narrative. There was an extract made of certain ſentences and portions of this book, being of this nature that I have ſet forth, by a great prelate and counſellor, upon a juſt occaſion; and there being ſome hollowneſs and heſitation in theſe matters, wherein it is a thing impious to doubt, diſcovered and perceived in *Talbot*, he was aſked his opinion concerning theſe aſſertions, in the preſence of the beſt: and afterwards they were delivered to him, that upon advice and *ſedato animo*, he might declare himſelf. Whereupon, under his hand, he ſubſcribes thus;

May it pleaſe your honourable good lordſhips: concerning this doctrine of Suarez, *I do perceive, by what I have read in this book, that the ſame doth concern matter of faith, the controverſy growing upon expoſition of ſcriptures and councils, wherein, being ignorant and not ſtudied, I cannot take upon me to judge; but I do ſubmit my opinion therein to the judgment of the catholic* Roman *church, as in all other points concerning faith I do. And for matter concerning my loyalty, I do acknowledge my ſovereign liege lord king* James, *to be lawful and undoubted king of all the kingdoms of* England, Scotland, *and* Ireland; *and I will bear true faith and allegiance to his highneſs during my life.*

William Talbot.

My lords, upon theſe words I conceive *Talbot* hath committed a great offence, and ſuch a one, as if he had entered into a voluntary and malicious publication of the like writing, it would have been too great an offence for the capacity of this court. But becauſe it grew by a queſtion aſked by a council of eſtate, and ſo rather ſeemeth, in a favourable conſtruction, to proceed from a kind of ſubmiſſion to anſwer, than from any malicious or inſolent will; it was fit, according to the clemency of theſe times, to proceed in this manner before your lordſhips. And yet let the hearers take theſe things right; for certainly, if a man be required by the council to deliver his opinion whether king *James* be king or no; and he deliver his opinion that he is not, this is high treaſon. But I do not ſay that theſe words amount to that; and therefore let me open them truly to your lordſhips, and therein open alſo the underſtanding of the offender himſelf, how far they reach.

My lords, a man's allegiance muſt be independent and certain, and not dependent and conditional. *Elizabeth Barton*, that was called the holy maid of *Kent*, affirmed, that if king *Henry* VIII. did not take *Catharine* of *Spain* again to his wife within a twelvemonth, he ſhould be no king: and this was treaſon. For though this act be contingent and future, yet the preparing of the treaſon is preſent.

And in like manner, if a man ſhould voluntarily publiſh or maintain, that whenſoever a bull of deprivation ſhall come forth againſt the king, that from thenceforth he is no longer king; this is of like nature. But with this I do not charge you neither; but this is the true latitude of your words, that if the doctrine touching the killing of kings be matter of faith, then you ſubmit yourſelf to the judgment of the catholic *Roman* church: ſo as now, to do you right, your allegiance doth not depend ſimply upon a ſentence of the pope's deprivation againſt the king; but upon another point alſo, if theſe of doctrines be already, or ſhall be declared to be matter of faith. But, my lords, there is little won in this: there may be ſome difference to the guilt of the party, but there is little to the danger of the king. For the ſame pope of *Rome* may, with the ſame breath, declare both. So as ſtill, upon the matter, the king is made but tenant at will of his life and kingdoms, and the allegiance of his ſubjects is pinned upon the pope's acts. And certainly it is time to ſtop the current of this opinion of acknowledgment of the pope's power *in temporalibus*; or elſe it will ſap and ſupplant the ſeat of kings. And let it not be miſtaken, that Mr. *Talbot*'s offence ſhould be no more than the refuſing the oath of allegiance. For it is one thing to be ſilent, and another thing to affirm. As for the point of matter of faith, or not of faith, to tell your lordſhips plain, it would aſtoniſh a man to ſee the gulf of this implied belief. Is nothing excepted from it? If a man ſhould aſk Mr. *Talbot* whether he do condemn murder, or adultery, or rape, or the doctrine of *Mahomet*, or of *Arius*, inſtead of *Suarez*; muſt the anſwer be with this exception, that if the queſtion concern matter of faith, as no queſtion it doth, for the moral law is matter of faith, that therein he will ſubmit himſelf to what the church ſhall determine? And, no doubt, the murder of princes is more than ſimple murder. But to conclude, *Talbot*, I will do you this right, and I will not be reſerved in this, but to declare that that is true; that you came afterwards to a better mind; wherein, if you had been conſtant, the king, out of his great goodneſs, was reſolved not to have proceeded with you in courſe of juſtice: but then again you ſtarted aſide like a broken bow. So that by your variety and vacillation you loſt the acceptable time of the firſt grace, which was not to have convented you.

Nay, I will go farther with you. Your laſt ſubmiſſion I conceive to be ſatisfactory and complete. But then it was too late; the king's honour was upon it; it was publiſhed and a day appointed for hearing. Yet what preparation that may be to the ſecond grace of pardon, that I know not: but I know my lords, out of their accuſtomed favour, will admit you not only to your defence concerning that that hath been charged; but to extenuate your fault by any ſubmiſſion that now God ſhall put into your mind to make.

XXII. *Proceedings againſt Mr.* RICHARD CHAMBERS, *in the* Star-Chamber, *for ſeditious Speeches before the Privy-Council,* 5 Cha. I. 1629.

[*The following account of theſe proceedings is taken from* Ruſhworth's Collections, *vol.* 1. *page* 670.]

AT the ſame time [1629] ſir *Robert Heath*, the king's attorney-general, preferred an information in the *Star-Chamber* againſt *Richard Chambers* of the city of *London*, merchant. Wherein, firſt, he did ſet forth the gracious government of the king, and the great privileges which the merchants have in their trading, by paying moderate duties for the goods and merchandizes exported and imported; and ſetting forth, that the raiſing and publiſhing of undutiful and falſe ſpeeches, which may tend to the diſhonour of the king or the ſtate, or to the diſcouragement or diſcontentment of the ſubject, or to ſet diſcord or variance between his majeſty and his good people, are offences of dangerous conſequence, and by the law prohibited, and condemned under ſeveral penalties and puniſhments. That nevertheleſs the ſaid *Richard Chambers*, the 28th day of *September* laſt, being, amongſt other merchants, called to the council-board at *Hampton-Court*, about ſome things which were complained of in reference to the cuſtoms, did then and there, in an inſolent manner, in the preſence or hearing of the lords and other of his majeſties privy-council, then ſitting in council, utter theſe undutiful, ſeditious, and falſe words, *that the merchants are in no part of the world ſo ſcrewed and wrung as in* England; *that in* Turkey *they have more encouragement.* By which words, he the ſaid *Richard Chambers*, as the information ſetteth forth, did endeavour to alienate the good affection of his majeſties ſubjects from his majeſty, and to bring a ſlander upon his juſt government: and therefore the king's attorney prayed proceſs againſt him.

To this Mr. *Chambers* made anſwer, that having a caſe of ſilk grogerams brought from *Briſtol* by a carrier to *London*, of the value of 400 *l.* the ſame were, by ſome inferior officers, attending on the *Cuſtom-Houſe*, ſeized without this defendants conſent, notwithſtanding he offered to give ſecurity to pay ſuch cuſtoms as ſhould be due by law; and that he hath been otherwiſe grieved and damnified, by the injurious dealing of the under-officers of the *Cuſtom-Houſe*; and mentioned the particulars wherein: and that being called before the lords of the council, he confeſſeth, that out of the great ſenſe which he had of the injuries done him by the ſaid inferior officers, he did utter theſe words, *that the merchants in* England *were more wrung and ſcrewed than in foreign parts.* Which words were only ſpoken in the preſence of the privy-council, and not ſpoken abroad, to ſtir up any diſcord among the people; and not ſpoken with any diſloyal thought at that time of his majeſty's government, but only intending by theſe words to introduce his juſt complaint againſt the wrongs and injuries he had ſuſtained by the inferior officers; and that as ſoon as he had heard a hard conſtruction was given of his words, he endeavoured by petition to the lords of the council, humbly to explain his meaning, that he had not the leaſt evil thought as to his majeſties government; yet was not permitted to be heard, but preſently ſent away priſoner to the *Marſhalſea*: and when he was there a priſoner, he did again endeavour by petition to give ſatisfaction to the lords of the council; but they would not be pleaſed to accept of his faithful explanation, which he now makes unto this honourable court upon his oath; and doth profeſs from the bottom of his heart, *that his ſpeeches only aimed at the abuſes of the inferior officers, who in many things dealt moſt cruelly with him and other merchants.*

There were two of the clerks of the privy-council examined as witneſſes to prove the words, notwithſtanding the defendant confeſſed the words in his anſwer as aforeſaid, who proved the words as laid in the information. And on the ſixth of *May*, 1629, the cauſe came to be heard in the *Star-Chamber*, and the court were of opinion, that the words ſpoken were a comparing of his majeſty's government with the government of the *Turks*; intending thereby to make the people believe, that his majeſty's happy government may be termed *Turkiſh tyranny*; and therefore the court fined the ſaid Mr. *Chambers* in the ſum of 2000 *l.* to his majeſty's uſe, and to ſtand committed to the priſon of the *Fleet*, and to make ſubmiſſion for his great offence, both at the council-board, in court of *Star-Chamber*, and at the *Royal Exchange*.

There was a great difference of opinion in the court about the fine: and becauſe it is a remarkable caſe, here followeth the names of each ſeveral perſon who gave ſentence, and the fine they concluded upon, *viz.*

Sir *Francis Cottington*, chancellor of the *Exchequer*, his opinion was for 500 *l.* fine to the king, and to acknowledge his offence at the council-board, the *Star-Chamber Bar*, and the *Exchange*.

Sir *Thomas Richardſon*, lord chief juſtice of the *Common Pleas*, 500 *l.* fine to the king, and to deſire the king's favour.

Sir *Nicholas Hide*, lord chief juſtice of the *King's Bench*, 500 *l.* and to deſire the king's favour.

Sir *John Cook*, ſecretary of ſtate,	1000 *l.*
Sir *Humphrey May*, chancellor,	1500 *l.*
Sir *Thomas Edmonds*,	2000 *l.*
Sir *Edward Barret*,	2000 *l.*
Doctor *Neal*, biſhop of *Wincheſter*,	3000 *l.*
Doctor *Laud*, biſhop of *London*,	3000 *l.*
Lord *Carlton*, principal ſecretary of ſtate,	3000 *l.*
Lord , chancellor of *Scotland*,	3000 *l.*
Earl of *Holland*,	1500 *l.*
Earl of *Doncaſter*,	1500 *l.*
Earl of *Saliſbury*,	1500 *l.*
Earl of *Dorſet*,	3000 *l.*
Earl of *Suffolk*,	3000 *l.*
Earl of *Mountgomery*, lord chamberlain,	1500 *l.*
Earl of *Arundel*, lord high marſhal,	3000 *l.*
Lord *Montague*, lord privy ſeal,	3000 *l.*
Lord *Conway*,	2000 *l.*
Lord *Weſton*, lord treaſurer,	3000 *l.*
Lord *Coventry*, lord keeper of the great ſeal,	1500 *l.*

So the fine was ſettled to 2000 *l.*

And all (except the two chief juſtices) concurred for a ſubmiſſion alſo to be made. And accordingly the copy of the ſubmiſſion was ſent to the warden of the *Fleet*, from Mr. Attorney-General, to ſhew the ſaid *Richard Chambers*, to perform and acknowledge it; and was as followeth:

"I *Richard Chambers*, of *London*, merchant, do humbly acknowledge, that whereas upon an information exhibited againſt me by the king's attorney-general, I was in *Eaſter-Term* laſt ſentenced by the honourable court of *Star-Chamber*, for that in *September* laſt, 1628. being convented before the lords and others of his majeſty's moſt honourable privy-council-board, upon ſome ſpeeches then uſed concerning the merchants of this kingdom, and his majeſty's well and gracious uſage of them; did then, and there, in inſolent, contemptuous, and ſeditious manner, falſely and maliciouſly ſay and affirm, *that they*, meaning the merchants, *are in no parts of the world ſo ſcrewed and wrung as in* England; *and that in* Turkey *they have more encouragement.* And whereas by the ſentence of that honourable court, I was adjudged, among other puniſhments juſtly impoſed upon me, to make my humble acknowledgment and ſubmiſſion of this great offence at this honourable board, before I ſhould be delivered out of the priſon of the *Fleet*, whereto I was then committed, as by the ſaid decree and ſentence of that court, among other things, it doth and may appear: now I the ſaid *R. Chambers*, in obedience to the ſentence of the ſaid honourable court, do humbly confeſs and acknowledge the ſpeaking of theſe words aforeſaid, for the which I was ſo charged, and am heartily ſorry for the ſame; and do humbly beſeech your lordſhips all to be honourable interceſſors for me to his majeſty, that he would be graciouſly pleaſed to pardon this great error and fault ſo committed by me."

When Mr. *Chambers* read this draught of ſubmiſſion, he thus ſubſcribed the ſame:

> "All the aboveſaid contents and ſubmiſſion, I *Richard Chambers* do utterly abhor and deteſt, as moſt unjuſt and falſe; and never till death will acknowledge any part thereof.
>
> *Rich. Chambers.*"

Alſo he under-writ theſe texts of ſcripture to the ſaid ſubmiſſion, before he returned it.

That make a man an offender for a word, and lay a ſnare for him that reproveth in the gate, and turn aſide the juſt for a thing of nought.

Blame not before thou haſt examined the truth; underſtand firſt, and then rebuke: anſwer not before thou haſt heard the cauſe, neither interrupt men in the midſt of their talk.

Doth our law judge any man before it hear him, and know what he doeth?

King Agrippa *ſaid unto* Paul, *thou art permitted to ſpeak for thyſelf.*

Thou ſhalt not wreſt the judgment of the poor in his cauſe, thou ſhalt not reſpect perſons, neither take a gift: for a gift doth blind the eyes of the wiſe, and pervert the eyes of the righteous.

Wo to them that deviſe iniquity, becauſe it is in the power of their hand, and they covet fields, and take them by violence; and houſes, and take them away: ſo they oppreſs a man and his houſe, even a man and his heritage.

Thus ſaith the Lord God, let it ſuffice you, O princes of Iſrael: *remove violence and ſpoil, and execute judgment and juſtice, take away your exactions from my people, ſaith the Lord God.*

If thou ſeeſt the oppreſſion of the poor, and violent perverting of judgment and juſtice in a province, marvel not at the matter: for he that is higher than the higheſt regardeth, and there be higher than they.

Per me, *Richard Chambers.*

Afterwards in the term of *Trinity*, the 5th year of king *Charles*, it is found in the great roll of this year, that there is demanded there, of *Richard Chambers* of *London*, merchant, 2000 *l.* for a certain fine impoſed on him, hither ſent by virtue of a writ of our ſaid lord the king, under the foot of the great ſeal of *England*, directed to the treaſurer and barons of this *Exchequer*, for making execution thereof to the uſe of the ſaid lord the king, as is there contained; and now, that is to ſay, in the *Octab* of the Bleſſed *Trinity*, this term, comes the ſaid *Richard Chambers* in his own proper perſon, and demands *oyer* of the demand aforeſaid, and it is read unto him; and he demands *oyer* alſo of the writ aforeſaid, under the foot of the great ſeal of *England* hither ſent, and is read unto him in theſe words:

"*CHARLES* by the grace of God, of *England*, *Scotland*, *France* and *Ireland*, king, defender of the faith, &c. to his treaſurer and barons of his *Exchequer*, health. The extrete of certain fines taxed

“ and adjudged by us and our council, in our ſaid council, in our court of *Star-Chamber*, in the term of St. *Michael*, the term of St. *Hilary*, and the term of *Eaſter* laſt paſt, upon *Thomas Barns*, of the pariſh of St. *Clement Danes* in the county of *Middleſex*, carpenter, and others, ſeverally and dividedly, as they be there ſeverally aſſeſſed, we ſend unto you included in theſe preſents, commanding, that looking into them, you do that which by law you ought to do againſt them, for the levying of thoſe fines. Witneſs our ſelf at *Weſtminſter*, the 21ſt of *May*, in the year of our reign the 5th *Mutas*.”

And the tenor of the ſchedule to the ſaid writ annexed, as to the ſaid *Richard Chambers*, followeth in theſe words:

“ IN the term of *Eaſter*, the fifth year of king *Charles*, of *Richard Chambers* of *London*, merchant, 2000 *l.* which being read, heard, and by him underſtood, he complains, that he is grievouſly vexed and inquieted by colour of the premiſes; and that not juſtly, for that proteſting, that the great roll, and the matter therein contained, is not in law ſufficient, to which he hath no need, nor is bound by law to anſwer. Yet for plea the ſaid *Richard Chambers* ſaith, that he, of the demand aforeſaid, in the great roll aforeſaid mentioned, and every parcel thereof, ought to be diſcharged againſt the ſaid lord the king, for that he ſaid, that he from the time of the taxation of the aforeſaid fine, and long before, was a freeman and a merchant of this kingdom; that is to ſay, in the pariſh of the Bleſſed *Mary* of the *Arches*, in the ward of *Cheap*, *London*: and that by a certain act in the parliament of the lord *Henry*, late king of *England*, the third, held in the ninth year of his reign, it was provided by authority of the ſaid parliament, that a freeman ſhall not be amerced for a little offence, but according to the manner of the ſaid offence; and for a great offence, according to the greatneſs of the offence, ſaving to him his contenement or freehold; and a merchant in the ſame manner, ſaving unto him his merchandize; and a villain of any other than the king after the ſame manner to be amerced, ſaving his wainage; and none of the ſaid amerciaments to be impoſed but by the oaths of good and lawful men of the neighbourhood: and by a certain other act in the parliament of the lord *Edward*, late king of *England*, the firſt, held in the third year of his reign, it was and is provided, that no city, borough, or town, nor any man, ſhall be amerced, without reaſonable cauſe, and according to his treſpaſs; that is to ſay, a freeman, ſaving to him his contenement; a merchant, ſaving to him his merchandize; and a villain, ſaving to him his wainage: and this by their peers: and by the ſame act in the parliament of the ſaid lord *Henry*, late king of *England*, the third, held in the ninth year of his reign aforeſaid, it was and is provided by the authority of the ſaid parliament, that no freeman ſhould be taken or impriſoned, or diſſeized of his freehold, or liberties, or free-cuſtoms, or out-lawed, or baniſhed, or any way deſtroyed: and that the lord the king ſhould not go upon him, nor deal with him, but by a lawful judgment of his peers, or by the law of the land: and by a certain act in parliament of the lord *Edward*, late king of *England*, the third, held in the fifth year of his reign, it was and is provided by the authority of the ſaid parliament, that no man henceforward ſhould be attached by reaſon of any accuſation, nor prejudged of life or member, nor that his lands, tenements, goods or chattels ſhould be ſeized into the hands of the lord the king againſt the form of the great charter, and the law of the land: and by a certain act in the parliament of the lord *Henry*, late king of *England*, the ſeventh, held in the third year of his reign, reciting, that by unlawful maintenances given of liveries, ſigns, and tokens, and retainders by indentures, promiſes, oaths, writings, and other imbraceries of the ſubjects of the ſaid lord the king, falſe demeanors of ſheriffs, in making of pannels, and other falſe returns, by taking of money by jurors, by great riots and unlawful aſſemblies, the policy and good government of this kingdom was almoſt ſubdued; and by not puniſhing of the ſaid inconveniencies, and by occaſion of the premiſſes, little or nothing was found by inquiſition; by reaſon thereof, the laws of the land had little effect in their execution, to the increaſe of murders, robberies, perjuries, and inſecurities of all men living, to the loſs of their lands, and goods, to the great diſpleaſure of Almighty God; it was ordained for reformation of the premiſſes, by authority of the ſaid parliament, that the chancellor and treaſurer of *England* for the time being, and the keeper of the privy-ſeal of the lord the king, or two of them, calling to them one biſhop, one lord temporal of the moſt honourable council of the lord the king, and the two chief juſtices of the *King's Bench* and *Common Pleas* for the time being, or two other juſtices in their abſence, by bill or information exhibited to the chancellor for the king, or any other, againſt any perſon, for any other ill behaviours aforeſaid, have authority of calling before them, by writ of privy-ſeal, ſuch malefactors, and of examining them and others by their diſcretion, and of puniſhing ſuch as they find defective therein, according to their demerits, according to the form and effect of the ſtatutes thereof made, in the ſame manner and form as they might and ought to be puniſhed, if they were thereof convinced according to the due courſe of law: and by a certain other act in the parliament of the lord *Henry*, late king of *England*, the eighth, held in the one and twentieth year of his reign, reciting the offences in the foreſaid ſtatute of the ſaid late king *Henry* the ſeventh, before-mentioned, by authority of the ſaid parliament, it was and is ordained and enacted, that henceforward the chancellor, treaſurer of *England*, and the preſident of the moſt honourable privy-council of the king, attending his moſt honourable perſon for the time being, and the lord keeper of the privy-ſeal of the lord the king, or two of them, calling to them one biſhop, and one temporal lord, of the moſt honourable council of the lord the king, and two chief juſtices of the *King's Bench*, and *Common Pleas* for the time being, or two juſtices in their abſence, by any bill or information then after to be exhibited to the chancellor of *England*, the treaſurer, the preſident of the moſt honourable council of the lord the king, or the keeper of the privy-ſeal of the lord the king for the time being, for any miſdemeanor in the aforeſaid ſtatute of king *Henry* the ſeventh aforeſaid before recited, from henceforth have full power and authority of calling before them, by writ or by privy-ſeal, ſuch malefactors, and of examining of them and others by their diſcretion, and of puniſhing thoſe that are found defective according to their demerits, according to the form and effect of the ſaid ſtatute of the aforeſaid lord king *Henry* the ſeventh, and of all other ſtatutes thereupon made not revoked and expired, in the ſame manner and form as they might and ought to be puniſhed, if they were convicted according to the due order of the laws of the ſaid lord the king. And by the aforeſaid writ, under the foot of the great ſeal, it manifeſtly appears, that the ſaid fine was impoſed by the lord the king and his council, and not by the legal peers of the ſaid *Richard Chambers*, nor by the law of the land, nor according to the manner of the pretended offence of the ſaid *Richard Chambers*, nor ſaving unto him his merchandize, nor for any offence mentioned in the ſaid ſtatutes. All and ſingular the which, the ſaid *Richard Chambers* is ready to verify to the court, *&c.* and demands judgment; and that he be diſcharged of the ſaid 2000 *l.* againſt the ſaid lord, the now king; and that as to the premiſſes he may be diſmiſſed from this court.

Waterhouſe.”

With this plea, he annexed a petition to the lord chief baron, and alſo to every one of the barons, humbly deſiring the filing of the plea, with other reaſons in the manner of a motion at the bar, becauſe he ſaid, counſel would not move, plead, nor ſet hand to it, as further appeareth.

The copy of the order upon Mr. Attorney's motion in the Exchequer, *the 17th of* July, 1629. *after the plea put in, and order to file it.* Per *the lord chief baron.*

“ TOuching the plea put into this court by *Richard Chambers*, to diſcharge himſelf of a fine of 2000 *l.* ſet on him in the *Star-Chamber*, foraſmuch as ſir *Robert Heath*, knight, his majeſties attorney-general, informed this court, that the ſaid *Chambers* in his ſaid plea recites divers ſtatutes, and *Magna Charta*, and what offences are puniſhable in the *Star-Chamber*, and how the proceedings ought to be; and upon the whole matter concludes, that the ſaid fine was impoſed by the king and his council, and not by a legal judgment of his peers, nor by the laws of the land, nor according to the manner of his offence, nor ſaving his merchandize, nor for any offence mentioned in the ſaid ſtatutes; which plea, Mr. Attorney conceiving it to be very frivolous and inſufficient, and derogatory to the honour and juriſdiction of the court of *Star-Chamber*, humbly prayeth might not be allowed of, nor filed: it is therefore this day ordered, that the ſaid plea ſhall be read on *Saturday* next; and then upon hearing the king's council, and the council of the ſaid *Richard Chambers*, this court will declare their further order therein; and in the mean time the ſaid plea is not to be filed nor delivered out.”

In *Michaelmas Term* following, Mr. *Chambers* was brought by a *Habeas Corpus* out of the *Fleet*; and the warden did return,

“ THAT he was committed to the *Fleet* by virtue of a decree in the *Star-Chamber*, by reaſon of certain words he uſed at the council-table, *(viz.) that the merchants of* England *were ſcrewed up here in* England *more than in* Turkey. And for theſe and other words of defamation of the government, he was cenſured to be committed to the *Fleet*, and to be there impriſoned until he had made his ſubmiſſion at the council-table, and to pay a fine of 2000 *l.* And now at the bar he prayeth to be delivered, becauſe this ſentence is not warranted by any law or ſtatute: for the ſtatute of 3 *Hen.* 7. which is the foundation of the court of *Star-Chamber*, doth not give them any authority to puniſh for words only. But all the court informed him, that the court of *Star-Chamber* was not erected by the ſtatute of 3 *Hen.* 7. but was a court many years before, and one of the moſt high and honourable courts of juſtice; and to deliver one who was committed by the decree of one of the courts of juſtice, was not the uſage of this court; and therefore he was remanded.”

As a concurrent proof of theſe proceedings concerning Mr. *Chambers*, we ſhall inſert here a petition of his (though out of time) to the long parliament.

To the parliament of the common-wealth of England, Scotland, *and* Ireland.

The brief remonſtrance and humble petition of *Richard Chambers*, merchant, late alderman and ſheriff of the city of *London*:

SHEWING,

“ THAT in the parliament held in the years 1627 and 1628, it was voted and declared by the honourable houſe of commons, that whoſoever ſhall counſel or adviſe the taking or levying of the ſubſidy of tunnage and poundage, not granted by parliament, or ſhall be any actor or inſtrument therein, ſhall be reputed an innovator in the government, and a capital enemy to the kingdom and commonwealth; and if any merchant or perſon whatſoever ſhall voluntarily yield or pay the ſaid ſubſidy of tunnage and poundage, not being granted by parliament, they ſhall likewiſe be reputed betrayers of the liberties of *England*, and enemies to the ſame, as may appear by the ſaid order upon record.

“ In ſubmiſſion and obedience whereunto, the petitioner firſt oppoſed and withſtood the payment of tunnage and poundage (until they were ſettled by parliament) and all other illegal taxes; for which ſubmiſſion and obedience, in the years 1628 and 1629, the petitioner had 7060 pounds of his goods wrongfully taken and detained from him by the late king's officers and farmers of the *Cuſtom-Houſe* of *London*, for pretended duties, and a heavy ſentence and fine in the *Star-Chamber*, which was impoſed upon him in the year 1629. Beſides which loſſes, the petitioner further ſuffered in his perſon by ſix whole years impriſonment in the *Fleet*, for not ſubmitting to that ſentence and fine; and in the year 1637, nine months impriſonment in *Newgate* for withſtanding ſhip-money; by which loſſes and impriſonments, the petitioner was put by the exerciſe of his calling, and was wounded in his credit and reputation.

“Which ſufferings the honourable houſe of commons (upon the petitioners complaint in the year 1640,) taking into their grave conſiderations, were pleaſed to refer the examination thereof to a committee of fifty members, wherein were included the committee for the navy and cuſtoms; who being well ſatisfied of the truth thereof, by oath, and other good ſufficient proofs upon record, drew up their report, that the petitioner ought then to have 13680 pounds in part of reparation, leaving the reſt of thoſe reparations to the further judgment of the honourable houſe, as by the annexed copy of that report may further appear.

“In purſuit of which report, the parliament then levied and received from the old farmers and officers of the cuſtoms 50000 pounds for wrongs and abuſes done to the petitioner (chiefly) and other merchants, intending firſt to give to the petitioner ſatisfaction out of the ſame, becauſe he was the firſt man that oppoſed the pretended duties, and the greateſt ſufferer.

“Whereupon in the year 1642, the petitioner was choſen alderman, and in the year 1644 ſheriff of the city of *London*: which places the petitioner earneſtly endeavoured to ſhun; but ſuch were the earneſt importunities, and perſuaſive encouragements of divers members of the honourable houſe, (who then deſired to have the petitioner in place of truſt, for his former ſervice to the commonwealth) that the petitioner was conſtrained to accept not only of the place of alderman, but further underwent the office and charge of ſheriff of *London*, which ſtood the petitioner in 4000 pounds that year.

“But notwithſtanding the aforeſaid promiſes and intents of the parliament to give the petitioner ſatisfaction, ſuch were the great compulſive exigents, and urgent neceſſities of thoſe times, cauſed by the publick diſtractions, that the ſaid monies were converted to the publick uſe. Therefore the parliament deſired the petitioner to have a little patience, promiſing him ſpeedy ſatisfaction as well for the forbearance as for the principal debt. But the diſtractions continuing, the petitioner had neither intereſt nor any part of his principal. The parliament in the year 1648. in part of ſatisfaction, ſettled the petitioner in the office of ſurveyor and check in the *Cuſtom-Houſe* of *London*, then worth at leaſt 600 *l. per annum*; but the petitioner having enjoyed that place only eight months, was cauſeleſly ouſted by ſiniſter information of intruders, who have enjoyed that office and divided the profit thereof between them ever ſince that intruſion.

“Moreover, the late king, by privy-ſeal, owes to the petitioner's wife (who is the relict of Mr. *Thomas Ferrer*) for linnen cloth 5000*l.* and for money lent 1200 *l.* for which ſhe was aſſigned ſatisfaction out of the cuſtoms of tobacco. Beſides, ſhe was further aſſigned out of Sir *Thomas Dawes* office one hundred marks *per annum*. All which debts likewiſe lie wholly unſatisfied, to the petitioner's great prejudice.

“Beſides the aforeſaid loſſes, hinderances, expences, ſufferings, and forbearances of the profit of the ſaid office, the petitioner from time to time hath laid out himſelf for the common good, in acting, lending, ſpending, (and ſerving) when others refuſed; expoſed himſelf to that eminent danger at *Branford*, by leading out a troop of horſe for the privileges, liberties, and rights of the city of *London* and commonwealth, inſomuch, that thereby, and for want of his ſatisfaction aforeſaid, the petitioner, having conſumed his eſtate, hath been conſtrained to ſell and mortgage ſome part of his lands to pay creditors, and to maintain his family, having a wife and nine children; and is likely to be undone for obeying the parliament's commands, unleſs by the juſtice and commiſeration of this honourable aſſembly he be ſpeedily relieved and righted; for that ever ſince the ſaid reported ſum, the petitioner from time to time hath made his humble addreſſes to the ſupreme powers for the time being, for ſatisfaction thereof, and to be reſtored to the ſaid office, but could not prevail.

“The petitioner therefore humbly prays, that he may not periſh for acting for the public good according to the declaration of parliament; but that now after twenty-ſix years ſuffering, whereof twelve years in fruitleſs and weariſome waitings, this honourable aſſembly would now be pleaſed to take the unparalleled ſufferings of the petitioner into their grave conſiderations, for ſome ſpeedy courſe for the petitioner's ſatisfaction, to pay his debts, and redeem his lands, by ordering him the one moiety of his debt in ready money out of the daily cuſtoms of *London*, (from whence his firſt loſſes and ſufferings ſprang) and the other moiety to be diſcompted upon ſuch goods as the petitioner ſhall make entries of by exportation or importation in the *Cuſtom-Houſe*, *London*, until his debt with the intereſt be fully ſatisfied and paid; or any other ſpeedy way, as in your grave wiſdoms ſhall ſeem meet: and in like manner for his wife's debt, which is to pay debts and legacies: and that the petitioner may forthwith be reſtored to, and ſettled in the ſaid office, and have reparations from the intruders.

“*And the petitioner, with his, ſhall in all duty ever pray*, &c.

“*Sept.* 6. 1654. *Richard Chambers.*”

The petitioner being wearied out with twelve years attendance upon one parliament, in hopes of reparation for his impriſonment, troubles, and loſſes, during the eleven years former interval of parliament, in ſtanding for the liberty of the ſubject, grew infirm; and being not relieved, was reduced to a low eſtate and condition. He died in ſummer 1658, being about the age of ſeventy years.

XXIII. *Proceedings in the* Star-Chamber *againſt Dr.* ALEXANDER LEIGHTON, *for a Libel*, 4 June, 6 Cha. I. 1630.

[*The following report of this caſe is extracted from* 2 Ruſhworth, 55. *Mrs.* Macaulay, *in her hiſtory, comments on the proceedings againſt Dr.* Leighton *with great ſeverity.* 2 Macaul. Hiſt. 91. *Indeed the cruelty of the ſentence is beyond excuſe.*]

AN information formerly exhibited in the *Star-Chamber* againſt *Alexander Leighton*, a *Scotſman* born, and a doctor of divinity came to be heard the 4th of *June* in the court of *Star-Chamber*, for framing a book entitled, *An Appeal to the Parliament, or a Plea againſt Prelacy*, which he printed and publiſhed, during the ſitting of the laſt parliament: and delivered it to diverſe perſons in a way of preſenting juſt complaints (as he gave out) to the then commons houſe of parliament, 4 *Carol.* 1.

The defendant was charged by the ſaid information with framing, publiſhing, and diſperſing a ſcandalous book againſt *king*, *peers*, and *prelates*, wherein amongſt other things he ſets forth theſe falſe and ſeditious aſſertions and poſitions following.

1. ‘That we do not read of greater perſecution and higher indignity done upon God's people in any nation profeſſing the Goſpel, than in this our *iſland*, eſpecially ſince the death of queen *Elizabeth*.

2. ‘He terms the *prelates* of this realm *men of blood*, and enemies to God and the ſtate, and ſaith, that the maintaining and eſtabliſhing of biſhops within this realm is a main and maſter-ſin eſtabliſhed by law, and that miniſters ſhould have no voices in *council deliberative* and *deciſive*.

3. ‘He avowed the prelacy of our church to be *antichriſtian* and *ſatanical*; and terms the biſhops, *ravens* and *magpies*, that prey upon the ſtate.

4. ‘He terms the *canons* of our church, made *anno* 1603, *nonſenſe canons.*

5. ‘He diſallowed and contemned the ceremony of *kneeling* in the receiving of the ſacrament, alledging that the ſuggeſtion of falſe fears to the king by the prelacy, and the ſeeking of their own unlawful ſtanding, brought forth that received ſpawn of the *beaſt*, *kneeling* at the receiving of the ſacrament.

6. ‘He affirms that the prelates did corrupt the king, foreſtalling his judgment againſt God and goodneſs; and moſt audaciouſly and wickedly calleth his majeſty's royal conſort, our gracious queen, the *daughter* of *Heth*.

7. ‘He moſt impiouſly ſeems to commend him that committed the barbarous and bloody act of murdering the late duke of *Buckingham*; and to encourage others to ſecond him in the like wicked and deſperate attempt, to the deſtruction of others.

8. ‘He layeth a moſt ſeditious ſcandal upon the king, ſtate, and kingdom, wickedly affirming, *that all that paſs by us ſpoil us, and we ſpoil all that rely upon us*; and amongſt other particulars, inſtanceth the black pining death of the famiſhed *Rochelers*, to the number of 15000 in four *months*: by which paſſages and wicked poſitions and aſſertions, he did, as much as in him lay, ſcandalize his majeſties *ſacred perſon*, his religious wiſe and juſt *government*, the perſon of his royal conſort the *queen*, the perſons of the *lords* and *peers* of this *realm*, eſpecially the reverend *biſhops*.

9. ‘That in another place of the ſaid *book*, endeavouring to ſlander not only his majeſty's ſacred perſon and government, but alſo to detract from his royal power, in making laws and canons for government eccleſiaſtical, and in matters concerning the church, he ſaith, that the church hath her laws from the ſcripture, and that no king may make laws in the houſe of God: for if they might, then the ſcripture might be imperfect.

10. ‘And further charged, that in another place of the ſaid book, thinking to ſalve all with an expreſſion of his ſacred majeſty, he hath theſe words following; *what pity it is, and indelible diſhonour it will be to you the ſtates repreſentative, that ſo ingenious and tractable a king ſhould be ſo monſtrouſly abus'd, to the undoing of himſelf and his ſubjects?*’

Dr. *Leighton*'s anſwer. The defendant in his anſwer confeſſed the writing of the book, but with no ſuch ill intention, as by the ſaid information is ſuggeſted; his end therein being only to remonſtrate certain *grievances* in church and ſtate, under which the people ſuffered, to the end the parliament might take them into conſideration, and ſo give ſuch redreſs, as might be for the honour of the king, the quiet of the people, and the peace of the church.

June 4. At the hearing of the cauſe, the defendent's anſwer was read at large, and the aforeſaid particulars charged in the information as ſeditious and ſcandalous, were alſo read out of the book. After which the court proceeded to give ſentence, and did there declare, that it evidently appeared upon proof, that the defendent had printed five or ſix hundred of the ſaid books, and that in their opinions he had committed a moſt odious and heinous offence, deſerving the ſevereſt puniſhment the court could inflict, for framing and publiſhing a book ſo full of moſt peſtilent, deviliſh and dangerous aſſertions, to the ſcandal of the *king*, *queen* and *peers*, eſpecially the *biſhops*.

The two lord *chief juſtices* being preſent, delivered their opinions, that they would without any ſcruple have proceeded againſt the defendent as for treaſon committed by him, if it had come before them; and other lords expreſsly affirm'd, that it was his majeſties exceeding great mercy and goodneſs, that he was brought to receive the cenſure of this court, and not queſtioned at another *tribunal* as a traitor.

And their lordſhips by an unanimous conſent adjudged and decreed, that Dr. *Leighton* ſhould be committed to the priſon of the *Fleet*, there to remain during life, unleſs his majeſty ſhall be graciouſly pleaſed to enlarge him; and he ſhall pay a fine of 10000 *l.* to his majeſty's uſe.

And in reſpect the defendent hath heretofore entered into the miniſtry, and this court, for the reverence of that calling, doth not uſe to inflict any corporal or ignominious puniſhment upon any perſon, ſo long as they continue in orders, the court doth refer him to the *High-commiſſion*, there to be degraded of his miniſtry; and that being done, he ſhall then alſo for further puniſhment and example to others, be brought into the *pillory* at *Weſtminſter*, (the court ſitting) and there whipped, and after his whipping be ſet upon the *pillory* for ſome convenient ſpace, and have one of his ears cut off, and his noſe ſlit, and be branded in the face with a double S S, for a *ſower of ſedition*; and ſhall then be carried to the priſon of the *Fleet*, and at ſome other convenient time afterwards ſhall be carried into the *pillory* at *Cheapſide*, upon a market-day, and be there likewiſe whipt, and then be ſet upon the *pillory*, and have his other ear cut off, and from thence be carried back to the priſon of the *Fleet*, there to remain during life, unleſs his majeſty ſhall be graciouſly pleaſed to inlarge him.

This ſentence being given toward the end of *Trinity-Term*, and the court not uſually ſitting after the term, unleſs upon emergent occaſions, and it requiring ſome time in the *Eccleſiaſtical court*, in order to the degradation of the defendent, it was *Michaelmas-Term* following before any part of the ſentence could be put in execution; but *November* the 4th he was accordingly degraded, and on *Wedneſday November* the 10th (being a *Star-Chamber day*) he was to have undergone the execution of this ſentence; but the evening before he eſcaped out of the *Fleet*, where he had been kept a cloſe priſoner, and information hereof being given to the lords of the privy-council, they ordered this hue and cry to be printed to retake him.

A hue and cry againſt Dr. *Leighton*, by order of the privy-council.

Whereas Alexander Leighton, *a* Scottiſh *man born, who was lately ſentenced by the honourable court of* Star-Chamber, *to pay a great fine to his majeſty, and to undergo corporal puniſhment, for writing, printing, and publiſhing a very libellous and ſcandalous book againſt the king, and his government, hath this* eleventh day of November *eſcaped out of the priſon of the* Fleet, *where he was a priſoner: theſe are in his majeſties name to require and command all juſtices of peace, mayors, ſheriffs, bayliffs, cuſtomers, ſearchers and officers of the ports, and all other his majeſties loving ſubjects, to uſe all diligence for the apprehending of the ſaid* Alexander Leighton; *and being apprehended, ſafely to keep him in cuſtody, until his majeſty ſhall receive notice thereof, and ſhall give further direction concerning him. He is a man of low ſtature, fair complexion; he hath a yellowiſh beard, a high forehead, between forty and fifty years of age.*

This *hue and cry* followed him to *Bedfordſhire*, where he was apprehended, and brought again a priſoner to the *Fleet*. Concerning whoſe eſcape, and executing of the ſentence upon him afterwards, the biſhop of *London* in his *Diary*, on the fourth of *November*, makes this memorial, *viz.*

'*Leighton* was degraded at the *High-commiſſion*, *Tueſday* the 9th of *November*; that night *Leighton* broke out of the *Fleet*, the warden ſays he got or was helped over the wall, and moreover profeſſed he knew not this till *Wedneſday* noon, he told it not me till *Thurſday* night. He was taken again in *Bedfordſhire*, and brought back to the *Fleet*, within a fortnight. *Friday*, *November* the 16th, part of his ſentence was executed upon him in this manner, in the new *palace* at *Weſtminſter*, in *term* time:

1. 'He was ſeverely whipt before he was put in the *pillory*.
2. 'Being ſet in the *pillory*, he had one of his ears cut off.
3. 'One ſide of his noſe ſlit.
4. 'Branded on one cheek with a red hot iron, with the letters S S; ſignifying a *ſtirrer up of ſedition*, and afterwards carried back again priſoner to the *Fleet*, to be kept in cloſe cuſtody.

'And on *that day ſeven night*, his ſores upon his back, ear, noſe, and face being not cured, he was whipt again at the *pillory* in *Cheapſide*, and there had the remainder of his ſentence executed upon him, by cutting off the other ear, ſlitting the other ſide of the noſe, and branding the other cheek.'

The ſevere puniſhment of this unfortunate gentleman many people pitied, he being a perſon well known both for learning, and other abilities; only his untempered zeal (as his country-men then gave out) prompted him to that miſtake, for which the neceſſity of affairs at that time required this ſeverity from the hand of the magiſtrate, more than perhaps the crime would do in a following juncture.

Afterwards thoſe who procured his eſcape were taken and brought into the *Star-Chamber*, and proceeded againſt, *viz.*

Attor. regis ore tenus verſus. Levingſton & *alios.* The defendents practiſing with one *Leighton*, a notable offender, to procure his eſcape out of the *Fleet*; *Levingſton* put off his cloak, hat and breeches, being all of a grey colour, and *Anderſon* his doublet, and *Leighton* put theirs on, and in that diſguiſe they all went out of the *Fleet* unſuſpected; but were afterwards taken again, and for theſe offences, and reſpect had of their penitency, they were only *fined* 500 *l.* a-piece, and committed to the *Fleet* during the king's pleaſure. (a) *Star-chamber.*

(a) In 1641 the houſe of commons came to ſeveral reſolutions in condemnation of the proceedings againſt Dr. *Leighton*. Particularly, they reſolved, that the fine and corporal puniſhment and impriſonment by the ſentence of the *Star-Chamber* were illegal, and that he ought to have ſatisfaction for his ſufferings and damages. *Journ. Comm.* 21 *April* 1641. EDITOR.

XXIV. *Proceedings in the* Star-Chamber, 29 May, 6 Cha. I. 1630, *againſt the Earl of* BEDFORD, *the Earl of* CLARE, *the Earl of* SOMERSET, *Sir* ROBERT COTTON, JOHN SELDEN, *Eſq*; OLIVER ST. JOHN, *Eſq*; *and others, for publiſhing a ſeditious and ſcandalous Writing.*

[*The written piece, which gave occaſion to theſe proceedings, was a moſt unconſtitutional project for advancing the king's prerogative and revenue. It appears to have been ſent over from* Italy *by the famous ſir* Robert Dudley, *ſon of queen* Elizabeth's *favourite the earl of* Leiceſter; *and ſir* Robert *is ſuppoſed to have been the author; though if that was really ſo, it highly reflects on one, who on other accounts is tranſmitted to us with high encomiums for his mental endowments and accompliſhments, as the reader will ſee by conſulting ſir* William Dugdale. *See* 2 Dugd. Baron. 222. *It is probable, that the proſecution was commenced, in order to exculpate both* James *and* Charles the Firſt, *with their reſpective miniſters, from the imputation of approving of the project. It may ſeem ſurprizing to the reader, that ſuch perſons as Mr.* Selden, *and the other defendants named, except the earl of* Somerſet, *ſhould lie under a ſuſpicion of countenancing propoſitions ſo irreconcileable with their political profeſſions and conduct at the time. But, as there can be no reaſon for ſuppoſing that they gave their approbation to ſuch arbitrary propoſals, perhaps they were included in the proſecution from a ſuſpicion of having encouraged a belief, that the king ſecretly favoured the ſcheme and meditated to execute it. On conſulting the book intitled the* Annals of James and Charles the Firſt, *we obſerve that the author adopts a like conſtruction, adding that the piece in queſtion was written by ſir* Robert Dudley *at* Florence, *in* 1613. *See page* 361.

We ſhall now lay before the reader, firſt the writing which was the cauſe of the proſecution; and ſecondly the account of the proceedings in the Star-Chamber; *for both of which we are obliged to Mr.* Ruſhworth.]

Extract from Ruſhworth's Appendix *to his* Hiſtorical Collections, *vol.* 1. *page* 12.

A Propoſition for his Majeſty's Service to bridle the Impertinence of Parliaments.

THE propoſition for your majeſty's ſervice, containeth two parts: the one to ſecure your ſtate, and to bridle the impertinency of parliaments: the other, to increaſe your majeſty's revenue, much more than it is.

1. Touching the firſt, having conſidered divers means, I find none ſo important to ſtrengthen your majeſty's regal authority, againſt all oppoſitions and practiſes of troubleſome ſpirits, and to bridle them, than to fortify your kingdom, by having a fortreſs in every chief town, and important place thereof, furniſhed with ordnance, munition, and

faithful men, as they ought to be, with all other circumſtances fit for to be digeſted in a buſineſs of this nature; ordering withal, the trained ſoldiers of the country to be united in one dependency with the ſaid fort, as well to ſecure their beginning, as to ſuccour them in any occaſion of ſuſpect; and alſo to retain and keep their arms for more ſecurity, whereby the countries are no leſs to be brought in ſubjection, than the cities themſelves, and conſequently the whole kingdom; your majeſty having by this courſe the power thereof in your own hands. The reaſons of the ſuggeſts are theſe. 1. That in policy, there is a greater tie of the people by force and neceſſity, than merely by love and affection; for by the one, the government reſteth always ſecure; but by the other, no longer than the people are contented. 2. It forceth obſtinate ſubjects to be no more preſumptuous, then it pleaſeth your majeſty to permit them. 3. That to leave a ſtate unfurniſhed, is, to give the bridle thereof to the ſubjects; when, by the contrary, it reſteth only in the prince's hands. 4. That modern fortreſſes take long time in winning, with ſuch charge and difficulty, as no ſubjects in theſe times have means probable to attempt them. 5. That it is a ſure remedy againſt rebellion, and popular mutinies, or againſt foreign powers; becauſe they cannot well ſucceed, when by this courſe the apparent means is taken away to force the king and ſubject upon a doubtful fortune of a ſet battle, as was the cauſe that moved the pretended invaſion againſt the land, attempted by the king of *Spain* in the year 1588. 6. That your majeſty's government is the more ſecure, by the people's more ſubjection; and by their ſubjection, your parliament muſt be forced conſequently to alter their ſtyle, and to be conformable to your will and pleaſure; for their words and oppoſition import nothing, where the power is in your majeſty's own hands, to do with them what you pleaſe; being indeed the chief purpoſe of this diſcourſe, and the ſecret intent thereof, fit to be concealed from any *Engliſh* at all, either counſellors of ſtate, or other.

For theſe, and divers other weighty reaſons, it may be conſidered in this place, to make your majeſty more powerful and ſtrong, ſome orders be obſerved, that are uſed in fortified countries, the government whereof imports as much as the ſtates themſelves, I mean, in times of doubt or ſuſpect, which are theſe. *Imprimis*, that none wear arms or weapons at all, either in city or country, but ſuch as your majeſty may think fit to priviledge, and they to be enrolled. 2. That as many highways as conveniently may be done, be made paſſable through thoſe cities and towns fortified, to conſtrain the paſſengers to travel through them. 3. That the ſoldiers of fortreſſes be ſometimes choſen of another nation, if ſubject to the ſame prince; but howſoever, not to be born in the ſame province, or within forty or fifty miles of the fortreſs, and not to have friends or correſpondency near it. 4. That at all the gates of each walled town be appointed officers, not to ſuffer any unknown paſſengers to paſs, without a ticket, ſhewing from whence he came, and whither to go. And that the gates of each city be ſhut all night, and keys kept by the mayor or governor. 5. Alſo innkeepers to deliver the names of all unknown paſſengers that lodge in their houſes; and if they ſtay ſuſpiciouſly at any time, to preſent them to the governor: whereby dangerous perſons ſeeing theſe ſtrict courſes, will be more wary of their actions, and thereby miſchievous attempts will be prevented. All which being referred to your majeſty's wiſe conſideration, it is meet for me withal to give you ſome ſatisfaction of the charge and time to perform what is purpoſed, that you may not be diſcouraged in the difficulty of the one, or prolongation of the other; both which doubts are reſolved in one and the ſame reaſon, in reſpect that, in *England*, each chief town commonly hath a ruinated caſtle, well ſeated for ſtrength, whoſe foundation and ſtones remaining, may be both quickly repaired for this uſe, and with little charge and induſtry made ſtrong enough, I hope, for this purpoſe, within the ſpace of one year; by adding withal bulwarks and rampiers for the ordnance, according to the rules of fortification. The ordnance for theſe forts may be of iron, not to diſfurniſh your majeſty's navy, or be at a greater charge than is needful.

To maintain yearly the fort, I make account an ordinary pay, three thouſand men will be ſufficient, and will require forty thouſand pound charge *per annum*, or thereabouts, being an expence that inferior princes undergo, for their neceſſary ſafety. All which prevention, added to the invincible ſea-force your majeſty hath already, and may have, will make you the moſt powerful and obeyed king of the world: which I could likewiſe confirm by many examples, but I omit them for brevity, and not to confuſe your majeſty with too much matter. Your majeſty may find by the ſcope of this diſcourſe, the means ſhewed in general to bridle your ſubjects, that may be either diſcontent or obſtinate. So likewiſe am I to conclude the ſame intent particularly, againſt the perverſeneſs of your parliament, as well to ſuppreſs that pernicious humour, as to avoid their oppoſitions againſt your profit, being the ſecond part to be diſcourſed on: and therefore have firſt thought fit, for better prevention thereof, to make known to your majeſty the purpoſe of a general oath your ſubjects may take, for ſure avoiding of all rubs, that may hinder the concluſion of theſe buſineſſes. It is further meant, that no ſubject, upon pain of high treaſon, may refuſe the ſame oath, containing only matter of allegiance, and not ſcruples in points of conſcience, that may give pretence not to be denied. The effect of the oath is this, that all your majeſty's ſubjects do acknowledge you to be as abſolute a king and monarch within your dominions, as is among the Chriſtian princes; and your prerogative as great; whereby you may and ſhall of yourſelf, by your majeſty's proclamation, as well as other ſovereign princes doing the like, either make laws, or reverſe any made, with any other act ſo great a monarch as yourſelf may do, and that without further conſent of a parliament, or need to call them at all in ſuch caſes; conſidering, that the parliament in all matters, excepting cauſes to be ſentenced at the higheſt court, ought to be ſubject unto your majeſty's will, to give the negative or affirmative concluſion, and not be conſtrained by their impertinencies to any inconvenience, appertaining to your majeſty's regal authority; and this, notwithſtanding any bad pretence or cuſtom to the contrary in practiſe, which indeed were fitter to be offered a prince elected, without other right, than to your majeſty, born ſucceſſively king of *England*, *Scotland*, and *Ireland*, and your heirs for ever; and ſo received, not only of your ſubjects, but alſo of the whole world. How neceſſary the dangerous ſupremacy of parliament's uſurpation is to be prevented, the example of *Lewis* the eleventh, king of *France*, doth manifeſt, who found the like oppoſition as your majeſty doth, and by his wiſdom ſuppreſſed it. And to the purpoſe here intended, which is not to put down altogether parliaments and their authority, being in many caſes very neceſſary and fit; but to abridge them ſo far, as they ſeek to derogate from your majeſty's regal authority, and advancement of your greatneſs; the caution in offering the aforeſaid oath, may require ſome policy, for the eaſier paſſage at firſt, either by ſingular or particular tractation; and that ſo near about one time over the land, as one government may not know what the other intendeth; ſo it may paſs the eaſier, by having no time of combination or oppoſition. There is another means alſo more certain than this, to bring to paſs the oath more eaſily, as alſo your profit, and what elſe pretended; which here I omit for brevity, requiring a long diſcourſe by itſelf, and have ſet it down in particular inſtructions to inform your majeſty.

2. The ſecond part of this diſcourſe is, touching your majeſty's profit, after your ſtate is ſecured: wherein I ſhould obſerve both ſome reaſonable content to the people, as alſo conſider the great expences that princes have now-a-days, more than in times paſt, to maintain their greatneſs, and ſafety of their ſubjects, who, if they have not wit or will to conſider their own intereſt ſo much indifferently, your majeſty's wiſdom muſt repair their defects, and force them to it by compulſion; but I hope there ſhall be no ſuch cauſe, in points ſo reaſonable, to increaſe your majeſty's revenue, wherein I ſet down divers means for your gracious ſelf to make choice of, either all or part at your pleaſure, and to put it in execution by ſuch degrees and cautions, as your great wiſdom ſhall think fit in a buſineſs of this nature.

Imprimis, the firſt means or courſe intended to increaſe your majeſty's revenues or profits withal, is of greateſt conſequence, and I call it a *decimation*, being ſo termed in *Italy*, where in ſome part it is in uſe, importing the tenth of all ſubjects eſtates, to be paid as a yearly rent to their prince, and as well monied-men in towns, as landed-men in the countries, their value and eſtates eſteemed juſtly as it is to the true value, though with reaſon; and this paid yearly in money: which courſe applied in *England* for your majeſty's ſervice, may ſerve inſtead of ſubſidies, fifteens, and ſuch like, which in this caſe are fit to be releaſed, for the ſubjects benefit and content, in recompence of the ſaid *decima*, which will yield your majeſty more in certainty, than they do caſually, by five hundred thouſand pounds *per annum* at the leaſt. *Item*, that when your majeſty hath gotten money into your hands by ſome courſes to be ſet down, it would be a profitable courſe to encreaſe your *entrada*, to buy out all eſtates and leaſes upon your own lands, in ſuch ſort, as they be made no loſers; whereby having your lands free, and renting it out to the true value, as it is moſt in uſe, and not employed as heretofore, at an old rent, and ſmall fines, you may then rent it out for at leaſt four or five times more money than the old rent comes unto. So as if your majeſty's lands be already but ſixty thouſand pounds *per annum*, by this courſe it will be augmented at the leaſt two hundred thouſand pounds *per annum*; and to buy out the tenants eſtates will come to a ſmall matter by the courſe, to make them no loſers, conſidering the gain they have already made upon the land: and this is the rather to be done, and the preſent courſe changed, becauſe it hath been a cuſtom uſed meerly to couſen the king. *Item*, whereas moſt princes do receive the benefit of ſalt in their own hands, as a matter of great profit, becauſe they receive it at the loweſt price poſſible, and vent it at double gain yearly; the ſame courſe uſed by your majeſty, were worth at leaſt one hundred and fifty thouſand pounds *per annum*. It is likewiſe in other parts, that all weights and meaſures of the land, either in private houſes, ſhops, or public markets, ſhould be viewed to be juſt, and ſealed once a year, paying to the prince for it; which in *England*, applied to your majeſty, with order to pay ſixpence for the ſealing of each ſaid weight or meaſure, would yield near ſixty thouſand pounds *per annum*. *Item*, tho' all countries pay a *gabella* for tranſportation of cloth, and ſo likewiſe in *England*; yet, in *Spain*, there is impoſt upon the wools, which in *England* is ſo great a wealth and benefit to the ſheep-maſters, as they may well pay you five pounds *per cent.* of the true value at the ſhearing, which I conceive may be worth one hundred and forty thouſand pounds *per annum*. *Item*, whereas the lawyers fees and gains in *England* be exceſſive, to your ſubjects prejudice; it were better for your majeſty to make uſe thereof, and impoſe on all cauſes ſentenced with the party, to pay five pounds *per cent.* of the true value that the cauſe hath gained him; and for recompence thereof, to limit all lawyers fees and gettings, whereby the ſubject ſhall ſave more in fees and charges, then he giveth to your majeſty in the *gabella*, which I believe may be worth, one year with another, fifty thouſand pounds. *Item*, whereas the inns and victualling-houſes in *England* are more chargeable to the travellers than in other countries, it were good for your majeſty to limit them to certain ordinaries, and raiſe beſides a large impoſition, as is uſed in *Tuſcany*, and other parts; that is, a prohibiting all inns and victualling-houſes, but ſuch as ſhall pay it; and to impoſe upon the chief inns and taverns, to pay ten pounds a-year to your majeſty, and the worſt five pounds *per annum*, and all ale-houſes twenty ſhillings *per annum*, more or leſs, as they are in cuſtom. Of all ſorts there are ſo many in *England*, that this impoſt may well yield one hundred thouſand pounds *per annum* to your majeſty. *Item*, in *Tuſcany*, and other parts, there is a *gabella* of all cattle, or fleſh, and horſes ſold in markets, paying three or four *per cent.* of what they are ſold for, which by conjecture may be worth in *England*, two hundred thouſand pounds *per annum*; uſing the like cuſtom upon fiſh, and other victuals, (bread excepted) and for this cauſe, fleſh, and fiſh, and victuals in the markets, to be priſed and ſold by weight, whereby the ſubject ſaveth more in not being couſened, than the impoſition impaireth them. *Item*, in *Tuſcany* is uſed a taxation of ſeven *per cent.* upon all alienation of lands to the true value. As alſo ſeven *per cent.* upon all dowries, or marriage-monies. The like, if it be juſtly uſed in *England*, were worth at leaſt one hundred thouſand pounds *per annum*; with many other taxations upon meal, and upon all merchandiſes in all towns, as well as port-towns, which here I omit, with divers others, as not ſo fit for *England*. And in ſatisfaction of the ſubject for theſe taxes, your majeſty may be pleaſed to releaſe them of wardſhips, and to enjoy all their eſtates at eighteen years old; and in the mean time, their profits to be preſerved for their own benefit. And alſo in forfeitures of eſtate by condemnation, your majeſty may releaſe the ſubject, as not to take the forfeiture of their lands, but their goods, high treaſon only excepted; and to allow the counſel of lawyers in caſe of life and death; as alſo not to be condemned without two witneſſes, with ſuch like benefit, which importeth much more their good than all the taxations named can prejudice them. *Item*, ſome of the former taxations, uſed in *Ireland* and in *Scotland*, as may eaſily be brought about by the firſt example thereof uſed in *England*, may very well be made to increaſe your revenue there, more than it is, by two hundred thouſand pounds *per annum*. *Item*, all offices in the land, great and ſmall, in your majeſty's grant, may be granted, with condition, to pay you a part yearly, according to the value: this, in time, may be worth (as I conceive) one hundred thouſand pounds *per annum*: adding alſo notaries, attornies, and ſuch like, to pay ſome proportion yearly towards it, for being allowed by your majeſty to practiſe, and prohibiting elſe any to practiſe in ſuch places. *Item*, to reduce your majeſty's houſhold to board-wages, as moſt other princes do, reſerving ſome few tables; this will ſave your majeſty ſixty thouſand pounds *per annum*, and eaſe greatly the ſubject beſides, both in carriages and proviſion, which is a good reaſon, that your majeſty in honour might do it. *Item*, I know an aſſured courſe in your majeſty's navy, which may ſave at leaſt forty thouſand pounds *per annum*, which requiring a whole diſcourſe by itſelf, I omit; only promiſe you to do it, whenſoever you command. *Item*, whereas your majeſty's laws do command the ſtrict keeping of faſting-days, you may alſo prohibit on thoſe days to eat eggs, cheeſe, and white-meats, but only ſuch as are contented to pay eighteen pence a year for the liberty to eat them, and the better ſort ten ſhillings. The employment of this may be for the defence of the land, in maintaining the navy, garriſons, and ſuch like, much after the faſhion of a *Cruſado* in *Spain*, as your majeſty knoweth, being firſt begun there, under the pretence to defend the land againſt the *Moors*. And the ſame uſed in *England*, as aforeſaid, may very well yield, one year with another, one hundred thouſand pounds, without any diſguſt to any, becauſe it is at every one's choice to give it or no. Laſtly, I have a courſe upon the Catholicks, and very ſafe for your majeſty, being with their good-liking, as it may be wrought, to yield you preſently at leaſt two hundred thouſand pounds *per annum*, by raiſing a certain value upon their lands, and ſome other impoſitions; which requiring a long diſcourſe by itſelf, I will omit it here, ſetting it down in my inſtructions. It will ſave your majeſty at leaſt one hundred thouſand pounds *per annum*, to make it pain of death, and confiſcation of goods and lands, for any of the officers to couſen you, which now is much to be feared they do, or elſe they could not be ſo rich; and herein to allow a fourth part benefit to them that ſhall find out the couſenage. Here is not meant officers of ſtate, as the lord treaſurer, *&c.* being officers of the crown. The ſum of all this account amounteth unto two millions, or twenty hundred thouſand pounds *per annum*: ſuppoſe it to be but one million and a half, as aſſuredly your majeſty may make by theſe courſes ſet down, yet it is much more than I promiſed in my letter for your majeſty's ſervice. Beſides, ſome ſums of money in preſent, by the courſes following: *imprimis*, by the prince's marriage, to make all the earls in *England* grandees of *Spain*, and *principi*, with ſuch like priviledges, and to pay twenty thouſand pounds a-piece for it. 2. As alſo, if you make them fœditaries of the towns belonging to their earldoms, if they will pay for it beſides, as they do to the king of *Spain* in the kingdom of *Naples*. And ſo likewiſe barons, to be made earls and peers, to pay nineteen thouſand pounds a-piece, I think might yield five hundred thouſand pounds, and oblige them more ſure to his majeſty. 3. To make choice of two hundred of the richeſt men of *England* in eſtate, that be not noblemen, and make them titulate, as is uſed in *Naples*, and paying for it; that is, a duke thirty thouſand pounds, a marqueſs fifteen thouſand pounds, an earl ten thouſand pounds, and a baron or viſcount five thouſand pounds. It is to be underſtood, that the antient nobility of barons, made earls, are to precede theſe as peers, tho' theſe be made marqueſſes or dukes; this may raiſe a million of pounds and more unto your majeſty. To make gentlemen of low quality, and francklins, and rich farmers, eſquires, to precede them, would yield your Majeſty alſo a great ſum of money in preſent. I know another courſe to yield your majeſty at leaſt three hundred thouſand pounds in money, which as yet the time ſerveth not to diſcover, until your majeſty be reſolved to proceed in ſome of the former courſes, which till then I omit. Other courſes alſo, that may make preſent money, I ſhall ſtudy for your majeſty's ſervice, and, as I find them out, acquaint you withal. Laſtly, to conclude all theſe diſcourſes, by the application of this courſe uſed for your profit, that it is not only the means to make you the richeſt king that ever *England* had, but alſo the ſafety augmented thereby to be moſt ſecure, beſides what was ſhewed in the firſt part of this diſcourſe; I mean, by the occaſion of this taxation, and raiſing of monies, your majeſty ſhall have cauſe and means to imploy in all places of the land ſo many officers and miniſters, to be obliged to you for their own good and intereſt, as nothing can be attempted againſt your perſon, or royal ſtate, over land, but ſome of them ſhall, in all probability, have means to find it out, and hinder it. Beſides, this courſe will detect many diſorders and abuſes in the public government, which were hard to be diſcovered by men indifferent. To prohibit gorgeous and coſtly apparel to be worn, but by perſons of good quality, ſhall ſave the gentry of the kingdom much more money, than they ſhall be taxed to pay unto your majeſty. Thus withal I take my leave, and kiſs your gracious hands, deſiring pardon for my error I may commit herein.

Extract from Ruſhworth's Hiſtorical Collections, *vol.* 2. *page* 51.

ON the 29th of *May*, 1630, a great cauſe was brought to hearing in the *Star-Chamber*, concerning a diſcourſe, entituled, *A Propoſition for his Majeſties Service to bridle the Impertinency of Parliaments.* Wherein the king's attorney-general was plaintiff, the earl of *Bedford*, the earl of *Clare*, the earl of *Somerſet*, ſir *Robert Cotton*, *John Selden*, *Oliver St. John*, and others, defendants: which diſcourſe we have inſerted at large in the *Appendix* to the firſt part of *Hiſtorical Collections*. Here now followeth the anſwers of the defendants, and the judgment of the court thereupon, *viz.*

After the king's attorney-general opened the aforementioned information, the anſwer of *Robert* earl of *Somerſet* to the ſaid information, was alſo opened by his council, to this effect:

That the diſcourſe, as he believed, was either the ſame that was ſhewed him in the time of his attendance near his late majeſty king *James*, or had many of the ſame things in it: and finding no cauſe of concealing a propoſition made in a former king's time, and having no apprehenſion, that ſcandal to his majeſty, or the preſent government, might thereby happen, he caſually imparted it to the earls of *Bedford* and *Clare*, who, after peruſal thereof, delivered their opinion concerning it, at their next meeting; 'that it was a phantaſtick project of ſome brain-ſick traveller, 'who had made collections of ſome princes in *Italy*, and other foreign 'ſtates, no way ſuitable to the government of this kingdom.'

And further ſaid, that (beſides that one time) there was never any conference, nor any paſſage by letter or otherwiſe, betwixt them concerning it, or with any other perſon, and denied that he either contrived the propoſition, or knew of the contriving thereof, or ever imagined that his majeſty would innovate the antient form of government, diſpoſe of the eſtates of his ſubjects without their conſents, make or repeal laws by proclamation without conſent of parliament, plant garriſons in his principal cities and towns, or put in execution any part of the ſaid diſcourſe: and the reaſon why he did not preſent the diſcourſe to his majeſty, or ſome of the lords of the council, or ſome magiſtrate, was, becauſe he did not conceive the ſame did in any ſort concern the time of his majeſties government, but was contrived in ſome former time, as appeared manifeſtly, by the particulars therein contained; and that about ſixteen or ſeventeen years ago, ſir *David Fowles* ſhewed him the project, to whom he replied, 'that he was ſatisfied no uſe could be made thereof, and ſo he 'redelivered it, and concluded that the divulging thereof was in his 'opinion pardoned by the general pardon granted upon his now majeſties 'coronation.'

The reſt of the defendents denied any their contrivance thereof, alledging the author (as they were informed) was living beyond ſea, and that they ought not to be queſtioned for it, being writ in the time of king *James*, and not in reference to his now majeſties government, denying that they had the leaſt thought or intention to ſcandalize the government; for that they rejected the diſcourſe as ſoon as they read it, as a fooliſh and impertinent iſſue of ſome projecting brain; and they averred their deteſtation of ſuch a project, and that they bore loyal hearts to his majeſty, and bleſſed God for the happy and peaceable government under him.

After the publication of the cauſe in order to a hearing, it appeared by the depoſitions of ſir *David Fowles*, that he received the ſaid writing from one Mr. *Yates*, in the time of king *James*, who brought it from ſir *Robert Dudly* at *Florence*, together with a letter, deſiring him to deliver it to the earl of *Somerſet*, that he might communicate it to king *James*, which was done accordingly, and that in his hearing the earl ſignified a diſlike thereof; and that he received it back from the earl (being the original) and kept it by him till the lords of the council ſent for it, and that he made no copy thereof.

It appeared alſo by the depoſitions of other witneſſes, that this diſcourſe, nine years ago, was bought by them in *Little-Britain* amongſt other manuſcripts.

So this cauſe coming to hearing, a great preſence of nobility being in court, the attorney-general opened the charge. But before much proceeding, his majeſty ſent word unto the lord keeper *Coventry*, then in court, that the queen was brought to bed of a ſon, and a private meſſage alſo was delivered to him from the king; whereupon the lord keeper declared in court, that his moſt ſacred majeſty had taken this matter into his moſt ſerious conſideration, and although the ſame was of ſo high a nature, as it was neceſſary to be brought in queſtion, (being contrary to many laws and ſtatutes, and the common law itſelf) yet his majeſty ballancing the ſame in the ſcales of juſtice and mercy (the author of the diſcourſe being diſcovered to live beyond the ſeas) found theſe defendents rather fitting to be objects of his mercy, than juſtice, they being ſome of them noblemen, and ſuch as his majeſty did and doth well eſteem and like of, in his royal opinion: and that his majeſty was the rather inclined to extend his goodneſs, in regard of the time; it having now pleaſed the great juſtice of heaven to bleſs his majeſty and his kingdom with a royal iſſue of his body, a hopeful prince, the great joy and long expectation both of king and kingdom.

Upon this declaration of the king's pleaſure, the lord keeper made known, that the court by his majeſties ſpecial command was to proceed no further in the hearing of this cauſe: but ordered the project, or book, to be burnt, as ſeditious and ſcandalous both to his majeſty, the ſtate, and government of this kingdom. And ordered the proceedings to be taken off the file.

XXV. *Proceedings in the Court of* Chivalry, *on an Appeal of* High-Treaſon, *by* Donald *Lord* Rea, *againſt Mr.* DAVID RAMSEY, 7 Cha. I. 1631.

[*The following caſe is an inſtance of awarding a trial by duel in the court of* Chivalry, *though afterwards the duel was prevented. There are two accounts of it, which we ſhall ſubmit to our readers. One is from* Sanderſon's Hiſtory of the Life and Reign of Charles the Firſt, *page* 164. *to* 173. *The other is from* Ruſhworth's Hiſtorical Collections, *vol.* 2. *pages* 62, 106, 112. *Biſhop* Burnet *relates the hiſtory of the accuſation in his* Lives of the Dukes of Hamilton, *principally with a view to juſtify the firſt duke of* Hamilton, *whoſe name was involved in the affair. See* Burnet's Memoirs of the Dukes of Hamilton, *p.* 11. *to* 14. *The biſhop, it is obſervable, charges* Sanderſon *with giving a journal of the procedure on lord* Rea's *appeal, in order to impeach the duke of* Hamilton's *loyalty. In* Ruſhworth *there is a letter from* Charles *the firſt to the duke of* Hamilton, *which explains what was done in the court of* Chivalry, *and amply proves, that the king was quite ſatisfied of the duke's innocence. This letter forms a part of* Ruſhworth's *relation As to the account in the* Annals of James and Charles the Firſt, *it is merely a copy of* Sanderſon, *with the addition of the king's letter from* Ruſhworth.]

Sanderſon's *Relation.*

WHEN friends fall out their faults are found, as appears by the quarrell between *Donnold* lord *Rey*, a *Scotiſh* highlander, or rather more northward of the iſles *Orkney*, and one *David Ramſey* a true *Scot* courtier, concerning words and deſigns of treaſon againſt the king and kingdom, which becauſe *Ramſey* denied, they are admitted the trial by combate, the manner being as followeth.

The day prefixt for trial was the 28 of *November*, 1631, before *Robert* earl of *Lindſey*, lord high chamberlain of *England*, and now *pro tempore* deputed lord high conſtable of *England*.

Thomas earl of *Arundel*, earl marſhall of *England*.
The earl of *Pembroke*, lord chamberlain of the kings houſhold.
The earl of *Dorſet*, chamberlain to the queens houſhold.
The earl of *Carlile*.
Earl of *Malgrave*.
Earl of *Morton*.
Viſcount *Wimbleton*.
Viſcount *Wentworth*.
Viſcount *Falkland*.
Sir *Henry Vane*.

The place was the *Painted Chamber* at *Weſtminſter*: at the upper end thereof a bench was erected four foot high for the conſtable, and marſhal, and lords aſſiſtants. Under them ſeats about a ſquare table, filled with the heralds of arms, and ſerjeants at arms, and other officers of the court. Directly under the upper bench ſate the regiſter doctor *Dethick*, and over againſt him doctor *Duck* the kings advocate for the marſhals court. Behinde him at the bar were the two pews for the appellant and defendant.

At eight a clock comes the earl marſhal (uſhered in with nine heralds, and three ſerjeants at arms) bearing his marſhal truncheon of gold, tipped with black, and commanding room, and giving orders, retired into the upper houſe of parliament, and then returned into the court, as to make way for the high conſtable, who followed, and all took place in their degrees.

The earl marſhal riſes, makes obedience to the conſtable, and paſſing forward meets ſir *William Seager* king of heralds, and both of them preſent to the conſtable his commiſſion, which he received with his hat off: and delivered it to the regiſter to reade, in effect,

That his majeſty being informed by *Donnold* lord *Rey*, how *David Ramſey* eſquire, had plotted, and was privy unto divers treaſons and conſpiracies againſt his royal perſon, government, and kingdoms. In the ſearch whereof the king had uſed all ways and means for the diſcovery of the truth: the one of them accuſing, the other denying, and ſo no certain ſecurity to his own perſon and his ſubjects: therefore he doth authorize the ſaid *Robert Bartie* earl of *Lindſey* lord high conſtable, for to call unto him *Thomas* earl of *Arundel* earl marſhal, and with him ſuch other peers, ſheriffs, and officers, as he thinks fit, to hold a marſhal's court, for ſifting the truth between the ſaid parties, &c.

Then the king of heralds delivers to the conſtable, his ſilver verge or ſtaff, half a yard in length, headed with a crown of gold. Then the earl marſhal delivered a key to a herald, to fetch in the appellant uſhered in by the herald, and accompanied with his ſureties, ſir *Pierce Crosby*, ſir *Walter Crosby*, ſir *William Forbiez*, ſir *Robert Gordon*, and ſir *William Evers*. He was apparelled in black velvet trimmed with ſilver buttons, his ſword in a ſilver imbroidered belt, in his order of a *Scotiſh* baronet, about his neck, and ſo with reverence entered into his pew. His council doctor *Reeves* ſtanding by. His behaviour (like himſelf, tall, ſwarthy, black, but comely) very port-like and of ſtaid countenance.

The defendant was alike uſhered in by another herald. His ſureties were the lord *Roxborough* and lord *Abercorn*: and his deport like himſelf, ſtern and brave, a fair, ruddy, yellow-headed buſh of hair, (ſo large, and in thoſe days unuſual, that he was called *Ramſey Redhead*). His apparel ſcarlet, over-laced with ſilver, the ground hardly diſcerned, and lined with ſky-coloured pluſh, but unarmed, without a ſword. After his reverence to the court, he faced the appellant, who alike ſterned a countenance at him.

After *O yes!* the earl marſhal told them the effect of the commiſſion, and the power of this court, which was not of any ſtrange nature, but legal and juſtifiable as any other trial in *Weſtminſter-Hall*; and that there had been no more nor other trials of this kinde of late, we were to attribute it to Gods goodneſs, the juſtice of the king, and loyalty of the ſubject, with the providence of ſtate, and wiſhed there might be no more in time to come; and that to expect any combate, this court he hoped would prevent it by the diſcovery of the light, and ſo *magna eſt veritas, & prævalebit.*

He referred the further proceedings unto doctor *Duck*, the kings advocate, who ſpake thus in effect.

That the kings majeſty had committed the trial of the buſineſs to your grace my lord high conſtable, the earl marſhal, and this court, which courſe was warrantable by the laws of other nations, and alſo by our own, who have uſed the ſame manner of trial.

That our law admitted ſundry proofs for treaſon, which in other matters it did not: that all ſubjects were bound to diſcover treaſons: and cited two ancient civilians, *Hieronymus* and *Tiberius*, who gave their reaſons for this kinde of trial. And he mentioned ſundry records of our own chronicles and examples herein, as the duke of *Norfolk* combating againſt the duke of *Hartford* in *Henry* 4. his time; *Jo. Ely* and *William Scroop* againſt *Ballamon* at *Burdeaux*, the king being there; the lord *Morley* impeached *Mountague* earl of *Saliſbury*; and that *Thomas* of *Walſingham* and *Thomas* of *Woodſtock* in their learned writings, expreſſed ſundry preſidents for this manner of proceeding; wiſhing the court in Gods name to go on to the trial, and the appellant to give in his evidence.

Then the appellant came up upon the table, to whom the earl marſhal delivered the petition, which he had the day before exhibited to the king. And the defendant being alſo called up, the petition was read, which was in effect, that he having accuſed *Ramſey* of treaſon, and alſo *Meldram* his kinſman, and of confederacy, againſt whom captain *Nothwick* was witneſs, therefore had deſired, that the court would proceed againſt *Meldram* firſt.

But he was told by the court, that their caſes differing, the appellant was ordered to deliver in his charge againſt the defendant, which he did, in writing by bill, containing ſundry particulars, *viz.*

That in *May* laſt in the *Low-Countreys*, *Ramſey* complained to him againſt the court of *England*.

That the matters of church and ſtate was ſo out of frame as muſt tend to a change, if not deſolation.

That therefore he had abandoned the kingdom, to live where now he was, and to expect a mutation forthwith, to which end he had brought preſent moneys to maintain him at ſix pounds a day for three years. That marqueſs *Hamilton* had a great army promiſed to him, for pay whereof the king had given in hand ten thouſand pound, and all the wine cuſtomes in *Scotland* for ſixteen years, preſently to be ſold for the armies ſubſiſtence. And that he ſtaid but for ammunition and powder to come over, for which his lordſhip was to mediate with his majeſty of *Sweden* and the *States*, and then link themſelves together, of whoſe minde *Rey* ſhould know hereafter.

That their friends in *Scotland* had gotten therefore arms and powder out of *England*, and that what he ſhould procure in *Holland* was to be brought over by the marqueſs; and that all *Scotland* were ſure to them except three.

That *France* and *Spain* thirſted for *England*, but *Hamilton* would defeat them for himſelf. His onely fear was of *Denmark*, where he meant to land, and either to take him off, or make a party.

That afterwards at *Amſterdam*, *Ramſey* with *Alexander Hamilton* ſolicited him the lord *Rey* to be true to them, and to be of their council, though as yet they durſt not reveal too much of *Hamilton*'s ſecrets, but if he repaired to *England*, he would intruſt him with letters; and that his brother in law *Sea-port* knew all.

This being the effect of the charge. He added,

That if *Ramſey* would deny it, he was a villain and a traitour, which he would make good. And therewith caſt him his glove.

Ramſey denied all, and ſaid, *Rey* was a liar, a barbarous villain, and threw down his glove, proteſting, to gar him dy for it, if he had had him in place for that purpoſe.

Rey was temperate, without any paſſion, but ſmiling, replied, Mr. *Ramſey*, we will not contend here. Anſwer to my bill.

Then *Ramſey* offered ſome reaſons of the impoſſibility of the charge, the ſlender numbers of men from *England*, but ſix thouſand raw ſouldiers, againſt three kingdoms, whom the firſt proclamation might diſſipate. That the marqueſs was neither ſo wicked, nor weak in judgment: and if he ſhould conceit to ſurprize the king, what hope had he againſt his children and kindred? And therefore (ſaid he) my lord *Rey* is a barbarous villain, and a liar, and he will gar him dy for it, or loſe his deareſt bloud.

He was interrupted by the earl marſhal, telling him, he muſt not ſtand upon conjectures, but anſwer the bill of form according to law, and was adviſed to take counſel therein.

Then *Ramſey* in general acknowledged all the particular circumſtances of time and place alleged by *Rey*, and the diſcourſe to that effect; but concluded, that no treaſon was intended or uttered, and craved counſel to anſwer, which was granted.

And ſo the court adjourned to the fifth of *December*, but upon a freſh arreſt by the earl marſhal they were to put in bail for appearance, which were the old ſecurity; and *Ramſey* ordered to anſwer upon oath. At which day appearing, the fame of the cauſe brought thither ſuch a crowd of people as was not imaginable.

Rey entered as before in manner and habit: but *Ramſey* was new ſuited in black ſatten, and preſented his anſwer in writing to this effect:

That having well conſidered the time, place, and communication with the lord *Rey* beyond the ſeas, (as before urged) he confeſſes;

That *Rey* demanded of him, whether the marqueſs *Hamilton* intended to come over and follow the wars? He ſaid, yes; and told him of his forces ſix thouſand men, and of the ten thouſand pounds in money, and wine-cuſtomes in *Scotland*, which he would ſell to maintain the army, and that he would come ſo provided with ammunition, that being joyned with his friends he valued no enemy. Upon which *Rey* replied, that his own two regiments ſhould wait upon him: but the place of theſe forces to meet was at ſea, and there to receive directions from the king of *Swede*, where to rendezvouz. Upon which *Rey* ſaid, that his life and fortunes ſhould wait on the marqueſs; who being told of his friendſhip, wrote a letter to *Rey*, which *Ramſey* delivered, in effect, that *Rey* would get ſome ammunition from the king of *Swede*, which was wanting. And that, ſpeaking in general of matters amiſs in *England*, *Rey* anſwered, God amend all. To whom *Ramſey* replied, by God, *Donnold*, we muſt help him to amend all. And to all the other matters and things he utterly denies, and craves revenge upon *Rey*'s perſon by dint of ſword.

Then doctor *Eden* of council for *Ramſey* ſpake to the court, that being aſſigned his council, his opinion was, that the defendant might decline the combate, and reply to the appellant's bill in brief, with theſe reaſons:

Firſt, that by the words in the bill, no man can be charged a traitor by one that is guilty in his own particular, and ſo is not tied to be defendant, nor to anſwer ſuch a bill.

Secondly, the incertainty and doubtfulneſs of the words in the charge; ſo that till the court doth cenſure them to be treaſonable, the defendant is not tied to anſwer.

Thirdly, the appellant refers the combate till the laſt, if he cannot in the mean time prove the charge by any other ways; then he offers to make it good by his body. So then, the defendant may forbear his anſwer, and decline the combate.

And now my lords (ſaid he) I humbly ſhall acquaint you with the defendants anſwer to me in private, which was,

That though in law he might, yet in honour and innocency he would not, decline the combate, but being his own conſent, his advocate hath the leſs to ſay for him. And ſo time was given for *Rey*'s replication till *Friday* after.

Reys councel moved, whereas Dr. *Eden* had excepted at ſome words in the charge, he anſwered, that whoever was accuſed of treaſon, was not to inſiſt, how polluted the anſwer was, but how to approve and clear himſelf: then to refer the combate to the laſt, was well done, *ultimum refugium*, to expoſe his life, for God, the king and his country.

This ſpeech being ſomewhat peremptory, and directory to the court, he was told,

That the court needed not his direction, as to the tryall of combate, their wiſdoms would conſider of that when it was time; and ſo the court adjourned, both parties being admitted to have common lawyers; but to plead onely by civilians.

This day come, *Rey* appears as before; but *Ramſey* in a new ſuit, of aſh-colour cloth, opened with ſcarlet colour, the cloke ſcarlet cloth, lined with aſh coloured velvet, and the whole ſuit and cloke overlaid with ſilver and ſky coloured lace.

The former proceedings were read by the regiſter; and thereupon the appellants replication preſented to the high conſtable: in effect, that *Ramſey* in his anſwer had cunningly ſlipt over a part of the charge, which was, that the lord *Rey* proteſted, he was not ingaged in wars, for want of ſubſiſtence, and therefore would not hazard in any deſigne, without ſure knowledge, upon which words, depends much of the matter and main of that part of the bill. And ſo ripping up the ſeveral charges of the bill, the ſtrength, reaſons, and likelihood, and the defendants defects in not clearing the chief points, they went on with the councel.

It was his part to inforce the charge againſt *Ramſey* to this effect.

He obſerved, that the firſt day, *Ramſey* denied all the charge, whileſt he ſtood upon poſitive reſolution, but afterwards his councel brought him to particulars, and taught him to anſwer ſuperficially; firſt he knew nothing, and yet now ſo much. No doubt there was ſome ſtranger enterprize by the marqueſſe *Hamilton*, then to ſerve the king of *Swede*, by *Ramſeys* profeſſing that *Hamilton* was a proteſtant, and bore arms for religion, not caring with whom to grapple; from hence obſerving, that they intended ſomewhat to attempt of themſelves. *Ramſey* ſtiled the marqueſſe his maſter in diſcourſe, and in many of his letters produced, much of the diſcovery by *Rey* was to fiſh out of *Ramſey* the truth of his doubtful words; how unlikely it was that *Rey* having two regiments of old ſouldiers, captain of the king of *Swedes* dragoons in good pay for all, ſhould offer to ſerve *Hamilton* who was to be commanded by the king.

And that *Ramſey* might decline the combate, or forbear anſwering till the laſt, was a ſtrange opinion of councel; becauſe, combate was to be reſerved till all other means of diſcovery fayled, and therefore *Rey* his reaſons were ſupplimental proofs; and requeſting *Meldrams* teſtimony; but however he was now ready, if the court thinks fit to give the combate preſently.

And concluded with an example in caſe of murther. Two men fight in ſecret, the one is ſlain, the other flies, and though without any witneſſe of the fact, his ſeeking to eſcape condemns him guilty. So *Ramſey* having been accuſed of treaſon above three moneths by the lord *Rey*, and both confined, *Ramſey* diſpairing of his cauſe, ſeeks his flight from juſtice by ſending to *Rey* a private challenger, being a ſufficient conviction in law, as by ancient preſidents in this court: *viz. Kiteles*, after an appeal, ſends a challenger to *Scroop*, and was therefore adjudged guilty.

Doctor *Duck* anſwered to all. That firſt, it was prudence for *Ramſey* to anſwer in general negatively, having been newly landed from ſea; and might be excuſed till time and conſideration, to refreſh his memory, being not upon oath; and as yet, the defendant need not anſwer perfectly, till further time and favour, to view the exhibits in court by copies, which he deſires.

And directly urged againſt the lord *Reys* replication, not to be allowed; becauſe, *Rey*, referring himſelf now to proofs, might have ſaved the trouble of this court of honour and chivalrie and hazzard of their perſons by combate, which intends the trial without proofs; and that the defendant having ingaged his ſureties, but to this day, he humbly deſires the time and place to be ordered for the ſudden combate, according to the law of arms, and cuſtom of this court; ſaying, that the duel foreſeen, muſt enſue upon the appeal and denial; and therefore ought now to be granted.

Doctor *Reeves* moved for continuance of the replication, and conſented to the combate; the court admitted the replication, and ordered time till *Wedneſday* for exceptions thereto.

Doctor *Duck* offered ſome reaſons to ſatisfy *Rey*, and extremely to cenſure *Ramſey*, where he was interrupted and told by the earl marſhall, that the court will ſave him the labour and councel, till the rejoynders be put in, and then to be ordered.

Doctor *Eden* ſhewed, that the copies of the letters exhibited were not given out: nor ſhall, ſayes the earl marſhal, till the court have conſidered of the contents, and ſo they were read.

The one was from *Ramſey* to *Rey*, certifying him of paſſages in the *Low-Countreys* ſince their parting, to put the marqueſſe in minde of directing him how to diſpoſe of the ammunition and arms in his cuſtody; ſubſcribed, your ſervant, *Ramſey*.

The other from the lord marqueſſe, to the lord *Rey*, congratulating his love and affection, expreſſing a great deſire to meet him in *Germany*, upon any termes he would propoſe; and that *Ramſey* the bearer was inſtructed for him to treat with the king of *Swede*, whom he deſires to favour and aſſiſt, which will oblige him his friend and ſervant, *Hamilton*.

Doctor *Duck* opened the whole matter, and each particular, inſiſting, that my lord *Reys* evidence being for the king, and he a perſon of honour, and peer of *Scotland*, his teſtimony was ſufficient.

And moves that Mr. *Meldram* might be admitted for ſupply, for though they were not joynt witneſſes together, of the words, which made the charge; yet for as much that they were ſpoken aſunder, and agreeing together, made up a full proof: that no teſtimony may be neglected in matters of treaſon. That if any part of the charge was denied by the defendant, and proved by the appellant, it might convince him in a manner of the whole: and urged the offence of *Ramſeys* challenging *Rey*. But more of that hereafter.

But doctor *Reeves* proſecuted the matter, for that *Ramſey*'s councel endeavoured to prove that he might decline the combate, or forbear anſwering, becauſe of ſome words which reflected upon my lord *Rey* as matter of reproach, that *Rey* had uttered words of treaſon to catch *Ramſey*, and then to turn informer. But (ſaid he) no office can be accounted baſe, when the king and kingdoms ſafety is concern'd; citing a ſtory out of *Livie*, that the *Romans* confederate with the *Sanubies*, were to undergo a baſe office that ſtood not with honour, and reſolved, ſo long as it was advantagious to the *Romane* ſtate, it might with honour be undertaken.

Doctor *Eden* was earneſt to excuſe himſelf for putting in theſe words againſt the lord *Rey*, ſaying, that his client enforced to have them inſerted.

But being a point of honour, the earl marſhal interpoſed, that true it was, the beſt man may not refuſe the baſeſt office to preſerve a king and nation; but again, it was moſt unworthy the degree of honour, for any man to angle and intrap another, and then to preſent him to that kings juſtice.

Then the pleaders argued concerning *Meldrams* teſtimony, that no proof ought to be omitted for the king; but it was offered for *Ramſey* to joyn iſſue upon that point in law; for the bill was laid againſt him not general, but particular to place, time and matter, *viz.* that in *May* laſt in a ſhip, and afterwards at *Amſterdam*, then again at *Delph*, *Ramſey* ſhould ſay ſuch and ſuch words, which if *Meldram* would juſtifie, beſides himſelf, they ought to be admitted, otherwiſe it was no good matter, but muſt refer to a new bill.

That the defendant had anſwered fully, for that the lord *Rey* profered his ſervice to the marqueſſe without preſſing to know any deſigne. That nothing in the letters could convict *Ramſey*. That the lord *Rey* ſtanding upon his great offices under the king of *Swede*, and ſo not neceſſitated to ſerve the marqueſſe, he had not thoſe places of command then, but ſince; and that ſince his coming into *England*, he ſaid that he would have ſerved under the marqueſs, and concluded that *Ramſey* and the marqueſs might uſe ſuch words, and yet not intend treaſon to his majeſty.

But having in this tryal medled ſo much with the marqueſs, the court was fain to enter an order or protection, to clear the marqueſs his words or actions from diſhonour.

Then the court proceeded to examine witneſſes *viva voce.*

Archibal Rauken was to prove the challenge as the bringer: upon theſe queſtions he confeſſed, that he was in *Ramſey*'s chamber at *Richmond* the laſt of *October.*

That *Ramſey* did not imploy him to carry any challenge to the lord *Rey*; but at that time *Ramſey* told him, that it was his grief to be reſtrayned not to meet *Rey*, who was a trayterous villain, and wiſhed to meet him in the open fields at *Barn-Elms*, he would make him dye for it, and tear his heart, with other ſuch words of reproach, and wiſhed this deponent to tell *Rey* ſo much, which he did, but it was three weeks after, and then, not until the lord *Rey* told him, that *Ramſey* had ſent him a challenge; ſo that ſaid *Ramſey*, my meſſage was but a relation, not a challenge.

But *Rauken* was obſerved to falter from what he affirmed before Dr. *Reeves*, and others, *viz.* to have carried the challenge, and that *Ramſey* could not deny it; ſo that *Rauken* was threatned not to accuſe *Ramſey.*

Gilbert Seaton depoſed, that *Ramſey* ſaid, he had made it come to *Rey*'s ears, to have ended this buſineſſe without troubling the king or lords.

Then doctor *Duck* ſummoned up all the proceedings, obſerving that formerly in the preſence of the king, *Ramſey* had with deep proteſtations and oath denied the time, place, and matter which he now confeſſeth, and though then not examined upon oath, yet in *France* and other countreys, the very holding up of the hand is an oath, and ſo *Tertullian* ſayes of the *Romanes*, and *Ramſey* confeſſing part, he might be guilty of the whole charge.

Doctor *Eden* ſaid, that *Rey* was not a competent witneſſe againſt *Ramſey*, though for the king, for he was *particeps criminis*; *capitalis inimicus*: for the firſt his bill made him ſo; for if *Ramſey* ſpake treaſon, ſo did *Rey*; for the ſecond, it appeareth by *Rey's* violent proſecution, and if all failed, his ſword muſt make it good; and ſo the defendant was not bound to anſwer, nor to accept the challenge unleſſe he will, to which he is ſo willing.

But doctor *Duck* ſaid theſe reaſons did not *currere quatuor pedibus.* Some of the conſpirators with *Cataline* were revealers of the treaſon, and allowed as witneſſes.

Doctor *Reeves* concluded, that although ſome of the lord *Rey*'s witneſſes did not affirm what they might, it would encourage him to ſet a ſharper edge upon his ſword when he entered the liſts; and that the God of right would ſo weaken the heart of *Ramſey*, that it ſhould fail him when he took his ſword in hand.

The holy-daies of *Chriſtmaſs* drawing nigh, the court ordered, that either party might repair to ſir *Henry Martin*, and poſſeſſe him with further proofs, out of theſe witneſſes already examined, but of no other. And ſo adjourned the court till *Monday* the ninth of *January*, when after ſome ſmall debates, but no further matter or proofs, the buſineſſe was briefly determined to be referred to the king's pleaſure.

Which came to this account. That *Hamilton*'s power with the king got all favour for *Ramſey*; and well rewarded in due time; and *Rey* having done the duty of a loyal ſubject, left the court and kingdom, and returned to his command in *Sweden.* But this ſtory, though tedious, will enlighten us further to the truths of the *Scotiſh* affairs.

Ruſhworth's *Account.*

TOWARDS the end of this year (1630), the marquis of *Hamilton* arrived at the court of *England*, where was at that time *Mackay*, lord *Ochiltry*, a lord in *Scotland*, by name *Stuart*, and who once bore the name of the earl of *Arran*, when by a parliament which contracted a *by-name* in that kingdom, the *Hamiltons* were attainted of treaſon, but afterwards both blood, honour, and eſtate were reſtored to them. This lord had no kindneſs for the marqueſs of *Hamilton*, but nouriſhed a diſcourſe, which *Ramſey* let fall to the lord *Rea* when they were beyond ſeas; and prevailed ſo far with lord *Weſton*, then lord high treaſurer of *England*, as to impart the buſineſs to the king, being a treaſon of an high nature (if true) to this effect; *that he raiſed this new army, with deſign, when he was at the head of them, to ſet himſelf up as king of* Scotland. Much credit was given to this deſign by the lord *Weſton* lord high treaſurer, who endeavoured to perſuade the king not to permit the marqueſs to come near his ſacred perſon, and in no kind to have the privilege to lie in his majeſty's bed-chamber, leſt his majeſties life were hazarded thereby.

The lord *Weſton* preſſed this home unto the king, but his majeſty kept his thoughts private to himſelf; and having a great affection to *Hamilton*, as ſoon as he came into his preſence, embraced him with great kindneſs, and diſcovered to him what he was accuſed of, but ſaid, I do not believe it; and that the world may know I have a confidence in your loyalty, you ſhall lie in my bed-chamber this night. But the marqueſs beſeeched his majeſty to excuſe him, till he had received a trial, and was cleared of the treaſon he was accuſed of; but the king would receive no denial, yet told him he would put the buſineſs into a way of examination; but afterwards when the examination was taken, it was found that the one affirmed the accuſation to be true, and the other as poſitively denied it, and that there appeared not then any concurrent proof of the ſame.

A report of theſe examinations was afterwards made to the king's majeſty, who was graciouſly pleaſed to refer the whole matter to a trial before the lord high conſtable, and earl marſhal, in the court of honour, of which the reader will have a full account towards the end of the next year in its proper time and place. In the mean time, the king cauſed *Rea* and *Ramſey* to be ſecured in order to that trial: ſo the marqueſs proceeded in making proviſions for the embarquing of his army, and ordering thoſe forces in *Scotland* to be in readineſs to be ſhipped, to come to the place of rendezvous when they received orders.

A memorial made by Mr. Juſtice Whitlock *in his life-time concerning the lord* Rea'*s diſcovery of the marquis of* Hamilton'*s conſpiracy.*

‘PResently after my return from this circuit, myſelf and the reſt of the judges of the *King's Bench* were ſent for by the lord-keeper to *London*, to adviſe with him about the affairs of his majeſty. We came thither on *Monday*, 22 *Auguſt*, except the chief juſtice, who was ſick. The matter conſulted of, was to give our opinion concerning the conference had in *Germany* between certain *Scotiſh* gentlemen, about the making the marquis of *Hamilton* the head of a party againſt the king and his kingdoms of *England* and *Scotland.*

‘The lord *Rea*, a *Scotiſh* baron, did impeach *Ramſey* and *Meldrum* for moving him to this conſpiracy: they denied it punctually, and no witneſs could be produced. *Ramſey*, a ſoldier, offered to clear himſelf by combat, that he was innocent; and the appellant accepted of his offer. The king was deſirous it ſhould be put upon a duel; and we were conſulted with, 1ſt What the offence was? 2dly Where the trial might be?

‘We all with the lord keeper were of the opinion, 1ſt, That it was an high and horrible treaſon, if that in the examinations were found true. 2dly, That the trial might be by an appeal of treaſon, upon which the combat might be joined: but the king muſt make a conſtable *durante bene placito*, for the marſhal could not take the appeal without him: that it muſt be after the manner of the civil law, and we were not to meddle in it. Likewiſe we were of opinion that this proceeding before the conſtable and marſhal was, as it was before the ſtatute of the 35th *H.* 8. *cap.* 2. and that ſtatute deviſed a way how to try theſe foreign treaſons in *England*, but did not take away the other. We were alſo of opinion that the ſtatute of 1 *Mar. cap.* 10. did not take it away nor intend it; and that a conviction in this appeal was no corruption of blood or forfeiture at the common law. See *Doughtie*'s caſe in *Coke's Commentaries*, fol. 75, ſect. *Eſcuage.*’

IN order to a commiſſion under the great ſeal, dated the 24th of *November*, [1631] there began a notable trial, before *Robert* earl of *Lindſey*, conſtable of *England*; and *Thomas* earl of *Arundel* and *Surry*, earl marſhal of *England*, in the court of *Chivalry*, judicially ſitting in the *Painted-Chamber* at *Weſtminſter*; together with other honourable perſons, namely *Philip* earl of *Pembrook* and *Montgomery*, lord chamberlain of the king's houſhold; *Edward* earl of *Dorſet*, lord chamberlain of the queen's houſhold; *James* earl of *Carliſle*; *Edmund* earl of *Mulgrave*; *William* earl of *Morton*; *William* earl of *Stratherne*; *Edward* vicount *Wimbleton*; *Thomas* vicount *Wentworth*; *Henry* vicount *Faulkland*; and ſir *Henry Martin*, judge of the high court of *Admiralty*; all of counſel with the court; *Gilbert Dethick* being regiſter. And firſt *William Seager*, king of arms, preſented to the lord conſtable of *England* letters patents of the tenor following.

CAROLUS *Dei gratia* Angliæ, Scotiæ, Franciæ, & Hiberniæ, *rex, fidei defenſor, &c. predilecto & per-quam fideli conſanguineo & conſiliario noſtro* Roberto *comit.* Lindſey *ſummo camerario* Angliæ *ſalutem. Cum officium conſtabular.* Angliæ *vacans exſtat, ac* Donaldus Mackay *dominus* Rea *nuncupatus, in regno noſtro* Scotiæ *oriundus, quendam* Davidem Ramſey *armiger. in eodem regno noſtro ortum, de quibuſdam contemptis & proditionibus contra nos in partibus tranſmarinis actis & perpetratis, in curia militari appellare intendit, et nobis ſupplicavit ſibi juſtitiam ſuper appellatione predicta exhiberi: Nos in hac parte fieri volentes, quod juſtum eſt, ac de fidelitate & provida circumſpectione veſtra plenius confidentes, vobis conceſſimus officium conſtabular.* Angliæ *(hac vice) ad appellationem predictam* Donaldi *in hac parte, una cum predilecto & per-quam fideli conſanguineo ac conſiliario noſtro* Thoma *comite* Arundel & Surr. *mareſchal. noſtro* Angliæ, *audiend. & ſine debito terminand. et omnia quæ ad officium conſtabular. pertinent in cauſa & negotio predictis faciend. & exercend. ſecundum legem & conſuetudinem armorum & curiæ militaris* Angliæ, *vobis, ut predictum eſt, authoritatem damus & committimus, tenore preſentium: et ideo vobis mandamus, quod circa premiſſa, una cum prefato* Mareſcallo *intendentes ſitis, in forma predicta: damus autem ducibus, marchionibus, comitibus, vicecomitibus, baronibus, juſticiariis, ballivis, prepoſitis & miniſtris, & aliis fidelibus noſtris univerſis & ſingulis, tam infra libertates, quam extra, tenore preſentium in mandatis, quod vobis in premiſſis faciend. & exp'end. intendentes ſint, & conſulentes, reſpondentes, & auxiliantes, quoties & prout per vos fuerint ſuper hoc premoniti ex parte noſtra. In cujus rei teſtimonium has literas noſtras fieri fecimus patentes. Teſte me ipſo apud* Weſtm. *viceſimo quarto die* Novemb. *anno regni noſtri ſeptimo.*

Per ipſum regem.

Which letters patents being read by the regiſter of the court, *Donold* lord *Rea*, the plaintiff, and *David Ramſey*, gentleman of the king's privy-chamber, defendent, made their perſonal appearance. Then the lord marſhal ſpake in defence of the court of *Chivalry*, and the manner of proceeding therein, according to the law and cuſtom of arms, ſhewing;

‘That it was legal and agreeable to right and juſtice, as any judicial proceſs in any other court of this realm; eſpecially when the nature of the cauſe required it. And that in theſe latter ages this kind of trial hath not bin frequently uſed, but that was to be attributed to the pious and peaceable government of the ſtate, under our moſt happy and prudent king, and his moſt illuſtrious predeceſſors, the kings and queens of *England*, and the obedience and fidelity of the people of *England*; both which are to be aſcribed to the favour of Almighty God, conferring this bleſſing upon our nation above all the nations round about us.

The lord marſhal further ſhewed; 'that it was an error in many, to apprehend, that as ſoon as an appeal is brought into this court, it was preſently to be decided by duel; when as dueling was the ultimate trial in defect of all others. And even then it was in the arbitriment of the court, whether a duel ſhall be granted or denied.'

The earl marſhal's ſpeech being ended, *Arthur Duck*, doctor of the civil law, made a ſpeech concerning the antiquity, juriſdiction, and neceſſity of the court of *Chivalry*, held by the lord high conſtable, with the earl marſhal, eſpecially in caſes of treaſon, where the truth can no otherwiſe be diſcovered.

Then *Rea* and *Ramſey* were called into the inner court, and the one ſtood on the right hand, and the other on the left of the lord conſtable, and earl marſhal.

The lord *Rea* preſented his appeal in writing; and his petition formerly exhibited to the king, was read in theſe words.

To the king's moſt excellent majeſty.

The humble petition of Donald *lord* Rea.

Moſt humbly ſheweth,

'THAT whereas he having heard ſundry ſpeeches fall from Mr. *David Ramſey*, importing plots and practices againſt your royal crown and realms, did, according to his duty and allegiance, reveal the ſame to your majeſty; the truth whereof he is ready to maintain with the hazard of his life, and deareſt blood, if he be thereunto required. Now ſo it is (may it pleaſe your ſacred majeſty) that your petitioner being informed (by his counſel) that theſe trials, by duel, or ſingle combat, are *ultimum remedium*; and that a man may not appeal to this kind of divine judgment, but where all poſſibility of diſcovery by ordinary trials fail, and cannot be had. And whereas your ſuppliant, at ſuch time as he diſcloſed all the practices which he heard from the ſaid *Ramſey*, and did withal diſcover what he heard likewiſe from *Robert Meldrum*; againſt whom alſo one captain *James Borthwick* hath been examined, and the examination of *Meldrum* taken thereupon. And your ſuppliant conceiving that if *Meldrum* be guilty, the ſaid Mr. *Ramſey* cannot be innocent, your ſuppliant therefore, not out of any inclination to decline the combat (as God who knoweth his heart can witneſs with him) but only out of his ſincere deſire to have the truth diſcovered, in a caſe ſo highly concerning your majeſty's ſafety, honour and government, moſt humbly prayeth, that you would be graciouſly pleaſed, that *Meldrum* may be firſt proceeded againſt according to law; and if upon his tryal, the conſpiracy affirmed by your petitioner do not fully appear, he ſhall then with all alacrity (as in a caſe which otherwiſe cannot be cleared) juſtifie his aſſertions to be moſt true: either as a defendant againſt the ſaid *Ramſey*, who demanded the combat of him before your majeſty, or as a challenger if the court of *Chivalry* ſhall ſo award; and ſhall be bound in all duty ever to pray for your majeſty's long life and happy reign.'

The petition being read, the lord conſtable, with the counſel of the other nobles, declared his majeſty's pleaſure, that this cauſe ſhould be tried in this court, and gave the appeal to be read as followeth:

'*IN the name of God*, *Amen*. Before you, moſt illuſtrious and right honourable lords, *Robert* earl of *Lindſey*, conſtable of *England*, and *Thomas* earl of *Arundel* and *Surry*, marſhal of *England*, or your lieutenants in this court-martial: I *Donald* lord *Rea* do accuſe and challenge thee *David Ramſey* in the month of *May* or of *June* in the year of our Lord 1630, and in the ſixth year of the reign of our lord *Charles*, by the grace of God king of *England*, *Scotland*, *France*, and *Ireland*, being then alone in my ſhip within or near the port of *Elſinore*, in the kingdom of *Swedeland*, in the upper part or deck of the ſaid ſhip, when thou hadſt this diſcourſe or the like, and ſpakeſt theſe or the like words to me in *Engliſh*, *viz.* You told me many abuſes in the court of *England*, and that there was nothing to be looked for but deſolation and change of religion, and therefore you had retired your ſelf thence, ſince no honeſt man could live there, and with many ſuch diſcourſes you laboured to poſſeſs me: to which my anſwer was, the Lord mend thoſe evils, and no remedy but patience. *By God*, *Donald*, ſaid you, (I will uſe your own phraſe) *we muſt help God to amend it.* You told me you had brought as much gold with you as would maintain you at the rate of ſix pounds a day for three years, and you aſſured me before that time would expire, God would raiſe up ſome men to defend his church, and liberate honeſt men from ſlavery. I deſired if you could tell if the marqueſs of *Hamilton* would come over. You ſaid he would the morrow or next day. After I aſked you what content my lord marqueſs had at home. You ſaid, none. I aſked you what religion my lord marqueſs was. You ſaid, a good proteſtant, and before it be long he would let the world ſee his deſign was for the defence of his religion, and the glory of God, and that he ſhould have an army ſo well provided with brave men, and all warlike proviſion, that he ſhould not need to be afraid with whom he encountered. I aſked you what advantage was it to us to make a free paſſage for the goſpel in *Germany*, if we loſt it at home. You ſaid there were many honeſt men in our land, ſpeaking of *Scotland*; adding, if we had once an army over, what would you think if we ſhould take a ſtart to ſettle them alſo, for ere it be long you will hear our country will go together by th' ears. So cloſing that night's diſcourſe; he ſays at laſt, ſome ſuch thing perhaps is intended, but I will not tell you more, for my maſter's ſecrets are dear to me. The third night after, in an iſland, you told me, that *Alex. Hamilton* and ſir *James Hamilton* were to go for *England*, and you for *Holland*; and in the mean while pretended your ſelf willing to do me ſervice in *England*. I told you I had a promiſe of the reverſion of *Orkney* from the king my maſter; if the marqueſs would mediate with his majeſty for it, he would do me a great kindneſs, and I ſaid, it were good for my lord to have a friend in that place for his ends. You moreover aſked me, if there were good harbours in *Orkney*, or in my land, or in any part that might be fortified. I ſaid, yes. You ſaid, *by God*, *it was to be thought upon*; and you deſired leave to think upon it that night, and on the morrow *you* and *Alexander Hamilton* did deſire me to write a general letter to the marqueſs, with truſt to the bearer *Alexander Hamilton*, concerning *Orkney*, leſt letters ſhould miſcarry, with great aſſurance of true friendſhip from your maſter, if I would continue conſtant in reſolution, and ſo I gave you my letter.

'Afterwards in *March* laſt paſt, you came to me from the *Hague* in the *Low-Countries* to *Amſterdam*, where you ſtayed with me eight days, and delivered me a letter from the marqueſs, only of compliment and thanks; and you told me all went right with the marqueſs, that he had gotten from his majeſty 10000*l.* in *England*, and the wine cuſtoms of *Scotland* for ſixteen years, which the marqueſs would ſell, and all things went on without any demur or obſtacle, and the only ſtay was for want of arms, ammunition, and eſpecially powder, and deſired me to put in hard with the *Swediſh* ambaſſador, which I did; and you told me, that the marqueſs had writ to you, that if the arms and other proviſions were obtained, they ſhould be ſent to *England*, and not to *Scotland*; at which you did marvel, becauſe his lordſhip had changed his reſolution, being all the other proviſions were ſent to *Scotland*. Alſo you told me, that my lord had ſent over a man to receive them, as I deſired. I told you the letter, which Mr. *Lindſey* brought me, deſired the arms to be ſent to *England*. You ſaid, though the arms were had, yet you would not ſend them till you had further order from the marqueſs, and you deſired me to haſte to you the anſwer thereof. In the end you told me you had evil news to tell me, that the marqueſs's lady was brought to bed of a child.

'Some few days after, in *March* or *April* laſt paſt, at *Delf* in the *Low-Countries*, I told you that I had a letter from the king of *Sweden* to the king of *Britain*, deſiring ſome ſhips for the marqueſs. You ſaid the marqueſs and I muſt beware of that, for then they will think that we mean to take their land from them with their own ſhips. I aſked you, where our forces ſhould meet. You anſwered me, on the ſea. I aſked you, where we ſhould land. You ſaid in ſome part of your old maſter the king of *Denmark*'s country. You aſked further, what think you if we ſhould plunder ſome nook of his land, and thereafter go where we pleaſe; for we think he will be the only man that will be moſt againſt us. I anſwered, I am content; for he reſts in him more than you all. I aſked if my lord was to raiſe any men in *England*. You ſaid, one regiment. I aſked you if they would be true to us? You ſaid that there were *Engliſh* that my lord was as much aſſured of as of any *Scots*. I aſked, where we ſhould make theſe meet. You ſaid at *Harwich* or *Yarmouth*. I aſked if they were fortified. You ſaid, that no parts of all thoſe coaſts in *England* or *Scotland* could hold us from landing. I told you that I feared Mr. *Meldrum* was an evil ſecretary. You aſked me wherein. I ſaid, that *Meldrum* had told me many things, and that I thought he had told it to others. You ſaid Mr. *Meldrum* knew nothing thereof when you came from *England*, tho' he might well ſuſpect, and that he ſpake once to you to that time, as if all were ours, and that you had great patience to hold your hands off him although he was your couſin. I told you, that I was not a ſouldier of fortune; but had bread at home, and might live without hazarding my ſelf in the fortunes of war; yet notwithſtanding that I would hazard my life and fortune with the marqueſs, only that I would know the buſineſs. You anſwered, you would tell me no more of your maſter's ſecrets; but that you would write a letter with me to the marqueſs, and when I came there, the marqueſs would infuſe in me that which you would not; withal you deſired me not to tell the marqueſs what had paſſed betwixt you and me, whereby the marqueſs ſhould have all the thanks to himſelf; adding that he was very cloſe, and that he would diſcover himſelf to them that he knew would hazard with him. That my brother-in law *Seaforth* knew all, and that the marqueſs truſted him much. I aſked you what was done in my buſineſs of *Orkney*. You told me, nothing till my coming, and ſaid, it might be I ſhould have it better cheap than to pay the duty of it; and you told me *England* had made a peace with *Spain*, very prejudicial to *Holland*; and that *Spain* and *France* were both ſtriving who ſhould firſt drink up *England*, but you hoped we ſhould prevent them both. Beſides, you told me the lack of powder was the greateſt let. As for arms we might get help thereof in every houſe, and that we had reaſonable proviſion thereof already; and that my lord had written to you that he had 90 pieces of cannon great and ſmall already provided. I deſired you to go in perſon and ſpeak to the *Swediſh* ambaſſador for the powder, and to advertiſe me in the *Brill* of his anſwer, that ſo I might aſſure the marqueſs what he might expect; and you did ſend a letter by one of your own men to the *Brill*, to ſhew me that you were with the ambaſſador, and hoped to have that which we ſpake of. You aſked my advice whether it was beſt to croſs the ſeas once, or to go on bravely. I anſwered, *delays were not good*, which you did condeſcend unto, or you uſed words and ſpeeches to that effect.

'But if thou the ſaid *David Ramſey* ſhall deny the premiſes, or ſay thou hadſt not the ſame diſcourſe, or to the ſame effect with me, at the foreſaid times and places; I the aforeſaid *Donald* lord *Rea* ſay and affirm, that thou *David Ramſey* art *a falſe traitor*, and *lyeſt falſly*. And in caſe the premiſes cannot otherwiſe be found out by the ſentence of this court, proffer my ſelf ready by the help of God, to prove and

‘ juſtifie this my accuſation and appeal, by my body upon thy body, according to the laws and cuſtoms of weapons in a duel, to be performed in the preſence of our lord the king, *&c.*’

Which challenge being publickly recited, the ſaid *Donald* lord *Rea*, the party challenging, threw his glove in the court, of a red or brown colour, for a pawn or pledge, in preſence of the aforeſaid lord conſtable, and *Thomas* lord marſhal, in confirmation of all contained in the bill and challenge.

Then the ſaid *David Ramſey* anſwered, in his own perſon, and ſaid, ‘ that the ſaid bill and appeal was and is falſe, and that the ſaid *Donald* lord *Rea*, the appellant or challenger, did lie falſly, and that he was ready to juſtify and prove this in duel, according to the laws and cuſtoms of arms, and of this court, by his body upon the body of the ſaid *Donald* lord *Rea*, as it ſhould ſeem good to the court.’

And thereupon in confirmation and juſtification of the premiſes, he threw his glove in the court, of a white colour, for his pawn, or pledge, in preſence of the lord conſtable, and earl marſhal aforeſaid; which gloves reſpectively *Richard St. George*, otherwiſe *Clarenceux*, king of arms, took up and delivered into the hands of the ſaid lord conſtable with due reverence; and the ſaid lord conſtable, together with the earl marſhal, committed them to the cuſtody of the aforeſaid regiſter of the court. Then the ſaid lord marſhal arreſted, as well the ſaid lord *Rea* the challenger, as the aforeſaid *David Ramſey* eſq; the defendant. And the ſaid *Donald* lord *Rea* produced ſir *Robert Gordon*, ſir *Pierce Croſby*, ſir *Walter Croſby*, and ſir *William Forbes* knights and baronets, and *William Innis* eſq; for his ſureties, who obliged themſelves all, and every of them, *& diviſim & conjunctim*, to our lord the king, for the ſaid lord *Rea*, body for body, that the ſaid lord *Rea* ſhould duly proſecute this aforeſaid challenge to the final and laſt determination of the ſame; and that in the mean time the ſaid lord *Rea* ſhould keep the peace of our lord the king, againſt all and every of his lieges, and eſpecially againſt the aforeſaid *David Ramſey* eſquire.

And the ſaid *David Ramſey* produced for his ſureties, the right honourable *James* earl of *Abercorne*, and *Robert* earl of *Roxborough*. Then the earl marſhal aforeſaid releaſed *Donald* lord *Rea* the challenger, and the aforeſaid *David Ramſey* defendent, from the aforeſaid arreſt, and at their requeſt reſpectively delivered their bonds of ſuretiſhips to be cancelled.

After this there was read in the court, the lord *Rea*'s petition to the king, for divers noblemen and others to be of his counſel in this cauſe; whoſe names he preſented in a ſchedule annexed, as they are here recorded.

To the king's moſt excellent majeſty,

The humble petition of Donald *lord* Rea.

‘ HUmbly beſeeching your royal majeſty in this cauſe of appeal againſt *David Ramſey* in the court of *Chivalry*, to grant unto the ſaid petitioner, that he may have the parties, whoſe names are in the ſchedule hereunto annexed, to be of his counſel in the ſaid court. And he ſhall daily pray for your majeſty's long life and happy reign over us.’

George earl of *Lyney*, lord *Gordon*.
Miles vicount *Mayo*.
Theobald baron of *Brillis*.
Maurice Roch, ſon and heir of the vicount *Fennoy*.
Donnough Mac Charty, ſon and heir of the vicount *Muſkery*.
Sir *Robert Gordon*.
Sir *Pierce Croſby*.
Sir *Walter Croſby*.
Sir *William Forbes*.
Donnough O Conno Sligo.
James Hay eſq; of his majeſty's body.
William Innis eſquire.
Dr. *Rives*. Dr. *Duck*.
Mr. *Selden*,
Mr. *Littleton*, } of the *Inner Temple*.

Upon which his majeſty iſſued out the following order.

It is his majeſty's pleaſure, that only theſe ſhould ſerve, both for his friends to adviſe him, and his counſel to plead for him.

Ramſey's *defence.*

IN the name of God, Amen. In the preſence of you moſt illuſtrious and right honourable *Robert* earl of *Lindſey*, conſtable of *England*, and *Thomas* earl of *Arundel* and *Surrey*, marſhal of *England*, or your deputies in your court marſhal; I *David Ramſey* eſq; defendent, ſay and affirm, that all and every the things contained in the ſaid pretended appeal and accuſation, were and are falſe, and ſuggeſted and propoſed againſt me maliciouſly, and againſt truth, excepting what follows at the time and place under-written, I had the under-written diſcourſe with thee, or to the ſame effect, and no other, *viz.*

I *David Ramſey* being with thee *Donald* lord *Rea*, in the month of *May* or *June*, as it is in the ſaid bill mentioned, and in the ſhip there alſo mentioned, being in or near the port there mentioned, thou deſiredſt that I would tell thee, if the marqueſs of *Hamilton* would come over; and I anſwered he would. And you aſking me of what religion the lord marqueſs was, I ſaid, a good proteſtant, and before it be long, he would let the world ſee his deſign was for the defence of his religion, and the glory of God. And then aſking me whether he would come over with an army; I ſaid, yes, with an army of brave men, and all warlike proviſion, that he cared not with whom he encountred. Which paſſages, upon often and better recollecting of my memory and thoughts than heretofore, I do now remember. And you the ſaid *Donald* lord *Rea*, having then under your command two regiments of ſouldiers in ſervice of the king of *Swedland*, and then and there of thine own accord ſaying to me, thou wouldſt get leave of the ſaid king to join your ſaid two regiments with the ſaid lord marqueſs his forces, and ſerve the ſaid king in the wars under the lord marqueſs, I kindly accepted that motion of yours, and deſired to confirm it in you; and I told you, that *Alexander Hamilton* and ſir *James Hamilton* were to go for *England*; and you told me you had a promiſe of the reverſion of *Orkney* from the king your maſter, if the marqueſs would mediate with your maſter for it; and I and *Alexander Hamilton* did deſire you to write a general letter to the marqueſs, with truſt to the bearer *Alexander Hamilton* concerning *Orkney*; and aſſured you of the ſaid marqueſs his friendſhip, if you would continue conſtant in your reſolution, in joining your regiments with the lord marqueſs, when he ſhould come over, and you gave a letter accordingly. Afterwards in *March* laſt, I being then at the *Hague* in imploiment for providing furniture for the ſaid marqueſs his companies, which were to go over into the king of *Swedland*'s ſervice, came to you from the *Hague* to *Amſterdam*, being earneſtly invited thereunto by letters from you; where I ſtaied with you eight days, and delivered to you a letter from the marqueſs only of complement and thanks for your offer, to join your regiment under the marqueſs his command. And I told you all went right with the marqueſs, and that I heard he had gotten from his majeſty 10000*l.* in *England*, and the wine-cuſtoms in *Scotland* for ſixteen years, which he would ſell; and all things for his coming over with his forces went on without any demur or obſtacle; and the only ſtay was, for want of arms and ammunition, eſpecially powder, and deſired you to put in hard for that with the *Swediſh* ambaſſador, which you did after the premiſes. And in *March* or *April* laſt, in *Delf* in the *Low-Countries*, you told me, you had a letter from the king of *Sweden* to the king of *Britain*, to deſire ſome ſhips for the marqueſs. And you ſaid further, that the king of *Sweden* ſaid, he had no ſhips to ſpare of his own, but he would write to our king for ſome for him; and that he the ſaid king of *Sweden* would allow 40000 *rix dollars* for the entertainment of the ſaid ſhips to be always in readineſs upon the motions of his army. You alſo aſked me, if my lord marqueſs was to raiſe any men in *England*. I anſwered, I heard he was to raiſe three regiments in *England*, and three in *Scotland*. You aſked me where theſe forces ſhould meet. I anſwered, on the ſea. You aſked where they ſhould land. I anſwered, I was doubtful where, becauſe the rendezvous was to be appointed by the king of *Sweden*. You ſaid further, that you was not a ſouldier of fortune, that you had bread at home, and might live without hazarding your ſelf in the fortunes of war; yet that you would hazard your life and fortune with the marqueſs. I anſwered, I knew no more of the marqueſs his deſigns, than I had then told you, but that I would write to the marqueſs to commend to him your forward affection to his ſervice, or to that purpoſe. I told you, that ſince my being in *Holland*, I did perceive the *Hollanders* did conceive, that *England* had made a peace with *Spain* very prejudicial to *Holland*; and that divers of them had ſaid ſo in my hearing: which paſſages concerning the ſaid peace, upon often and better recollection of my memory and thoughts than heretofore, I do now remember. And I alſo told you, that the lack of powder was the greateſt ſtay of the marqueſs his coming over; and you deſired me to ſpeak my ſelf to the *Swediſh* ambaſſador for the powder, and to advertiſe you of his anſwer, that you might aſſure the ſaid lord marqueſs what he might expect; and I did ſend one of my men to the *Brill*, called *John Thompſon*, to ſhew you I was with the ambaſſador, and hope to have what we ſpoke of.

But whereas thou the ſaid *Donald* lord *Rea* in thy ſaid pretended accuſation or appeal doſt affirm, that I ſaid other words to thee, than ſuch as are here ſet down in this my defence: I the aforeſaid *David Ramſey* ſay and affirm, that *thou lieſt falſly*, and *art a falſe calumniator*, and oughteſt to be puniſhed with the puniſhment of a falſe traitor; and I offer my ſelf ready to prove and juſtify, by the help of God, this my defence and exception, by my body upon thy body, according to the law and cuſtom of arms in a duel, to be performed in the preſence of our lord the king. And I humbly and inſtantly deſire, that a day and place may be aſſigned for the ſaid duel, *&c.*

Then was read in court the petition of *David Ramſey* to the king, beſeeching his majeſty to aſſign him the perſon, whoſe name was written in the ſchedule annexed, to be of counſel with him in this cauſe. The name written in the ſchedule was Mr. Dr. *Eden*. The witneſſes in this cauſe were commanded to make their perſonal appearance in the court, and were there examined; and divers letters written, as well from marqueſs *Hamilton* as from *Ramſey* to the lord *Rea*, were then produced.

Mr. *Ramſey* had bin releaſed from impriſonment in the *Tower* upon bail, and his promiſe to appear before the earl marſhal of *England*, or ſuch other perſons as his majeſty ſhould appoint, at ſuch time and place as ſhould be aſſigned unto him, upon three days warning; in the mean time to keep the peace, and to confine himſelf to *Richmond*, having the liberty of three miles walk, with this acknowledgment, that in caſe of abſenting himſelf from ſuch appearance, or breaking the peace, he will be accounted guilty of the crime, for which he ſtood committed. And for the performance of this engagement, the earls of *Abercorne* and *Roxborough* entered into a bond of *four thouſand* pounds to the king.

A while after *Ramſey* entered in the court a proteſtation of the tenor following.

‘ WHereas in obedience to his majeſty's commands, and in conformity to this honourable court, I have heretofore, contrary to ſuch intentions as ſeemed to me moſt reaſonable, procured ſome perſonages to ſtand engaged for my perſonal appearance in this court, concerning this pretended cauſe; and have, in obedience and conformity as aforeſaid, uſed the counſel of Dr. *Eden*, aſſigned unto me for that purpoſe by his majeſty, as defendent in the ſaid cauſe: and ‘whereas at my firſt appearance, upon ſight of my lord *Rea*'s bill, I accepted of the trial by combat, and ever ſince avoided and waved all courſes uſually propoſed by defendents to avoid the combat, which at this preſent I am ready to entertain; and whereas ſince from the premiſes, and the lord *Rea*'s pretences of proving new matters, the final decree in this cauſe, to my great prejudice in my other occaſions, hath bin from time to time put off, and nothing as I conceive, under favour of this honourable court, proved againſt me, either to convince me of any matter objected againſt me, or to urge me by the law of arms to ſubmit my ſelf to trial by combat, if I had a deſire to decline it: I do here again once more, and that moſt inſtantly, deſire a certain day and place to be aſſigned and decreed for the combat between the ſaid lord *Rea* and me, for the trial of the matter in iſſue between us in this honourable court; and I do with all humbleneſs deſire of this honourable court, that after all theſe delays uſed on the lord *Rea*'s behalf, I may now betake my ſelf to my ſaid firſt intentions; and therefore I do proteſt, that ſo much as in me lieth, I do now diſingage, and do deſire this honourable court for ever after this time, to hold for diſengaged thoſe honourable perſonages that are bound for my perſonal appearance; and I do humbly deſire to know what his majeſty's further pleaſure is concerning me, ſince I came hither upon his majeſty's command by letters, and am here ready to ſatiſfy my loyalty as his faithful ſervant, with the hazard of my life.’

And ſo inſtantly deſiring and urging to be releaſed of his obligation, and that his ſureties might be likewiſe releaſed, he was remanded to the *Tower* of *London*, and his ſureties were releaſed, and the bonds were rendered to them.

At another ſitting, when Dr. *Duck* moved divers things in behalf of the lord *Rea*, declaring, that with due reverence he ſubmitted to the court in all things; the earl marſhal made anſwer, that the lord *Rea* had governed himſelf in the whole proceſs of the cauſe with much prudence and moderation, and wiſhed that *Ramſey* had uſed the like moderation in his defence. And he further ſaid, that now it ſeems neceſſary to lay open the ſeries of the whole buſineſs: and ſo continuing his ſpeech, he ſhewed that our ſovereign lord the king, ſo ſoon as he had knowledge of the crime objected, did uſe all diligence to find out the truth, and called the parties before him; and the lord *Rea* conſtantly affirmed the truth of theſe things, and offered to juſtify the ſame with the hazard of his blood and life; and Mr. *Ramſey* on the other part with the like conſtancy denied the accuſation, and ſaid, he would prove it falſe againſt the lord *Rea* by duel, if it ſeemed good unto his majeſty; and that the king obſerving the confidence of the parties, and the defect of other proofs, and the parties free choice of duel, conſulted about the way of a public duel by the authority of this court, and took care to be informed of the proceedings and cuſtoms thereof. That it was certain, that this court was the only publick judicature, to which the cognizance of treaſons committed beyond ſea appertained before the time of *Henry* the 8*th*; and that the ſtatute of 26*th* and 35*th* years of that king, concerning another manner of proceeding therein, was not derogatory to the authority of this court, but only ſuperadded another way of trial. That all private duels were accounted and are unlawful; but publick duels, decreed by the authority of this court, were always granted to be lawful in caſes of treaſon, when for the ſafety of the king and ſtate the truth would not otherwiſe appear. That his majeſty therefore conſented to the requeſts of theſe parties, that they ſhould fight a duel for the diſcovery of the truth in this behalf; and therefore he conſtituted and confirmed this court under the great ſeal of *England*. That the lord conſtable, and he the earl marſhal, according to the king's letters patents, together with thoſe noble perſons that were of counſel with the court, had heard with patience whatſoever was alledged on either ſide; and that there were three ways of determining things of this nature in this court uſed by our anceſtors.

Firſt, to abſolve the accuſed; which in this caſe, the nature, quality, and circumſtances of the fact and crime objected being conſidered, cannot be.

Secondly, to condemn the accuſed, when the truth of the crime objected evidently appeareth by witneſſes, or any other way; which in this caſe hath not been, nor ſeemeth poſſible to be, when out of the accuſation it ſelf, it appeareth, that the words were ſpoken ſecretly, and not before witneſſes.

Thirdly, by way of publick duel, to the decreeing whereof the lord conſtable and himſelf, with the aſſent of thoſe honourable perſons of counſel with the court, did intend to proceed.

Then the lord conſtable together with the earl marſhal demanded of the parties, whether they had any thing more to ſpeak or propound in this cauſe. They ſeverally anſwered they had nothing more. The forenamed lords aſked the lord *Rea*, whether he would finally acquieſce in his forementioned bill of appeal. Whereunto he anſwered he would therein acquieſce. Then they aſked *Ramſey*, whether he would acquieſce in his anſwer to the bill of appeal. Whereunto he alſo anſwered that he would therein acquieſce. After this, the regiſter read in court the lord *Rea*'s bill of appeal, and *Ramſey*'s defence in the preſence of the parties. Preſently the lord *Rea* ſealed his bill with his ſeal at arms, and ſubſcribed his name with his own hand. After the ſame manner Mr. *Ramſey* ſealed and ſubſcribed his anſwer.

Then the lord conſtable taking the appeal in his hands, and folding it up, put it into the glove, which the lord *Rea* had caſt forth in the court for a pawn in this behalf; and held the bill and glove in his right hand, and in his left hand the anſwer and glove or pawn of *David Ramſey*; and then joyning the bill and anſwer, and the gloves, and folding them together, he, with the earl marſhal, adjudged a duel between the parties under this form of words.

In the name of God the Father *the* Son *and the* Holy-Ghoſt, *the Holy and moſt Bleſſed* Trinity, *who is one, and the only God and Judge of battels; we, as his vicegerents under the moſt excellent* prince *in* Chriſt *our lord and king, by whom we are deputed to this, do admit you the aforeſaid* Donald *lord* Rea; *the party challenging, and you the aforeſaid* David Ramſey, *the defendent, to a duel, upon every accuſation contained in this bill and the anſwer to the ſame; and we aſſign unto you the twelfth day of the month of* April *next following, between ſun and ſun, in the fields called* Tuttle-Fields, *in or near* Weſtminſter, *in the preſence of our lord the king, to do and perform your parts to your utmoſt power reſpectively.*

And we will and enjoyn you the aforeſaid lord Rea *the challenger, to be in the aforeſaid fields, and within the liſt there, between ſeven and nine of the clock in the forenoon of the aforeſaid day. And we enjoyn you the aforeſaid* David Ramſey *the defendent, to be in the fields in the aforeſaid liſt between nine and eleven of the clock in the forenoon of the ſaid day, upon peril attending you reſpectively in that behalf.*

Which decree and final ſentence pronounced, the lord *Rea* craving pardon of the court, ſpake to this effect. Firſt, he gave thanks to the lord conſtable, the earl marſhal, and the reſt of the lords, that they had with ſo much patience and juſtice heard and examined this cauſe, and for the juſtice therein exerciſed, eſpecially for the ſentence already given. Then he proteſted before Almighty God and that court, that he had revealed nothing againſt *David Ramſey*, or any other, for malice, or hatred, or hope of reward, either gain, or honour, but only out of his faithfulneſs to our lord the king, and for the ſafety of his flouriſhing kingdoms, knowing that nothing is more pernicious to kingdoms and commonwealths than inteſtine wars. He profeſſed that if he himſelf had not revealed the premiſſes, but ſome other acquainted with the treaſon had firſt diſcovered it, he without all doubt had deſerved the death of a traytor. And whereas it might be ſaid, that he by revealing it had hazarded his own life: to this he anſwered, that he was unworthy of all honour, yea of life it ſelf, that was not ready to lay down, much more to hazard his own life for the ſafety of king and kingdom. And whereas he might ſeem in the proceſs of this cauſe to have declined a *duel*; he deſired to be underſtood that whatſoever was done in that behalf, he did in hope and expectation, that the treaſon, which was communicated to many, might be ſome way brought to light; for he did neither diſtruſt his own cauſe, nor fear the perſon of his adverſary, nor any other in ſo juſt a cauſe, only in this he grieved, that an adverſary, equal to him in birth, degree, and nobility, was not offered. And whereas many wondered that he would hazard his life for revealing words, whereof he was doubtful, whether they would amount to treaſon or not; he ſaid, he knew much more concerning the treaſon, than what was contained in this bill, which, by the interpoſing of authority, was for juſt cauſes yet to be ſuppreſſed.

As for the *duel* now decreed, he profeſſed, that he embraced the ſentence with all chearfulneſs, and deſired no further delay of the combat, than that in the mean time he might provide himſelf with ſuch neceſſaries for this duel as became his ſtock and kindred, and the combatant and champion of ſo great a king. That he had no private hatred to the perſon of *David Ramſey*, but was now to encounter him, being by the court declared his publick enemy. And ſo having prayed to God for his majeſty's ſafety, and happy government, and imploring the favour of the court, he made an end of ſpeaking.

After this the court aſſigned to both parties a day, whereon to make ſuch propoſitions as they would think fit.

Then the lord *Rea* deſired, that the crimes and words, by him objected in his bill againſt *David Ramſey*, might be declared treaſonable, and that *Ramſey* were guilty of treaſon, if he uttered thoſe words: which the court with an unanimous conſent did declare ſo, and adjudge.

Ramſey moved, that a ſhorter time, and ſome day within the 12*th* of *April*, might be aſſigned for the duel, ſaying that he would ſoon compel the lord *Rea* to confeſs the falſhood of the crime objected, if he would meet him in place convenient.

The lord marſhal anſwered, that the day was determined; and further intimated to both parties that they were to be attached and kept in ſafe cuſtody, if they gave not ſufficient caution for their appearing at the day and place appointed, and in the mean while for keeping the peace. For the performance whereof on his part the lord *Rea* produced ſureties, namely ſir *Pierce Croſby*, ſir *William Forbes*, ſir *Walter Croſby*, knights and baronets, and *William Jones*, eſq; who bound themſelves to the king body for body.

Then Mr. *Ramſey* being aſked, whether he would bring forth ſureties, anſwered, that he was ready in the word and honour of a gentleman, to oblige himſelf to whatſoever in that regard ſhould be by the court enjoyned; but as for ſureties that he had none, or at leaſt deſired none; that it was troubleſome for him to engage noble perſons, who had in other reſpects interpoſed in this behalf. Whereupon the lord *Rea*'s advocate deſired, that *Ramſey* be committed to the *Tower* till the day appointed for the combat.

Then *Robert* earl of *Roxborough* publickly offered, and ſaid that himſelf and *James* earl of *Abercorne* were ready to put in caution for *Ramſey*, if the court would admit them; and *Walter* earl of *Balclough* made the ſame offer; and the court admitted them, (although the lord *Rea*'s advocate alledged many things to the contrary) and they became bound body for body. Whereupon *Ramſey* was releaſed from his impriſonment in the *Tower*.

The lord conſtable and earl marſhal admoniſhed both parties to keep within the bounds aſſigned them, to wit, that the lord *Rea* ſhould not go weſtward beyond *Charing-Croſs*, nor Mr. *Ramſey* beyond *Whitehall* eaſtward. Theſe bounds they might not paſs without the ſpecial licence of the court, or ſome juſt and reaſonable cauſe.

The weapons, which the court aſſigned to the combatants, were a *ſpear*, a long *ſword*, a ſhort *ſword*, and a *dagger*; each of them with a point.

Then the lord *Rea* preſented theſe proteſtations to the court.

Firſt, he did humbly deſire of the right honourable judges the lord conſtable and earl marſhal, that his arms and weapons might be aſſigned him for to aid himſelf therewith againſt his adverſary in the day and place to him aſſigned, and alſo in any other day and place, if any ſhould be aſſigned him; and that he might have no weapon of advantage, and that he might be received into the liſts or field with thoſe arms as ſhall be aſſigned him, and armed in what ſort he ſhould pleaſe; and that he might have with him all other things needful and accuſtomed by right to aid himſelf at need againſt his adverſary, although they be not expreſsly written; and deſired that his adverſary ſhould have no other weapon, nor of other ſize than thoſe, that he the ſaid lord *Rea* ſhould have; and if the ſaid adverſary ſhould bring into the liſt any other weapons, or of other ſize than the court ſhould aſſign him, that ſuch weapon ſhould be taken from him, and that he be allowed no other.

It ſeemed reaſonable to the court, that he ſhould be received into the liſts armed as is fit: and as for the weapons, was to have a *ſpear*, a long *ſword*, a ſhort *ſword* and a *dagger*, each with a point, as above ſaid, and for the reſt the court would do reaſon, according to the cuſtom and law of arms.

Item, the ſaid *challenger* did pray, that his counſel might be received into the liſts or field with him, for to counſel him what ſhould be needful, and that he might have a chirurgeon with his ointments and inſtruments to ſerve and aid him when need required; and he did pray, that his counſel might remain with him, until the words *leſſer les armes* were cried.

The court willeth, that he ſhall have ſufficient counſel, a chirurgeon with his ointments and inſtruments within the ſaid liſts, as appertaineth, until the words *leſſer les armes* be pronounced.

Item, he did pray, that he might have, within the ſaid liſts or fields, a ſeat or pavilion, or other coverture to reſt himſelf; that he might have bread, wine, or other drink, iron-nails, hammer, file, ſciſſars, bodkin, needle and thread, armorer and tailor with their inſtruments, and other neceſſaries to aid and ſerve him in and about his armour, weapons, apparel and furniture, as need required.

The court willed, that he have a ſeat and ſuch coverture as he ſhall pleaſe, without fixing any thing in the ground, bread, wine, and other neceſſaries, in ſuch caſes requiſite, till the words *leſſer les armes* were pronounced.

Item, he did pray, that he might have liberty to make trial of his arms and weapons within the field, to put them off, and to put them on, and change them at his pleaſure; to nail, faſten, or looſe his arms and apparel, and other things needful; to eat and drink, and to do all other his neceſſities.

The court granted, until the words *leſſer les armes* were pronounced.

Item, he did pray, that after he did once come into the field and liſts, that his adverſary ſhould not be permitted to make him ſtay and attend too long, under pain of being convict.

To this the court returned anſwer, *the court will do you reaſon.*

Item, he did pray, that if it ſhould happen, either by the delay of his adverſary, or any other impediment, that he ſhould not be able to prove his intent upon his adverſary in the day aſſigned him, between ſun and ſun, that then he might have further time and day allowed and aſſigned him for the proof thereof on his ſaid adverſary.

To this the court anſwered, *the court in this caſe will do as anciently hath been uſed according to the cuſtom and law at arms.*

Item, he did pray, that the field and liſts might be well and ſafely guarded for him until the end of the battel, and as well in the night as in the day, until that with the aid of God he ſhould make good, and prove his intent upon his adverſary.

It was anſwered, *the court will do herein as is right.*

Item, he did humbly pray, that if God ſhould ſo diſpoſe, as that he died in the proſecution of this his rightful appeal in this behalf, that then his heirs, without any impeachment or hinderance, might take his body and give it Chriſtian burial, in ſuch place as he ſhall appoint by his laſt will and teſtament.

It was anſwered, *this muſt be at the king's pleaſure.*

Item, he did pray, that notwithſtanding that the cuſtom of arms will, that he ſhould bear into the field certain things neceſſary for him, that theſe, or ſome of theſe things, may be brought by others in caſe of him, and that they might be ſaved and carried back for him, if in caſe God ſhould pleaſe to give him the victory, as he may of his ſpecial goodneſs and mercy.

Hereupon this order was made by the court;

The court willeth, that you do herein according to the cuſtom of arms uſed in like caſes before this time.

Item, he did deſire, that the ſame day when with God's help he did intend to prove his intent upon his adverſary, he might have all other things neceſſary for him, and accuſtomed by right and law of arms, although they were not expreſſed in theſe his proteſtations.

To this it was anſwered, *the court herein will do that which ſhall ſeem reaſonable unto them.*

Item, he did pray, that theſe his proteſtations, nor the copy of them, might be delivered nor ſhewed to his adverſary, nor to any of his counſel, or other perſon, whereby his ſaid adverſary might have knowledge thereof: further praying, and deſiring, that theſe his proteſtations and demands might be graciouſly granted unto him, by thoſe honourable lords, as the right and law of arms did require.

It was anſwered, *the court would herein do that which ſhould be reaſon.*

Item, he did pray, that it might be lawful for him to go or ride into *Tuttle-Fields*, in or near *Weſtminſter*, at his pleaſure, and ſo often as he ſhould think fit, to view the ground which ſhould be aſſigned him for the proving of his intent, and for ſuch other ends as ſhould be moſt for his advantage for the proving of his intent upon his adverſary.

To this the court anſwered, *it ſeemeth reaſonable unto the court, that at convenient times, which ſhould be ſignified and expreſſed under the hands of the lord conſtable and earl marſhal, what ſhould be lawful for him to do as was deſired.*

Item, he did humbly pray, that ſince by the law and cuſtom of arms, and of the honourable court, the defendent is never to be allowed counſel, nor to have any aſſiſtants, nor to have any petitions of favour granted, except in due time he ſhall have deſired, or ſhall have proteſted that he would deſire them; and that in this caſe his adverſary publickly hath proteſted againſt the having of counſel, and all other aids and aſſiſtants in this court, as by the acts of the court appeareth; he humbly prayeth, that he might not have any counſel, nor aids, nor aſſiſtants aſſigned unto him in this behalf; and that no petitions or proteſtations (if he ſhall make any) might be granted unto him; and in this he humbly deſired the juſtice of that honourable court.

Anſwer was made, *the court would do herein upon conſideration, as to the cuſtom and law of arms appertained.*

The dimenſions of the weapons were as followeth.

A *long ſword*, four foot and a half in length, hilt and all; in breadth two inches.

Short ſword, a yard and four inches in length, hilt and all; in breadth two inches.

Pike, fifteen foot in length, head and all.

Dagger, nineteen inches in length, hilt and all; in breadth an inch.

The weapons were not to exceed this proportion; but the parties might abate of this length and breadth if they thought fit.

Theſe proteſtations and petitions were accepted and regiſtered.

Afterwards Mr. *Ramſey* preſented a petition to the lord high conſtable, and to the earl marſhal.

Ramſey's petition.

To the right honourable the lord high conſtable and the lord marſhal of England;

The humble petition of Mr. David Ramſey, *gent. of his majeſty's privy-chamber in ordinary.*

Shewing,

‘THAT in regard there can be no preſident ſhewed forth by authentical record, whereby the choice of arms was ever heretofore permitted or granted to the challenger, or refuſed to the defender, ſuitable to the cuſtom and law of all Chriſtian nations; as likewiſe in regard the challenger himſelf, as I ſuppoſe, being aſhamed of his proteſtations and demand for defenſive armour, has in good company denied the ſame, and aſcribed it to your lordſhips impoſing; he therefore according to the ſaid law of nations, and cuſtom of the kingdom, doth humbly intreat, that there be no other arms allowed for the trial, than ſuch as he hath bin already ſuitor for, (*viz.*) *rapier* and *dagger*, as being in the number of ſuch as your lordſhips were pleaſed to nominate, which are the moſt common in all gentlemen's opinions, and that are carried by all and every man that is acquainted with the management of them.

‘Laſtly, intreating, that if there chanced to be found any want or miſtake in the formality of this, that your lordſhips will be pleaſed to paſs over the ſame, and attribute it to the abſence of the lawyer allowed by your lordſhips, having now no other counſel than the juſtice and equity of his demand. And as in duty bound, he ſhall never be wanting, either in action or ſpeech, to ſhew his gratitude for theſe your lordſhips ſo juſt and noble favours.’

To the foregoing petition, this following anſwer was returned *decimo Aprilis* 1632.

The firſt part concerning my lord *Rea*, the lords having called ſir *William Balfour*, (the witneſs vouched by Mr. *Ramſey*) and heard him, but could not prove what was alledged.

The ſecond part, concerning the election of arms, the lords thought it was not fit to be granted, the cuſtom of this court being otherwiſe, and other arms being already aſſigned by the court.

On the 10*th* of *April Rea* and *Ramſey* appeared again before the court, ſitting in the *Council Chamber* at *Whitehall*; at which time the lord high conſtable and the earl marſhal ſignified to the parties, that it was the king's pleaſure, for certain juſt and urgent cauſes, to prorogue the day of combat, from the 18*th* of *April*, to the 17*th* of *May*; and they prorogued the ſame accordingly; and required *Rea* and *Ramſey* to appear in *Tuttle-Fields*, upon the day laſt aſſigned, at the hours appointed in the former day: for the performance whereof, both the challenger and the defender produced their ſeveral ſureties, and the cautions and ſureties for the former day were by the court remitted.

The lord *Rea* deſired to know the pleaſure of the court, whether he might uſe defenſive arms; and in caſe he might, whether according to his own diſcretion, or as the court ſhall regulate.

The judges of the court anſwered, that the offenſive weapons and their dimenſions were aſſigned by the court already; but both parties might uſe defenſive weapons at their own diſcretion.

May the 12*th* the court reaſſembled, and the parties were called, and anſwered to their names.

Then the conſtable, together with the marſhal, declared, that upon hearing and examination of this cauſe, they had not found *David Ramſey* guilty of *treaſon*, nor was the treaſon intimated made appear by the lord *Rea*, though he had ſo long time attempted it; yet they found that he had ſeditiouſly committed many contempts againſt his majeſty, the reformation whereof his majeſty reſerved to himſelf; and therefore the court decreed, that they (the ſaid lord *Rea* and *David Ramſey)* ſhould both be committed to the *Tower* of *London*, till by ſureties to be approved by his majeſty, they gave in ſufficient caution, that neither in their own perſon, nor by any in their families, nor by their procurement or aſſent, they would attempt any thing one againſt the other, and that ſo long, till it ſeemed good to his majeſty to ſet them at liberty; and ſo they were both arreſted by order of the lord conſtable and marſhal, and by *ſerjeants at arms* delivered over to ſir *William Balfour*, lieutenant of the *Tower*.

Then a letter was brought from his majeſty by *Richard St. George*, king of arms, to the lord conſtable and marſhal, by which his majeſty revoked his *letters patents*, given to the ſaid lords for the trial of this cauſe, not willing to have it decided by duel. And ſo there was nothing more done in it.

On the 8*th* of *May* this year, [1632] a period was put to the great trial in the court of honour before the lord high conſtable, and lord marſhal, between *Rea* and *Ramſey*, concerning the forementioned accuſation of high treaſon againſt marqueſs *Hamilton*, which begun to have a hearing in *November* the laſt year, and was now decreed by that court in this year to be determined by combat: which in regard it is a trial remarkable after the proceeding of the civil law, we have given the reader an account thereof at large. However, take his majeſty's thoughts of it, as it is expreſſed in this letter to the marqueſs.

James,

‘SInce you went I have not written to you of *Mackay*'s buſineſs, becauſe I neither deſire to propheſie nor write half news; but now ſeeing (by the grace of God) what ſhall be the end of it, I have thought fit to be the firſt advertiſer of it to you. I doubt not but you have heard, that (after long ſeeking of proofs for clearing the buſineſs as much as could be, and formalities which could not be eſchewed) the combat was awarded, day ſet, weapons appointed: but having ſeen and conſidered all that can be ſaid on either ſide, as likewiſe the carriage of both the men, upon mature deliberation I have reſolved not to ſuffer them to fight. Becauſe, firſt, for *Mackay*, he hath failed ſo much in his circumſtantial probations, eſpecially concerning *Muſchamp*, upon whom he built as a chief witneſs, that no body now is any way ſatisfied with his accuſations. Then for *David Ramſey*, though we cannot condemn him for that that is not, yet he hath ſo much, and ſo often offended by his violent tongue, that we can no ways think him innocent, though not that way guilty whereof he is accuſed; wherefore I have commanded the *court ſhall be diſmiſſed*, and *combat diſcharged*, with a declaration to this purpoſe, that though upon want of good proof the combat was neceſſarily awarded, yet upon the whole matter I am fully ſatisfied that there was no ſuch treaſon as *Mackay* had fancied. And for *David Ramſey*, though we muſt clear him of that treaſon in particular, yet not ſo far in the general, but that he might give occaſion enough *by his tongue* of great accuſation, if it had been rightly placed, as by his fooliſh preſumptuous carriage did appear.

‘This is the ſubſtance, and ſo ſhort, that it is rather a direction how to believe others, than a narration it ſelf; one of my chief ends being that you may ſo know *David Ramſey*, that you may not have to do with ſuch a *peſt* as he is, ſuſpecting he may ſeek to inſinuate himſelf to you upon this occaſion. Wherefore I muſt deſire you, as you love me, to have nothing to do with him.

‘To conclude now; I dare ſay that you ſhall have no diſhonour in this buſineſs; and for my ſelf, I am not aſhamed that herein I have ſhewed my ſelf to be

London, *May* 8,
1632.

Yonr faithful friend,
and loving couſin,
CHARLES *R.*’

XXVI. *Proceedings in the* Star-Chamber *againſt Sir* DAVID FOWLIS, *Sir* THOMAS LAYTON, *and* HENRY FOWLIS, *Eſquire, on a Charge of oppoſing the King's Service, and traducing his Officers of State.* Hilary, 9 Char. I. 1633.

[*The following account of this caſe is extracted from* Ruſhworth's Hiſtorical Collections, *vol.* 2. *page* 215. *In the* Appendix *at the end of vol.* 3. *page* 65. *of the ſame work, there is an abridged account of the ſame caſe. The proſecution was apparently promoted by lord* Wentworth, *afterwards the famous earl of* Strafford. *It produced diſagreeable conſequences to the earl; for on the trial of his impeachment for treaſon, ſir* David Fowlis, *and ſir* Thomas Layton, *two of the defendants in this caſe, were material witneſſes againſt his lordſhip on the ſecond article of the impeachment; both ſwearing to having heard him uſe thoſe emphatically threatning words to ſcme juſtices of the peace,* ‘ *that the king's little finger ſhould be heavier than the loins of the law.*’ *See* Ruſhworth, *vol.* 8. *pages* 149, 154.]

In the month of February *in* Hilary-Term, *upon an information in the* Star-Chamber *againſt ſir* David Fowlis, *ſir* Thomas Layton, *and* Henry Fowlis, *eſq*; *defendants, the cauſe came to a hearing.*

The information being opened to the court was to this effect:

THAT whereas ſeveral *commiſſions* had iſſued lately out of his majeſties court of *Exchequer* in the 6*th*, 7*th*, and 8*th*. year of his majeſties reign, directed to the lord viſcount *Wentworth*, and to divers other lords, knights, and gentlemen of the beſt and principal rank and quality in thoſe northern parts, who were thereby authorized for the more eaſe of the *country*, to treat, commune, and compound with all and ſingular his highneſs's ſubjects of the city and county of *York*, and other northern counties therein particularly expreſſed, as would make fine with his majeſty for their contempts in not attending his majeſties coronation, to have taken the order of knighthood, as they ought to have done; and the ſaid lord viſcount *Wentworth* was by expreſs *letters* from his majeſty in that behalf ſpecially appointed to be collector: and albeit the ſaid ſir *David Fowlis* had received many gracious favours both in honour and profit, as well from king *James*, as his now majeſty, which might juſtly have incited and ſtirred him up to all dutiful and grateful thankfulneſs for the ſame; nevertheleſs the ſaid ſir *David Fowlis* moſt undutifully, and ingratefully, did not regard the ſame, but harbored ſome ſecret diſcontentment, and ill affection in his heart; for whereas the ſaid lord viſcount *Wentworth*, and other his *majeſties commiſſioners*, carefully and dutifully intended the due execution of his *highneſs's* ſaid *commiſſions*, and had by vertue thereof ſummoned, and given notice to *Ralph Ewre*, *James Penniman*, eſquires, and ſundry others dwelling and inhabiting near unto the ſaid ſir *David Fowlis*, to attend the ſaid commiſſioners at the ſaid city of *York*, for their compounding for their ſaid *fines* of *knighthood*; the ſaid ſir *David Fowlis* moſt undutifully endeavoured and practiſed what he poſſibly could to oppoſe his *majeſties* ſervice therein, and to diſſwade and divert perſons from compounding with the ſaid *commiſſioners*, and many times publicly declared his diſlike and diſaffection of, and to the ſaid ſervice, which was generally obſerved and noted throughout the country where he dwelt; which was by him ſo ſpoken of intent and purpoſe to cauſe men to forbear and refrain compounding, or reſorting to the ſaid *commiſſioners*, to make any compoſition for their aforeſaid contempts; and thereby animated and incouraged ſundry perſons to ſtand out, and refuſe to make any compoſition at all, who otherwiſe would have compounded with the ſaid *commiſſioners* for their ſaid *fines* of contempt, in not attending at his *majeſties coronation* to take the order of *knighthood*, as aforeſaid. And in farther proſecution of his ill affection, and to ſhew his diſlike of the ſaid ſervice, and the more fully to expreſs and manifeſt himſelf, and his deſire for the hindrance thereof, he the ſaid ſir *David Fowlis*, at a public meeting, at the houſe of the ſaid ſir *Thomas Layton*, in the beginning of the *month* of *July* 1632, did, in divers of his conferences with gentlemen concerning the compounding with the ſaid lord *viſcount*, and the other *commiſſioners* for their *fines* and contempts of *knighthood*, publicly affirm and ſay; ‘that *Yorkſhire* gentlemen had been in time paſt accounted and held ſtout ſpirited men, and would have ſtood for their rights and liberties, and were wont to be the worthieſt of all other ſhires in the kingdom. And that in former times all other ſhires did depend, and would direct all their great actions by that country. And that other counties, for the moſt part, followed and imitated *Yorkſhire*: but now in theſe days *Yorkſhire-men* were become degenerate, more daſtardly and more cowardly than the men of other counties, wanting their wonted courage and ſpirit, which they formerly uſed to have.’ Which ſaid words and ſpeeches the ſaid ſir *David Fowlis* then uſed and uttered purpoſely to diſſwade and diſcourage perſons from compounding for the ſaid contempts and *fines* for *knighthood*, as aforeſaid. And the more to encourage thoſe that ſtood out, and refuſed to compound, the ſaid ſir *David Fowlis*, at the ſame time and place, extolled and highly commended one *James Maleverer*, eſq; for denying and refuſing to compound with the ſaid *commiſſioners* for his *fines of knighthood*, and ſaid; ‘that the ſaid *James Maleverer* was the wiſeſt and worthieſt man in the country; and that he was a brave ſpirit, and a true *Yorkſhireman*; and that none durſt ſhew himſelf ſtoutly for the good of the country, but the ſaid Mr. *Maleverer*, and was to be honoured therefore;’ and did very much commend him, both there, and at other places and times, for not compounding. And the ſaid ſir *David Fowlis* being then told, it might perhaps prove more chargeable to the ſaid Mr. *Maleverer*, for his wilful ſtanding-out in that manner; the ſaid ſir *David* replied, ‘that the ſaid Mr. *Maleverer* had put in his *plea* thereunto, and would eaſily procure his diſcharge, both of the *fines* and *iſſues*.’ And in truth he had pleaded in his majeſties *Exchequer* an inſufficient plea, and after ſuch time as he had paid 156*l*. for *iſſues*, at laſt he compounded for his *contempt*. And farther to diſcourage and hinder men from compounding, the ſaid ſir *David Fowlis* then alſo alledged, that in other counties and ſhires they had not advanced their *fines* of *knighthood* ſo high, as was done by the *commiſſioners* in *Yorkſhire*, ſaying, that there were many in *Buckinghamſhire* and *Oxfordſhire*, who did utterly refuſe to compound: and thereupon ſhewed forth a liſt or paper of the names of ſundry perſons of thoſe two counties, that ſo refuſed to compound. And the ſaid ſir *David Fowlis* taking notice of Mr. *Ewre*'s, and Mr. *Pennyman*'s compounding with the *commiſſioners*, blamed and reproved them for ſo doing, ſaying, *that they had by compounding done themſelves ſome wrong, and that the country hereafter would be much troubled with ſuch impoſitions.* And the ſaid ſir *David Fowlis* farther, to beget and draw a general diſobedience in the hearts of his *highneſs*'s people, and to cauſe them to deny and refuſe to compound for their *knighthood-fines* with the ſaid commiſſioners, and to draw a ſcandal upon the ſaid lord viſcount *Wentworth*, and to bring him into diſeſteem in the hearts and minds of the gentlemen of that country, publicly ſaid and pretended, ‘that the people of *Yorkſhire* did adore him the ſaid lord viſcount *Wentworth*, and were ſo timorous and fearful to offend his lordſhip, that they would undergo any charge, rather than diſpleaſe him; and that his lordſhip was much reſpected in *Yorkſhire*, but at court he was no more reſpected than an ordinary man; and that as ſoon as his back was turned for *Ireland*, his place of *preſidentſhip* of the council would be beſtowed on another man.’ And the ſaid ſir *David Fowlis*, and the defendant *Henry Fowlis* did, about the beginning of *July* 1632, and at other times publicly, in the hearing of ſundry knights and gentlemen, to the end to hinder his *majeſties* ſervice, and to render the ſaid lord viſcount *Wentworth* odious to the inhabitants of *Yorkſhire*, and the places and countries where he was employed as a commiſſioner, moſt falſely and untruly ſcandalize and wrong the ſaid lord viſcount *Wentworth*, to have received much money of the country for *knighthood-fines*, by vertue of the aforeſaid commiſſion; and that his lordſhip had not paid the ſame, either to his *majeſty*, or the *Exchequer*. The contrary whereof did plainly, clearly, and evidently appear by the ſeveral *tallies* and *conſtats*, which were produced and ſhewed in open court, teſtifying that the lord viſcount *Wentworth* had, a year before the ſpeaking of thoſe words by the ſaid Sir *David*, and his ſon, paid unto his *majeſties* receipts for *knighthood-fines* the ſum of 24500 *l.* beſides other aſſignments by his lordſhip diſburſed about the ſaid ſervice amounting to about 700 *l.* of his own money, and more than he had at that time received for his *majeſty*. And the ſaid ſir *David Fowlis* and *Henry Fowlis* moſt falſely and maliciouſly, not only to the ſcandal of his *majeſty* and his juſtice, but chiefly to wrong and ſlander the ſaid lord viſcount *Wentworth*, reported, gave out and affirmed in the preſence of divers knights, gentlemen and others, that when the ſaid lord viſcount *Wentworth* was gone into *Ireland*, all ſuch as had paid their *fines* to his lordſhip, although they had his lordſhip's acquittance for the ſame, yet they would and ſhould be forced to pay the ſame over again to his *majeſties* uſe. And the defendant, *Thomas Layton*, cauſed his officer and bailiff to levy about 39 *l.* *iſſues* upon the goods of one Mr. *Wivel*, who formerly compounded and paid his *fine* for *knighthood*, and had his lordſhips acquittance for the ſame; and that complaint had been made to the *council* at *York*, in the abſence of the ſaid lord *preſident*, that the ſaid ſir *Thomas Layton*'s officers or bailiffs had by his privity exacted and taken 40 *s.* worth of the ſaid *Wivel*'s tenants goods, by colour of the ſaid *levy*, for ſo levying of the ſaid *iſſues*, whereby the ſaid *council* conceived, that the ſame would much croſs and oppoſe his *majeſties* ſaid ſervice, and the exaction was meet to be puniſhed: and therefore did award, and ſend the *king's letter* to the ſaid ſir *Thomas Layton* (being then *high-ſheriff* for the county of *York*) for to appear, and anſwer an information exhibited againſt him, and his ſervants, for ſuch their ſuppoſed exactions in that behalf, as was lawful for the ſaid *council* to do; and cauſed the ſaid ſir *Thomas Layton* to be ſerved therewith, who immediately ſhewed it to the ſaid ſir *David Fowlis*: then the ſaid ſir *David Fowlis* thereon took upon him in a great preſence and aſſembly of divers knights and gentlemen of the county (himſelf being then one of his majeſties ſworn council in the ſaid *northern* parts, one of the *deputy lieutenants* there, and a *juſtice of peace* in the *North-Riding*, where he then dwelt) to adviſe and diſſwade ſir *Thomas Layton*, to yield obedience to his *majeſties letter*, which this court held to be a great contempt, and offence; for that he ſaid, that he held it not fit, that the ſaid ſir *Thomas Layton*, being *high-ſheriff*, ſhould appear, and anſwer the ſaid letter, before he had acquainted his *majeſty* firſt therewith, and known the king's pleaſure. The ſaid ſir *David* ſaying farther, (in ſcorn and contempt of the ſaid court and *council*, whereof himſelf was a member, and by his oath bound to maintain and uphold the rights and liberties thereof to his uttermoſt) ‘that the ſaid court was a *paper-court*, and the ſaid lord *preſident*, and *council*, had done more than they could juſtifie, by ſending for the ſaid *high-ſheriff*; and that, if he were in the ſheriff's caſe, he would not care a dog's turd for them.’ And the more to draw the council into diſeſteem and diſreſpect in thoſe parts, he the ſaid ſir *David* then alſo ſaid, that the ſaid council had nothing to do with a juſtice of peace; ſpeaking withall comparatively, that the office of a juſtice was above the council at *York*; the one (meaning a *juſtice of peace*) was by act of *parliament*, the other (meaning the court at *York*) was made but by *commiſſion*. And alſo the ſaid ſir *David* being reproved by ſome gentlemen there preſent, who much diſliked his diſcourſe, yet he anſwered, *he cared not who heard it, nor if it were proclaimed at the Croſs.*

To this information ſir *David Fowlis* made this anſwer; ‘that he hath been ſo far from oppoſing the commiſſion concerning *knighthood*, as that he hath, according to his power, advanced the ſaid ſervice; and that he did perſwade *James Maleverer*, and others to ſubmit to the commiſſioners, and compound for their *fines*. That he did perſwade ſir *Thomas Layton* to appear before the lord *Wentworth*, and the *council*, upon the *king's letter*, and denieth the words charged upon him. He confeſſeth he did ſay, that he knew not how his majeſty would take it to have a *high-ſheriff* committed, and diſgraced for executing his *majeſties writ*: and confeſſeth, that it appears by the information, that Mr. *Wivel* had made his compoſition for *knighthood*, and that he receiv'd his acquittance; nevertheleſs proceſs was awarded out of the *Exchequer* for levying *iſſues*, amounting to 30 *l.* or thereabout: whereupon this defendant did ſay, that if the lord *Wentworth* had paid in all the monies he had received, he might have done well to have taken order, that thoſe who had paid their money to him, ſhould be free from any trouble, and not be compelled to make double payment.’

Henry Fowlis *pleaded not guilty.*

SIR *Thomas Layton* for himſelf ſaith; ‘that a letter was ſerved upon him from the lord *preſident* and *council*, he being then *high-ſheriff* of the *county*, doing matters in the execution of his office; and that before he was in any contempt, he was within three days *arreſted* by the *purſivant* attending the *court*, and by him carried priſoner from his own houſe to the ſaid *council*, about thirty miles, and there remained in the cuſtody of the ſaid *meſſenger*, till he had anſwered an information there preferred againſt him, and interrogatories concerning the ſelf-ſame matter now charged upon him; and before he was diſcharged, paid the ſaid *Wivel* the money levyed by verture of the proceſs, and alſo paid 40 *s.* more, which (as was pretended) *Appleby*, the bailiff, exacted from the ſaid *Wivel*.

‘During all which time of this defendants reſtraint, he was *high-ſheriff* of the *county* of *York*, of all which he deſireth a conſideration might be had; albeit he might juſtly plead the dependance of the ſuit at *York*, yet he doth wave the ſame; and doth deny, that if the ſaid 40 *s.* were exacted by the ſaid bailiff, over and above the 39 *l.* levied upon Mr. *Wivel*, that the ſame, or any part thereof came to this defendant.’

And it plainly appeared to this *honourable court*, by good and ſufficient teſtimony then openly read; that all the particulars before-mentioned, wherewith ſir *David Fowlis* ſtood charged by the information, were fully proved againſt him: whereupon the court, upon grave and deliberate conſideration of all the aforeſaid premiſſes, declared; *that the ſaid ſir* David *had many ways endeavoured and ſought to oppoſe his majeſties ſervice, and had withall greatly and highly thereby ſcandalized his majeſty, who had done him ſo many gracious favours, and affronted his ſervice, and had unjuſtly traduced his majeſties commiſſioners, and great officers of ſtate, and ſhewed exceeding malice to the lord deputy: and the ſaid ſir* David *ſpeaking theſe words charged upon him, to deter his majeſties ſubjects from making payment of their* fines *to his majeſties receiver, for knighthood money: and that the court duly weighing and conſidering the hainouſneſs of the ſaid defendant's offence therein, and declaring the ſame worthy of ſevere and extraordinary puniſhment, ordered:*

That the ſaid ſir David Fowlis, *being a principal offender, ſhall ſtand, and be committed to the* Fleet, *there to remain during his majeſties pleaſure; and that he ſhall pay a* fine *of* 5000 *l. to his majeſties uſe; and ſhall alſo publickly acknowledge his great and ſeveral offences, both to his majeſty, and the ſaid lord viſcount* Wentworth; *not only in this court, but in the* court *of* York, *and likewiſe at the open* aſſizes *in the ſame* county, *where this decree ſhall be publickly read. And farther; that the ſaid ſir* David Fowlis *is a perſon altogether unworthy of the places he holds, as one of the* council *of* York, deputy-lieutenant, *and* juſtice of peace, *who hath breathed out ſo much faction and diſobedience. And for that he ſought and endeavoured to draw diſeſteem and ſcandal upon that court, whereof he himſelf was a member, and upon the principal officer and member of the ſaid court, the lord* Wentworth, *a noble perſon of ſingular worth and merit, and worthily employed in a matter of greateſt truſt and importance: the court hath therefore ordered and adjudged, that the ſaid ſir* David Fowlis *ſhall, from henceforth, be held, and made incapable to have, or execute any of the ſaid places, and that he ſhall pay good damage to the ſaid lord* Wentworth, *relator in this court, whom this court highly commended for vindicating his majeſties honour, in ſuch a ſervice of ſo undoubted right, juſtly appertaining to the crown, and which hath been heretofore taken by many kings, his majeſties predeceſſors, conſtantly and ſucceſſively. Their lordſhips generally condemned the ſaid ſir* David *therefore, and for the baſe and ſcandalous report, that he ſo publiſhed againſt the ſaid lord* Wentworth, *ordered and decreed, that the ſaid ſir* David *ſhould pay* 3000 *l. to the ſaid lord* Wentworth.

And touching the defendant *Henry Fowlis*, the court likewiſe thought him worthy of cenſure, and ordered and decreed, that he ſhould ſtand committed to the *Fleet*, and pay 500 *l.* *fine* to his majeſties uſe.

And foraſmuch as the council urged no proof againſt ſir *Thomas Layton*, they diſmiſſed him from any farther attendance.

XXVII. *The Caſe of* WILLIAM *Earl of* DEVONSHIRE, *on an Information in the* King's Bench *in* 1687, *for aſſaulting Colonel* CULPEPPER *in the King's Palace.*

[*The following ſtatement of this remarkable caſe and of the arguments againſt the proceedings of the* King's Bench *is from a volume of miſcellaneous pieces by the Lord* Delamer, *who was acquitted of a charge of high treaſon in the reign of* James *the Second, and after the revolution was created earl of* Warrington. *See his trial in volume* 4. *of this collection*, p. 210. *The book, from which we extract the caſe, was publiſhed as the works of the earl of* Warrington *in* 1694; *and though the publication appears to have been poſthumous, yet there is not the leaſt reaſon to ſuſpect the authenticity of the contents, as the book was dedicated to Lord* Warrington*'s ſon and heir by Mr.* De la Heuſe *the gentleman entruſted with his education. The caſe in queſtion, from the ſtile of it, is evidently addreſſed to the houſe of lords; but whether it was by way of ſpeech, or how otherwiſe, is not explained.*

After the earl of Devonſhire*'s caſe we give the proceedings of the houſe of lords upon it.*

In the article of duke of Devonſhire *in* Collins's Peerage *there are ſome anecdotes relative to this caſe, which deſerve to be remembered, though they are not noticed in the account we ſhall lay before the reader.*]

ON *Sunday* the 24th of *April*, 1687, the ſaid earl meeting with collonel *Culpepper* in the drawing room in *White-hall*, who had formerly affronted the ſaid earl in the ſaid king's palace, for which he had not received any ſatisfaction, he ſpake to the ſaid collonel to go with him into the next room, who went with him accordingly; and when they were there, the ſaid earl required of him to go down ſtairs, that he might have ſatisfaction for the affront done him, as aforeſaid; which the collonel refuſing to do, the ſaid earl ſtruck him with his ſtick, as is ſuppos'd. This being made known to the king, the ſaid earl was required by the lord chief juſtice *Wright*, by warrant, to appear before him with ſureties. Accordingly *April* 27, he did appear, and gave bail in 30000*l.* to appear the next day at the *King's Bench*, himſelf in 10000*l.* and his four ſureties in 5000*l.* a piece, who were the duke of *Somerſet*, lord *Clifford* the earl of *Burlington*'s ſon, lord *De-la-mere*, and *Tho. Wharton*, eſq; eldeſt ſon to lord *Wharton*. The earl appeared accordingly next morning, and then the court told him, *that his appearance was recorded*, and ſo he had leave to depart for that time. But upon the ſixth of *May* he appear'd there again, and being then requir'd to plead to an *information of miſdemeanour for ſtriking the ſaid collonel in the king's palace*, he inſiſted upon his priviledge, *that as he was a peer of* England, *he could not be tryed for any miſdemeanour during the priviledge of parliament:* and it being then within time of priviledge, he refuſed to plead. The court took time to conſider of it till *Monday*, which was the laſt day of the term, and the earl then appeared, and delivered in his former plea in parchment. The judgment given by the houſe of lords, in the caſe of the earl of *Arundel*, 3 *Car.* was urged on the behalf of the earl, *viz. that no lord of parliament, the parliament then ſitting, or within the uſual times of priviledge of parliament, is to be impriſon'd or reſtrain'd without ſentence or order of the houſe, unleſs it be for treaſon or felony, or for refuſing to give ſurety for the peace:* and alſo, that the like priviledge was, about two years before, allow'd in the caſe of my lord *Lovelace*. The court over-rul'd the earl's plea, and requir'd him to plead to the information the firſt day of the next term, and to be a plea as of this term; and ſo he had leave to depart, but his ſureties were not called, for to ſee if they would continue as his bail. The next term he appeared, and pleaded guilty to the information, and ſo the laſt day of the term the court did award, *that he ſhould pay a fine of* 30000*l. be committed to the* King's Bench *till it be paid, and to find ſureties for the peace for a year.*

To all which proceeding and judgment three notorious errors may be aſſign'd.

I. *The over-ruling of the earl's plea of priviledge.*
II. *The exceſſiveneſs of the fine.*
III. *The commitment till it be paid.*

1. The over-ruling the earl's plea of priviledge is a thing of that vaſt *conſequence*, that it requires a great deal of time to comprehend it aright, and is of ſo great an extent, that more may be ſaid of it than any one man can ſay. The judgment ſeems to be very unnatural, becauſe an inferiour court has taken upon it to reverſe a judgment given in a ſuperiour, of which no ſuch preſident is to be found in regular times, ſcarcely in the moſt confuſed and diſorderly.

2. Becauſe it is in caſe of *priviledge*, which is the moſt tender part of *every court*; for if the *rights* and *priviledges* of any court are made light of, the court itſelf will ſoon come to nothing, becauſe they are as it were the moſt eſſential part of it, if not the very eſſence of the court; for what ſignifies a court, if its orders cannot be executed? It is better that a court were not, than that its priviledges ſhould not be duly obſerv'd, for without that it becomes a ſnare and miſchief to the people, rather than an advantage.

3. Becauſe by this *they have ſet the feet above the head*; for as they have by this declared themſelves to be *ſuperior to the lords*, ſo it will naturally follow, that a *quarter-ſeſſions may reverſe their orders, or ſuſpend their priviledges*, and a more *inferiour court* ſhall ſuperſede what the *quarter ſeſſions* does: and thus it muſt go on till the courſe of *nature* is *inverted.*

4. Becauſe they may as well deny a lord, or over-rule any other priviledge, as well as this, and ſo conſequently, when the houſe of lords is not actually ſitting, every *peer* muſt be *beholden to the judges for every priviledge that he enjoys.*

5. If this judgment be according to *law*, then may the *King's Bench* try a peer for *miſdemeanor*, at the very time when the houſe of lords is ſitting; and conſequently the houſe muſt want a *member*, if the *King's Bench* ſees it good to have it ſo; and what a confuſion would it make, and the conſequence of it would be, is eaſily diſcern'd. The want of one member makes that houſe think itſelf to be lame: as was ſeen in the caſe of the earl of *Arundel*, 3 *Car.* How many petitions did the lords make, and how many meſſages paſſed to and fro, between the king and them, who would not proceed to any buſineſs *till he was reſtored to his place in that houſe?* For they told the king, *that no lord of parliament, the parliament ſitting, or within the uſual times of priviledge of parliament, is to be impriſon'd or reſtrain'd without ſentence or order of the houſe, unleſs it be for treaſon or felony, or for refuſing to give ſecurity for the peace.* Surely the judges did not give that judgment for want of *underſtanding* that judgment of the lords; for nothing can be more expreſs and plain for it: for it ſays directly, *that ſitting the parliament, or within uſual times of priviledge, no peer ſhall be moleſted, unleſs for treaſon or felony, or for refuſing to give ſecurity for the peace.* The earl of *Devonſhire* did all that the judges could require of him, by finding ſureties for the peace; and what the judges did more, was not grounded upon that *judgment of the lords*, but was a *manifeſt and preſumptuous invaſion and violation of the priviledges of the whole peerage of* England.

It is very obvious, how the peerage has been undermined ever ſince *Hen* VII's time, what endeavours have been uſed to make it leſs and leſs; firſt, by multiplying the number of them; ſecondly, by raiſing people of mean extraction to that dignity, both which tend to render it contemptible. But nothing can make it more deſpicable, than that its priviledges ſhould depend upon the beck of the *King's Bench:* and therefore conſidering how groundleſs and without preſident it is, what they have done in the caſe of the ſaid earl, it is no more than probable, that they thereby aimed at pulling down the peerage. For, what ſeems ſo likely as it does? It carries its evidence in its face, for it manifeſtly takes away the priviledge of the *peers*, and till it does appear for what other end it was done, all men of ſence, and that are unprejudic'd, *muſt believe it was to pull down the peerage*; for all that can be pretended, is, either to ſecure the *peace*, or to *puniſh the offence.* The earl did give ſecurity for the *peace*, and he did not deſign to ſhift off his *tryal*, but that it ſhould be in its proper ſeaſon; for though it delay'd the trial, yet it brought it to the proper time, and ſo conſequently the more legal and reaſonable: but the judges muſt go out of the way of *reaſon* and the *law*, to make a *breach in the priviledge of the peers.* It is too commonly the diſcourſe every where, and I fear with too much reaſon, that the *judges make very bold with the law*; but it's plain by this judgment, *that they have ſtuck the priviledges of the peers under their girdle.* Whether it did proceed from *ignorance* or *corruptneſs*, will appear upon what they ſhall ſay for themſelves. It is too plain from one of them it is, and either of them renders them unmeet to ſit in that place.

I do remember, that the *puny judge* gave this reaſon for over-ruling the earl's priviledge. Says he, *your lordſhip, and all the peers, receive all your priviledges from the king, and therefore it would be very unreaſonable to make uſe of them againſt him: and ſeeing the king is concerned in this caſe, I am of the opinion, that the plea be over-ruled.* It is ſaid, that he has ſome law, and therefore it's the greater preſumption in him to judge upon the lords priviledges, who is not qualified by law to ſit as a judge in any caſe; for he is a *papiſt*, as every body ſays, and ſo conſequently has not taken the *oaths* and *teſt*, that the *law* enjoins, before he take his place on the bench.

But as to his doctrine which he laid down, ſince it does not properly come into this debate, I will only aſk him a few queſtions: *whether there was not a people before there was a king? whether the king begot all his people? and if people of ſeveral nations ſhould be caſt upon an iſland, and ſeeing no probability of getting thence, they agree upon certain laws and rules for the common good, and make choice of the wiſeſt man amongſt them as their king, to rule and govern them according to thoſe laws, can it then be ſaid, that the people received their priviledges from him, or that he is not ſtrictly bound to govern them by thoſe laws and no other?* I deſire to aſk this one queſtion more: *whether the king is not bound, as well by his oath as by the nature of the government, to protect and defend every ſubject in his juſt rights and properties?* But allowing his doctrine as orthodox, yet his reaſon is admirable; for the ſubject is not to make a defence in any caſe, if the king have any title or concern in it, all corporations muſt deliver up their charters of courſe, whenever a *quo warranto* is brought; and why? Becauſe it was a grant from the king, and it would be very hard to oppoſe him with his own gift. Whoever holds any thing by gift from the crown, and tho' made as ſure as the broad ſeal can make it, yet if the king think good to queſtion it, the party muſt yield it up without inſiſting upon his right, for the reaſon given by the learned judge. For the ſame reaſon every peer, if denied his writ, muſt not demand it; nay, he muſt ſurrender his patent, and renounce his title, as far as in him lies, if the king require it: and for the ſame reaſon, when any man is called to an account for his life, he muſt make no defence, but ſubmit himſelf to the king's mercy; for all we have is from the king, and nothing muſt be diſputed when it is his pleaſure to queſtion it. This is indeed to make the king as *abſolute* as any thing on earth can be, yet is withal to make him the moſt *unjuſt prince* that ever ſate on the *Engliſh* throne. This ſort of juſtice is learnt from children, whoſe gifts continue good no longer than the donor remains in that kind mood. Surely nothing can more reflect diſhonour upon the king; for it makes him as unjuſt and uncertain as any thing can be, both which ſhould not be in the temper, much leſs in the actings of a prince.

Another reaſon was given, I think, by the chief juſtice, or elſe by Mr. Juſtice *Holloway*, *becauſe it was abſolutely neceſſary for the ſecuring of the peace, it was urg'd ſo far, as if the peace could not be ſecured without it.* Surely all this muſt be but *gratis dictum*, for my lord *Devonſhire*, by finding ſureties, had done all that the law does require for ſecuring the peace, unleſs they had clapt him up a cloſe priſoner; which they could not juſtifie, if he tender'd ſureties: and therefore, either my lord *Devonſhire* is different from all mankind, and a different method muſt be made uſe of to ſecure the peace, or elſe this argument of theirs ſavours not ſo much of reaſon as of ſomething elſe, that ought to be no ingredient when they give judgment in any caſe. And it ſurpaſſes common ſence to underſtand, *how over-ruling the lord's plea could tend to the ſecuring of the peace.* Either the ſecurity which he had given muſt awe him to keep the peace, or the other could not; for had he broke the peace again, and repeated it ſeveral times before he came to his trial, yet that could not affect the merits of the cauſe, neither could it be given in evidence at the trial, ſo as to alter the ſtate of the fact; neither could the judges, by reaſon of it, enhaunce his puniſhment if he were found guilty, but they muſt look upon it as a diſtinct offence, and ſo might require the greater ſecurity for the peace, and for a longer time.

Indeed it is an effectual way to prevent a man from breaking the peace, to lay ſuch a fine upon him as is impoſſible to be paid immediately, and to commit him till payment.

It is too probable, that the judges, being conſcious how liable they have made themſelves to be called in queſtion for this *ſawcineſs* and *trampling upon the law*, would debaſe and bring under the credit and authority of this court; becauſe no other can take cognizance of their proceedings, ſo as to correct their *errors* and *miſtakes.* It is only here that they can be called to an account for what they do amiſs; no court can puniſh them but this; ſo that if they can once top your lordſhips, there is nothing they need ſtand in awe of, nothing to reſtrain them, but they may act *ad libitum*, not *per legem*; for, let this court be *depreſt*, and they may ſay, *of whom then need we be afraid?* By what they have done already, they have ſufficiently ſhewn to what extravagances they will proceed, when they think themſelves to be *out of the reach of this court.*

If once the *King's Bench* can ſet it ſelf as high as the judges have attempted by this proceeding againſt my lord *Devonſhire*, then muſt the whole nation (your lordſhips not excepted) *ſtoop to all the extravagances and monſtrous judgments that every corrupt and ignorant fellow ſhall give, who ſhall chance to get up to the bench*; and not only this preſent age ſhall feel and undergo the miſchief, but it will be entailed upon all ſucceeding generations. Well then, did the judges attempt that which would bring your lordſhips ſo low, and raiſe their court ſo high, to ſet it above all reach or controul; eſpecially if they did promiſe to themſelves impunity, if not reward, which they might have expected, had it been in the reign of an arbitrary prince, who would be a great gainer by the fall of this court, becauſe then the ſkreen betwixt the king and people is taken away.

This is the firſt time, that an inferiour court did take upon it to invalid the priviledges of a ſuperiour. Superiour courts do ſometimes ſet aſide the orders and proceedings of inferiour courts; and yet in that caſe they proceed with that caution, that it is never done but when there is *manifeſt error*, and the law not duly purſued and obſerved; but in no caſe was it known that they ever meddled with their *priviledges.*

If what the judges have done is *good*, I cannot tell what *power* and *juriſdiction* they may not pretend to, for no *bounds* nor *limits* can be ſet to the *King's Bench*; it may aſſume as great a power in *civil affairs* as the *High-commiſſion* does in *eccleſiaſtical*, in their actings not to be tyed up to any rules or method, but to vary and alter them as well as the *law*, when occaſion or humor ſerves. The *proceedings* ſhall be as ſummary, or as delatory as they think fit, and your lordſhips ſhall no more than other people be exempted from the exerciſe of that power.

Therefore if your lordſhips will not prevent the miſchief from ſpreading it ſelf over the whole *nation*, yet I hope you will take notice of the injury you have ſuffered in the caſe of my lord *Devonſhire*, and to do your ſelves right.

The *law* has for the moſt part left *fines* to the *diſcretion of the judges*, yet it is to be ſuch a *diſcretion* as is defined by my lord *Coke*, *fol.* 56. *diſcretio eſt diſcernere per legem quid ſit juſtum*; not to proceed according to their own will and private affection, for *talis diſcretio, diſcretionem confundit*, as *Wingate* ſays, *fol.* 201. So that the queſtion is not *whether the judges could fine my lord* Devonſhire, but *whether they have kept themſelves within the bounds and limits which the law has ſet them.*

It is ſo very evident, as not to be made a queſtion, whether in thoſe things which are left to the *diſcretion* of the *judges*, that the law has ſet them bounds and limits, which, as God ſays to the waves of the ſea, *hitherto ſhalt thou go and no farther.* For either they are ſo reſtrained, or elſe the *law* does ſuppoſe them to be *exempted from thoſe frailties and paſſions which do attend the reſt of mankind*: but as they cannot be ſuppoſed to be void of *paſſions* and *infirmities*, no leſs than other men, ſo it cannot be imagined, that the *law* has left men to ſo wild a *juſtice* as is guided by *paſſion* and *affection*; for it had been ſo great a defect in the *conſtitution of this government*, that long before this it would have been reformed. And as it is moſt clear, that they are thus reſtrained, ſo thoſe *bounds* and *limits* are no leſs known to them that are acquainted with the *law*. There are two things which have heretofore been looked upon as very good guides, 1ſt, *what has formerly been expreſly done in the like caſe*; 2dly, *for want of ſuch particular direction, then to conſider that which comes the neareſt to it, and ſo proportionably to add or abate, as the manner and circumſtance of the caſe do require.* Theſe were thought very good and ſafe *directions*, till it was declared, and ever ſince has been *practiſed* in the *King's Bench*, that they did not regard *preſidents, but would make them*; and for ought that I can learn or find, this of my lord *Devonſhire* is an *original.*

What obſcurity ſoever may be pretended in other caſes, yet in this the law has given ſo poſitive and plain a *direction*, that it ſeems very ſtrange, how they came to lay a fine of 30000 *l.* upon my lord *Devonſhire.*

The court of *Star-Chamber* was taken away, becauſe of the *unmeaſurable fines* which it impoſed, which alone was a plain and direct prohibition for any other court to do the like, for otherwiſe the miſchief remained; for what advantage was it to the nation, if it had not been wholly ſuppreſt? The *ſhifting of hands* gave the people no *eaſe* in the *burden* that lay upon them. It was all one, whether the *Star-Chamber* or *King's Bench* did cruſh them by immoderate fines. But to put all out of diſpute, the ſtatute 17 *Car.* ſays expreſly, that *from henceforth no court, council, or place of judicature ſhall be erected, ordained, conſtituted, or appointed within this realm of* England, *or dominion of* Wales, *which ſhall have, uſe, or exerciſe the ſame, or the like juriſdiction, as is or hath been uſed, practiſed, and exerciſed in the ſaid court of* Star-Chamber: and this was upon very good reaſon, becauſe thoſe great *fines*, impoſed in that court, were *inconſiſtent* with the law of *England*, which is a *law* of *mercy*, and concludes every *fine* which is left at diſcretion, with *ſalvo contenemento.* If the fines impoſed in the *Star-Chamber* were an *intolerable burden to the ſubject, and the means to introduce an arbitrary power and government*, as that ſtatute recites, the like proceeding in the *King's Bench* can be no leſs grievous, and muſt produce the ſame evil. Laws that are made upon new occaſions, or ſudden immergencies, the reaſon upon which they were made may ceaſe, and conſequently they do ceaſe alſo. But laws that are grounded upon the *ancient principles of the government* cannot ceaſe, becauſe the reaſon of them will ever continue; and this ſtatute of 17 *Car.* being ſuch, no doubt holds good, and is now in as much force as the firſt moment in which it was made; and therefore this *fine* impoſed on my lord *Devonſhire* is in open defiance of that ſtatute.

I think no man can altogether excuſe my lord *Devonſhire*; for my part I don't, but think it was a very inconſiderate raſh act, and I believe the *indiſcretion* of it abſtracted from the *fine* is a very ſenſible trouble to him. Yet if thoſe things were wanting which may be urged in his *excuſe*, the *offence* and *puniſhment* don't ſeem to bear a proportion. Could not the *merits* of his *father* be laid in the balance, nor the ſurpriſe of meeting coll. *Culpepper*? For my lord having been abuſed by him, a man of ſo great courage and honour as my lord *Devonſhire*, muſt needs feel and remember it a long time, having received no ſatisfaction or reparation made him for it. But if there were nothing of this in the caſe, could all that may be ſaid to alleviate his *offence* be urged againſt him with a double weight, were the circumſtances of the *fact* as foul and aggravating as the *malice* of his *enemies* could wiſh, yet ſurely a leſs *fine* might have ſerved; for the *law* caſts in a great many grains of *mercy* into every *judgment*, and has ever looked upon an over-rigid *proſecution of the guilty to be no leſs tyranny than the proſecution of the not guilty*, becauſe it is *ſummum jus*, and has declared that to be *ſumma injuria.*

But beſides all this, I do conceive with ſubmiſſion, that *where the law has intruſted the judges with a power to fine, it is in a much leſs degree than they have done in this caſe.*

Firſt, becauſe the *law* is very cautious whom and with what it does intruſt. It repoſes a great confidence in the king, yet in ſome caſes his acts are not regarded by it; as the king can do no *miniſterial act*, a commitment *per ſpeciale mandatum dom. regis*, is a void commitment. Where there lies an action in caſe of wrong done to the party, the acts of the king in thoſe caſes, according to the old law phraſe, *are to be holden for none.*

Secondly, *becauſe liberty is ſo precious in the eye of the law, it is of ſo tender a regard, that it has reſerved the whole diſpoſe thereof to its own immediate direction, and left no part of it to the diſcretion of the judges; and what the law will not ſuffer to be done directly, it does forbid that it be done indirectly, or by a ſide-wind*; and ſo conſequently the judges cannot impoſe a greater fine than what the party may be capable of paying immediately into court. But if the judges may commit the party to priſon till the fine be paid, and withal ſet ſo great a fine as is impoſſible for the party to pay into court, then it will depend upon the judges pleaſure, whether he ſhall ever have his *liberty*; becauſe the fine may be ſuch as he ſhall never be able to pay; and thus every man's liberty is wreſted out of the diſpoſe of the *law*, and is ſtuck under the *girdle* of the judges.

Thirdly, becauſe the *nation* has an *intereſt* in the perſon of every particular ſubject; for every man, either one way or other, is uſeful and ſerviceable in his generation. But by theſe *intolerable fines* the *nation* will frequently loſe a member, and the perſon that is fined ſhall not only be diſabled from doing his part in the commonwealth, but alſo he and his family will become a *burden* to the land; eſpecially if he be a man of no great eſtate, for the exceſſive charge that attends a confinement will quickly conſume all that he has, and then he and his *family* muſt live upon *charity*. And thus the poor man will be doubly puniſhed, firſt, to wear out his days in *perpetual impriſonment*; and ſecondly, to ſee himſelf and family brought to a morſel of bread.

Fourthly, becauſe in all great *caſes*, and ſuch as require a grievous puniſhment, the law has in certain awarded the judgment; and next to life and corruption of blood, a ſeverer puniſhment cannot be impoſed, than to be *fined* more than a man can pay, and to lye in priſon till he does: but if ſome great caſes did happen, which could not be foreſeen, it was always uſual with the *judges*, when any ſuch caſe came before them, to adjourn it to the parliament, which had been needleſs, if they could have puniſhed at the rate that our judges have of late done.

Fifthly, becauſe where-ever the *law* has ſet down a *fine*, either by way of *puniſhment* or *caution*, it ſeldom exceeds 2000*l.* Nay, even in that tender place of liberty, *if a judge ſhall not relieve with an* habeas corpus, *but let the perſon languiſh in priſon, yet the third offence is but* 2000 *l. penalty*; and I ſuppoſe that that is but inconſiderable, in compariſon of what any of the judges are worth, yet it being taken as a puniſhment, is by the law looked upon as a great ſum.

Sixthly, becauſe the law of *England* being a *law of mercy*, and very careful to prevent *violence* and *oppreſſion*, and to that end having for almoſt every *offence* appointed its particular puniſhment, it cannot be ſuppoſed to have left ſo great a power in the *judges*, as they have exerted in this caſe. True it is, ſome things are left to their *diſcretion*; becauſe it was not poſſible to foreſee every particular caſe that might happen. Yet they are things of the leaſt ſize that are ſo intruſted to their judgment; for (as was ſaid before) *matters of any conſiderable moment were ſtill referred to the parliament*; as alſo the review of what the judges ſhould do in thoſe leſſer matters, which were left to their diſcretion.

As theſe proceedings are a great wrong to the *ſubject*, ſo are they no leſs a diſadvantage to the *king*; becauſe they will make his government look very rigid and ſevere, and gives it a grim fierce countenance, which, tho' I don't ſay that it will make the people rebel, yet I am apt to believe that it will ſet them upon their guard. It's fair and gentle uſage, that prevails upon reaſonable and free-born men. It's an eaſie government that will bow the hearts of the people of *England*; for, ſays the ſtatute of Wil. and Mar. *the eſtate of a king ſtandeth more aſſured by the love of his ſubjects than in fear of laws*; ſo that the king will be on the *loſing hand* by theſe proceedings, becauſe it ſpoils the complexion of his government.

And the king will yet be a farther ſufferer, for if 30000*l.* be the price of a *blow*, it will make *White-hall* very empty; for he that goes thither muſt approach it with fear and trembling, becauſe he does not know but he ſhall be ruined before he comes thence; for though a man arm himſelf with all the reſolution he can, yet it cannot be proof againſt the contrivance of thoſe that intend to do him a miſchief. Eſpecially if he is not upon very good terms at court, there will never want thoſe who will endeavour to draw him into the ſnare, hoping to merit by it; and though perhaps they miſtake their aim; yet however, *revenge*, that is ſo ſweet, will be greatly encouraged to provoke him, becauſe he cannot hope to reek his malice ſo plentifully as this way, becauſe if his attempt ſucceed, the other is ruined: nay, if he do not ſtrike, but only defend himſelf, yet if the judges don't like the complexion of the man, they will call the *fox's ears horns*, and lay all the blame on his back, and pronounce him more guilty that looks over the *hedge*, than he that *ſteals the horſe*.

Since the buſineſs of my lord *Devonſhire* happened, I have heard him blam'd as the author of his own misfortune, and that he drew the miſchief upon himſelf; and the reaſon given, was, *becauſe he ought not to have gone to court*; *for*, ſaid they, *he knew there were many there who wiſhed him ill, and therefore ſooner or later he would meet with an affront, and if he once fell into their hands, he muſt expect no quarter*, becauſe coll. *Culpepper*, who, without any provocation of my lord's part, had ſo unneceſſarily fallen upon him, and had by drawing blood upon my lord forfeited his hand; yet not only that, but all the reſt of the judgment was pardoned; and therefore as well that as this are looked upon as buſineſſes that were laid. But in ſaying this, I only tell your lordſhips what is ſaid *without doors*, and I don't ſpeak it as my *opinion*; but ſetting the tattle without doors aſide, I do conceive, *that can never be a juſt judgment which injures the king as well as the party that is puniſhed.*

But the true nature of my lord *Devonſhire*'s *offence* has not yet been thoroughly conſidered. The *law* does in all caſes give great allowances to what is done on a *ſudden heat*, where there does not appear any *premeditation*; and for this reaſon, when a man is indicted for murder, if upon the evidence there does not appear *malice prepenſe* either expreſſed or implyed, the party accuſed ſhall have his *clergy*. And for the ſame reaſon, though it be *death* to maim or disfigure another, yet if it be done on a *ſudden heat*, the party ſhall not dye for it; for in theſe and the like caſes the law thinks him to be more blame worthy who gave the provocation, than he that was ſo provoked; becauſe it was not the effect of an evil *mind*, but of *paſſion*; *et actus non ſit reus niſi mens ſit rea.* If therefore it be true which I have heard, that the king promiſed my lord *Devonſhire*, that coll. *Culpepper* ſhould never come to *Whitehall*, it will then follow, that my lord *Devonſhire*'s ſtriking coll. *Culpepper* was the effect of paſſion, and not of intention, becauſe he could not expect to meet him where he did. If ſo, I conceive with ſubmiſſion, that the puniſhment and offence don't in any meaſure bear proportion.

But I am perſwaded, that the judges were reſolved upon what they have done before they heard the cauſe, in caſe my lord was found guilty; and the rather, becauſe my lord chief juſtice was haranguing the offence beforehand; for when my lord *Devonſhire* appeared 6. *May*, he told him, that to ſtrike in the king's palace was little leſs, or next door to pulling the king out of his throne. Indeed, on the laſt day of the term he did explain them thus; that the time and circumſtances might be ſuch, as it would be little leſs than the aſſaulting the king in his throne. But ſeveral have told me, who heard him, and they ſay, the firſt words of *time and circumſtances* were not mentioned by him 6. *May*; and in particular, a noble lord of this houſe is one from whom I had my information; and if it were ſo, thoſe words ſavour too much of a prejudging the cauſe.

There is no doubt, but in caſe of a *fine* ſet, the court may commit the party, in caſe of obſtinacy, for not paying the fine into court. Yet this is to be taken *cum grano ſalis*; for if the *fine* be immoderate, or elſe he has not the money then ready, but either offers ſecurity to pay it, or elſe prays for ſome time, and in the interim to ſtand upon his recognizance; in either of theſe caſes, to *commit* for not paying the *fine* into court is not juſtifiable.

Firſt, becauſe it is to puniſh for not doing an impoſſibility, for *lex non cogit ad impoſſibilia.*

Secondly, it is not juſtifiable, becauſe if the *fine* be paid, the law is as much ſatisfied if it be paid five years hence, as if it be paid then immediately into court; for the *law* does not ſuppoſe, that the moſt wealthy man does carry ſo much money about him.

Thirdly, it is very unreaſonable, becauſe it does in a great part diſable the perſon to pay the *fine*; for if he be a man, that manages his own affairs, his writings, that are neceſſary to make the ſecurity, may be ſo diſpoſed of, that it will be difficult to come at them. Beſides, there being a neceſſity upon him to have the money, thoſe of whom he is to have it will be very apt to hold him to harder terms; for the world is ſo unnatural and brutiſh, that one man is but too prone to make his advantages upon the misfortunes and neceſſities of another; and that proverb, *homo homini lupus*, is in no caſe more true than in the buſineſs of money.

Proceedings in the Houſe of Lords on the Caſe of the earl of Devonſhire *after the Revolution, extracted from the* Journals of the Lords.

22 *April* 1689.

THE earl of *Huntingdon* reported from the committee of privileges the caſe of the earl of *Devon*, which was read, *viz.*

“ Ordered to report, that their lordſhips are of opinion, that the pro-
“ ceedings againſt the earl of *Devon*, in the court of *King's Bench*, in
“ *Eaſter-Term*, in the third year of king *James* the ſecond, upon an in-
“ formation for an aſſault upon Mr. *Culpepper*, wherein his lordſhip's
“ plea of privilege of parliament was over-ruled, and he was fined thirty
“ thouſand pounds, and thereupon committed to the *King's Bench* in exe-
“ cution, was a great violation of the privileges of the peers of this realm.

“ Their lordſhips are likewiſe of opinion, that thoſe judges, who ſat in
“ the ſaid court, when the ſaid judgments were given, and the ſaid com-
“ mitment made, ſhould be required to attend at the bar of this houſe to
“ anſwer for the great offence which they committed thereby.”

Hereupon the houſe made theſe orders following,

“ Ordered by the lords ſpiritual and temporal in parliament aſſembled,
“ that the clerk of the *Crown-Office* in the *King's Bench* do bring into this
“ houſe the records of that office, wherein the proceedings in the court of
“ *King's Bench* againſt the earl of *Devon* are entered in *Eaſter-Term*,
“ 3 *Jacobi ſecundi*, upon an information for an aſſault upon Mr. *Culpepper*,
“ on *Saturday* the 4th of *May* next, at ten of the clock in the forenoon.”

“ To ſir *Samuel Aſtry*, clerk of the crown
“ in the *King's Bench*, his deputy and
“ deputies, and every of them.”

“ Upon report from the committee of privileges concerning the proſe-
“ cution of the earl of *Devon*, upon an information in the *King's Bench*,
“ it is ordered by the lords ſpiritual and temporal in parliament aſſembled,
“ that the keeper of the priſon of *Newgate* be and is hereby required to
“ bring in ſafe cuſtody to the bar of this houſe ſir *Robert Wright* now in
“ his cuſtody, on *Saturday* the 4th of *May* next, at ten of the clock in the
“ forenoon, and this ſhall be a ſufficient warrant on that behalf.”

“ To the keeper of *Newgate*, his deputy
“ and deputies, and every of them.”

“ Upon report from the committee for privileges concerning the proſe-
“ cution of the earl of *Devon* upon an information in the *King's Bench*, it
“ is ordered by the lords ſpiritual and temporal in parliament aſſembled,
“ that ſir *Richard Holloway* be and is hereby required to attend this houſe
“ on *Saturday* the 4th of *May* next, at ten of the clock in the forenoon;
“ and hereof he may not fail.”

“ Ordered that Mr. *Petyt* and Mr. *Bradbury* do attend this houſe on
“ *Saturday* the 4th of *May* next, at ten of the clock in the forenoon.”

“ Ordered that Mr. juſtice *Powell* do attend this houſe on *Saturday* the
“ 4th of *May* next, at ten of the clock in the forenoon.”

3 *May* 1689.

“ Ordered that the keeper of the priſon of *Newgate* be, and is hereby re-
“ quired to bring in ſafe cuſtody, to the bar of this houſe, ſir *Robert*
“ *Wright* now in his cuſtody, on *Monday* the 6th day of *May* inſtant, at
“ ten of the clock in the forenoon; and this ſhall be a ſufficient warrant
“ on that behalf.”

“ To the keeper of *Newgate*, his deputy and
“ deputies, and every of them.”

“ Ordered that Mr. *Petyt* and Mr. *Bradbury* do attend this houſe on
“ *Monday* next, at ten of the clock in the forenoon.”

6 *May* 1689.

This day being appointed to hear ſir *Robert Wright*, ſir *Richard Holloway*, and Mr. juſtice *Powell*, concerning the proceedings in the court of *King's Bench* againſt the earl of *Devon*, in *Eaſter-Term*, 3 *Jac*. II. upon an information for an aſſault upon Mr. *Culpepper* in *Whitehall*.

And the ſaid ſir *Robert Wright*, and ſir *Richard Holloway*, being at the bar, and Mr. juſtice *Powell* in his place, and Mr. *Bradbury* and Mr. *Petyt* (who were appointed by the houſe to attend this day) being permitted by the houſe to ſtand at the end of the clerk's table, where alſo ſtood the clerk of the *Crown Office* in the *King's Bench*, and his deputy, with the records relating to this matter; which deputy having publicly read the ſaid record,

And being aſked, "what they had to ſay for themſelves in this buſineſs?"

Mr. juſtice *Powell* ſaid to this effect: "It was his great misfortune, "that he was miſguided by ſome books, which he looked on as authorities, "which he finds by their lordſhips judgments are not ſo, and he humbly "begged their lordſhips and the earl of *Devon*'s pardon. As to the fine, "he looked on 3000*l*. to be fine enough. His ſilence in that buſineſs was "his greateſt fault, for which he alſo begged pardon."

Then ſir *Robert Wright* ſaid to this effect: "that as to the breach "of privilege, they were miſguided by precedents, and as to the fine (which "is uſually ſet according to the quality and eſtate of the perſon fined) it "came from the puny judge thirty thouſand pounds; and ſo to him laſt, "according to the courſe of the court. And if he was miſtaken, he begged pardon; for he never had the leaſt diſreſpect to the lord of *Devon*."

Then ſir *Richard Holloway* ſpake to this effect: "he, as ſecond judge, "pronounced the fine 30,000*l*. which was ſet *nemine contradicente*; and if "a leſſer fine had been propoſed, he ſhould have accepted it; and did not "juſtify the proceedings, but looked on it as an exceſſive fine; and begged "my lord *Devon*'s pardon, and ſubmitted all to their lordſhips."

And then they being aſked, "whether they had no diſcourſe together "before, concerning the ſaid fine?"

Sir *Robert Wright* ſaid, "we diſcourſed not of the fine, but in court."

Sir *Richard Holloway* alſo declared, "he had no direction from either "the king or chancellor about the ſaid fine."

Whereupon Mr. juſtice *Powell* ſaid, "ſir *Richard Holloway* may re"member there was a diſcourſe of the fine 5 or 6 days before at the lord "chancellor's, where ſir *Robert Wright*, ſir *Richard Holloway*, ſir *Richard* "*Allibone*, and himſelf were."

"This ſir *Richard Holloway* ſaid he did not remember."

And ſir *Robert Wright* denied that they met there purpoſely about the fine.

Then they withdrew.

Mr. juſtice *Powell* being aſked, "what diſcourſe they had at the lord "chancellor's?" ſaid, "the lord chancellor firſt propoſed twenty thou"ſand pounds; but afterwards ſaid it would be better if thirty thouſand "pounds, and then the king might abate ten thouſand. To this he de"clared his diſlike to the other judges, but not before the chancellor."

Then he withdrew.

After debate the houſe were of opinion,

"That the court of *King's Bench*, in over-ruling the earl of *Devon*'s "plea of privilege of parliament, and forcing him to plead over in chief, "it being within the uſual time of privilege, did thereby commit a mani"feſt breach of the privilege of parliament.

"That the fine of thirty thouſand pounds, impoſed by the court of "*King's Bench* upon the earl of *Devon*, was exceſſive and exorbitant, "againſt *magna charta*, the common right of the ſubject, and againſt the "law of the land."

Ordered, that the judges this day preſent do give their opinions to-morrow, at ten of the clock in the forenoon, how the law ſtands as to the commitment of a peer upon a fine to the king.

7 *May* 1689.

The houſe heard the judges, what caſes and precedents there were in the law, for the commitment of a peer of this realm in execution for a fine.

And, after conſideration thereof, it is ORDERED, that this houſe will, on *Wedneſday* next, at ten of the clock in the forenoon, take into their conſideration a queſtion ariſing upon the caſe of the earl of *Devonſhire*, "whe"ther a peer of this realm may by law be committed in execution for a "fine?" and that notice be given to the king's counſel of the ſaid order.

15 *May* 1689.

Upon reports from the lords committees for privileges, who were of opinion, "that the proceedings againſt the earl of *Devon*, in the court of "*King's Bench* in *Eaſter-Term* in the third year of king *James* the ſecond, "upon an information for an aſſault upon Mr. *Culpeper*, wherein his "lordſhip's plea of privilege of parliament was over-ruled, and he was "fined thirty thouſand pounds, and thereupon committed to the *King's* "*Bench* in execution, were great violations of the privileges of the peers "of this realm."

After hearing the record of the court of *King's Bench*, wherein the judgment againſt the earl of *Devon* is entered, read, and alſo ſir *Robert Wright*, ſir *Richard Holloway*, and Mr. juſtice *Powell*, (who gave the judgment againſt the ſaid earl of *Devon*) what they could ſay for themſelves to juſtify their proceedings; and notice having been given to the king's counſel, to the end that they might attend if they had any thing to offer, whether a peer of this realm might by law be committed in execution for a fine, the ſaid counſel did accordingly give their attendance, (after a weeks notice) but did offer nothing therein.

After full conſideration had of the ſeveral caſes and precedents wherein the privileges of the peers have been concerned; the lords ſpiritual and temporal in parliament do declare and adjudge, that the court of *King's Bench*, in over-ruling the earl of *Devon's* plea of privilege of parliament, and forcing him to plead over in chief, it being within the uſual time of privilege, did thereby commit a manifeſt breach of the privilege of parliament; and that the fine of thirty thouſand pounds, impoſed by the court of *King's Bench* upon the earl of *Devon* was exceſſive and exorbitant, againſt *magna charta*, the common right of the ſubject, and the law of the land; and that no peer of this realm at any time ought to be committed for the non-payment of a fine to the king.

XXVIII. *The Caſe of the Bankers in the Court of* Exchequer, *and afterwards in the* Exchequer-Chamber *and* Parliament, 1690, 1696, 1699.

[*After the reſtoration it was uſual with a few great bankers, to accommodate the crown with large ſums of money on the credit of the growing produce, either of taxes granted by parliament, or of the hereditary revenue; the mode being, not, as it now generally is, to charge the publick revenue with annuities in perpetuity for the intereſt redeemable on payment of the principal, but to give tallies and orders of the* Exchequer *for paying both principal and intereſt out of the firſt monies from the funds pledged as a ſecurity. Lord* Clarendon *particularly explains, how ſuch buſineſs was tranſacted between the crown and the bankers.* 2. Clarend. Contin. fol. ed. 315. *The good faith for ſome time obſerved by the crown had eſtabliſhed ſo much confidence on the part of the bankers, that they lent their money without the leaſt ſuſpicion of ſeeing a miſapplication of the revenue appropriated to repay them. Other circumſtances too concurred to inſpire confidence; for in* 1667, *the king iſſued a declaration, by which he ſolemnly promiſed, that he would not "on any occaſion whatever" ſuffer an interruption of payment on theſe orders of the* Exchequer; *and about the ſame time they received the ſanction of a ſtatute to make them transferrable property.* Bankers Caſe *by* Turnour, 3d. edit. 135. 19 Cha. 2. c. 12. Keble's Stat. *But notwithſtanding thus pledging his royal word, the bankers were finally deceived. In* 1671, *when the debt to them was above a million of money, the king, having reſolved on a new war with the* Dutch, *and knowing that his parliament would be averſe to the meaſure, to ſupply his neceſſities reſorted to the violent expedient of ſhutting the* Exchequer; *which was executed, by poſtponing the payments there on orders before iſſued, with a very limited exception. The diſgrace of firſt ſuggeſting this ſtep is attributed to the earl of* Shafteſbury, *that of propoſing it to the king is given to lord* Clifford; *both of which lords were members of the then confidential council ſo well known by the name of the "cabal." At firſt the poſtponement of payment was only for a year; but it was afterwards continued ſo as to exclude the bankers from all hope of ever receiving the principal of their great debt. Theſe proceedings involved the bankers, particularly ſir* Robert Vyner, *in the greateſt diſtreſs; nor was the miſchief confined to them, great part of the monies they had lent to the crown belonging to other perſons; ſo much indeed, that the number of creditors to the bankers was computed to be near ten thouſand. However, after various poſtponements of payment to the bankers and their creditors, it was at length agreed by the crown to relieve the bankers; for which purpoſe the king, in* 1677, *granted annuities to them out of the hereditary* Exciſe, *equal to ſix* per cent. *intereſt on their ſeveral debts, but redeemable on payment of the principal.*

principal. This intereſt was accordingly paid till 1683; but it then became in arrear, and continued ſo at the revolution; and the ſuits, which were commenced to enforce the payment of theſe arrears, are the ſubject of the following caſe.

The firſt proceeding was a petition to the barons of the Exchequer for payment of the arrears of the annuities granted; to which petition the attorney-general demurred. Two points were made, firſt whether the grant out of the Exciſe was good, and ſecondly whether a petition to the barons of the Exchequer was a proper remedy. On the firſt point the whole court agreed, that in general the king could alienate the revenues of the crown; but Mr. baron Lechmere differed from the other barons, by thinking, that this particular revenue of the Exciſe was an exception to the general rule. But all agreed, that the petition was a proper remedy. Judgment was therefore given for the petition, by directing payment to the complainants at the receipt of the Exchequer.

A writ of error was brought on this judgment by the attorney-general in the Exchequer-Chamber. There all the judges, who argued, held the grant out of the Exciſe good. A majority of them, including lord chief juſtice Holt, alſo approved of the remedy by petition. But lord chief juſtice Treby was of opinion, that the barons of the Exchequer were not authorized to make order for payments on the receipt of the Exchequer, and therefore that the remedy by petition to the barons was inapplicable. In this opinion he was ſeconded by lord keeper Somers, who diſtinguiſhed himſelf by one of the moſt elaborate arguments ever delivered in Weſtminſter-Hall. A doubt then aroſe, whether the lord chancellor and lord high treaſurer were at liberty to give judgment according to their own opinion in oppoſition to that of a majority of the attendant judges; in other words, whether the judges called by the lord treaſurer and lord keeper were to be conſidered as mere aſſiſtants to them without voices. The opinion of the judges being taken on this point, ſeven againſt three held, that the lord treaſurer and lord chancellor were not concluded by the opinions of the judges; and therefore that the lord keeper in the caſe in queſtion, there being then no lord treaſurer, might give judgment according to his own opinion. Lord Somers, concurring in this idea, reverſed the judgment of the court of Exchequer. But the caſe was afterwards carried by error into parliament, and there the lords reverſed the judgment of the Exchequer-Chamber, and affirmed that of the Exchequer. However, notwithſtanding this final deciſion in favour of the bankers and their creditors, it appears by a ſubſequent ſtatute, that they were to receive only one half of their debt; the 12 & 13 W. 3. after appropriating certain ſums out of the hereditary Exciſe for publick uſes, providing, that, in lieu of the annuities granted to the bankers and all arrears, the hereditary Exciſe ſhould after the 26th of December, 1701. be charged with annual ſums equal to an intereſt of three per cent. till redeemed by payment of one moiety of the principal ſums. 12 & 13 W. 3. c. 12, & 15. Why ſuch a compoſition of the debt, after prevailing in the ſuits commenced to enforce payment, ſhould be accepted, we are unable to account.—It is obſervable, that part of one article of the impeachment of lord Somers is founded on his reverſing the judgment of the Exchequer without calling the barons before him; the 31 E. 3. c. 12. particularly requiring, that they ſhould be called to give the reaſons of their judgment. The ſame article criminates him for ſaying, that particular ſubjects might have rights and intereſts without any remedy for the recovery, unleſs by petition to the perſon of the king; a poſition to which effect occurs in the courſe of his argument in this caſe of the bankers. See 3 Chandl. Deb. Comm.

There are ſeveral printed reports of this caſe. Mr. Freeman, afterwards lord chancellor of Ireland, gives a ſhort note of the arguments in the Exchequer. The fifth volume of Modern Reports contains a full ſtate of the pleadings in the caſe, and of the arguments of the chief juſtices Holt and Treby in the Exchequer-Chamber. Holt's argument is alſo in Skinner's Reports, 601. Lord Somers's argument in the Exchequer-Chamber was printed ſeparately in 1733. All theſe, except the report by Skinner, we ſhall introduce in their reſpective order. We ſhall then add a copy of the printed caſe which was delivered to the lords by the plaintiff on error in parliament; for which we are obliged to the kind communication of Mr. Serjeant Hill, whoſe valuable treaſure of parliamentary caſes is well known to gentlemen of the law. It was out of our power to give the printed caſe on the part of the crown; it not being in the collection, to which we were permitted to have recourſe, though eſteemed by far the moſt perfect of any exiſting. The whole of what we ſhall offer to the reader will conclude with the judgment in parliament, and the proteſt entered upon the occaſion, both taken from the journals of the Lords.

About a year after the determination of the caſe of the bankers by the Lords, a controverſy aroſe about the diſpoſition of the forfeited eſtates in Ireland, in the courſe of which the queſtion as to the right of the king to alienate the hereditary eſtates and revenues of the crown was conſidered. Dr. Davenant commenced the diſpute, by publiſhing his diſcourſe on grants and reſumptions. The object of the diſcourſe was to evince, that the grants made by king William of the Iriſh forfeitures ſhould be reſumed, and that thoſe forfeitures ſhould be applied towards payment of the public debts. In enforcing this advice, though the author argues for the propriety of a parliamentary reſumption of royal grants, when they are exorbitant, and the neceſſities of the ſtate are urgent, yet he rather inſinuates a doubt of than directly denies the ancient right of the crown to alienate its hereditary eſtates. But then he cites a record of parliament of the 11 Hen. 4. which never occurred in the argument of the caſe of the bankers, and which he conſtrues to be a ſtatutory prohibition of future alienations, except when the king ſhall be out of debt; adding, that the force of this law had been evaded by clauſes of non obſtante, but that theſe were condemned by the bill of rights. The great ability and learning conſpicuous in this performance rendered it of too much importance, not only to thoſe intereſted in the grants of the Iriſh forfeitures, but to all deriving under regal alienations of a modern date, to ſuffer the impreſſions from it to remain unreſiſted. The ſubject was accordingly undertaken by a writer, whoſe name is not tranſmitted to us, but whoſe work proved him very adequate to the conteſt. The piece we allude to was publiſhed early in 1701, by the title of "Jus Regium, or the King's Right to grant Forfeitures, "and other Revenues of the Crown, &c." It is reprinted in the 2d volume of the collection of State-Tracts for the reign of king William. The author lays a great ſtreſs on the concurrence of all the judges in the caſe of the Bankers, that in general the king could alienate; and gives a ſhort hiſtory of the ſeveral opinions advanced in the progreſs of that caſe. He alſo denies the application of the record of 11 Hen. 4. cited by Davenant. The reſult of the controverſy was unfavourable to the grantees of the Iriſh forfeitures: for by an Engliſh act of parliament, ſuch lands as had been forfeited ſince the revolution were veſted in truſtees to be ſold for the publick benefit; all previous grants of the forfeitures were made void; and the rents, directed to be reſerved to the crown on ſale by the truſtees, were appointed to be for ſupport of the government of Ireland, and to be unalienable. 11 and 12 W. 3. c. 2. Such readers, as are diſpoſed to inform themſelves further on the conteſt in parliament about theſe Iriſh forfeitures, may conſult Mr. Harris's life of king William, and the Journals of the Engliſh parliament for the years 1699 and 1700, with the 2d volume of State-Tracts during the reign of king William.

The "Bankers caſe by Mr. Turnour," which we have referred to in the preceding part of this note, was publiſhed by that gentleman ſoon after the firſt ſtoppage of payment to the bankers, in order to expoſe the injuſtice and illegality of that meaſure, and to perſuade the re-opening of the Exchequer. It is written with great ability and learning, and well deſerves to be read by every lawyer. The author animadverts on thoſe, who adviſed ſhutting the Exchequer with great ſeverity; but at the ſame time obſerves great decorum towards the king perſonally.

Extract from Freeman's *Reports, vol.* 1. *p.* 331.

Upon the petition of Hornbee, Williamſon, Smith, *and* Stone. Hill. 1691.
In Scaccario.

KING *Charles* the ſecond, having taken up great ſums of money of the petitioners, or their teſtators, who were bankers, in conſideration thereof granted to them and their heirs ſeveral annuities, chargeable upon the hereditary revenue of exciſe, given to the king by the ſtatute of 12 *Car.* 2. *cap.* 24.

The ſaid annuity being for many years arrear, the petitioners exhibited their petition to the barons of the *Exchequer* for the ſaid arrears; whereupon two queſtions did ariſe,

1ſt queſtion. Whether this grant of the king were good to bind the ſucceſſor, ſo as to continue a charge upon the ſaid revenue?

2d queſtion. Whether the petitioners had taken their proper remedies for recovery of the ſaid arrears?

Ad primam Quæſt', *Atkins*, *Turton* and *Powell*, were of opinion, that the grant was good to charge the ſucceſſor.

It was admitted, that the king could not grant away his kingdom, nor put it in vaſſalage or ſubjection to the pope or any other, as is ſaid in 4 *Inſt.* 12, 14, 83, 202, 357.

That the king may grant an annuity or charge his revenue. 2 *Cro.* 78. 5 *Co.* 56. 7 *Co.* 21. 9 *H.* 7. 12. 2 Inſt. 58. *Vaugh.* 161. 4 Inſt. 29. *Dyer* 92. 9 *H.* 6. 12. *Bro. Quinz.* 7. 2 Rol. 176, 198. 19 *H.* 6. 6. 4 Inſt. 126. 6 *Co.* 73. 2 Rol. 98. *Moor* 833. 2 *H.* 7. 8. *Reg. Orig.* 193. 266. 307. 21 *Ed.* 3. 47.

That it muſt be ſaid of whoſe hands to be received, or elſe it is not good, for he cannot charge his perſon. *Nat. Brev.* 52. *Dy.* 92. *Hob.* 148.

Obj. That it was out of an incorporeal inheritance.

Anſ. It is good notwithſtanding. 1 *Inſt.* 47.

Obj. It was pretended, that the king was deceived in his grant, as to the conſideration.

Anſ. If the king be deceived in a conſideration real executory, it will void the grant, but not in a conſideration perſonal executed. *Plow.* 454. *Lane* 3. 76. 108. 10 *Co.* 47. 6 *Co.* 56. 1 *Co.* 43. *Yelv.* 1. 11 *Co.* 90. *Hob.* 230.

That there have been acts of reſumption ſhews that the grants were good, becauſe they could not be avoided but by act of parliament.

Obj. This is but an authority, and ſo void by death, becauſe revocable.

Anſ. It is an intereſt; and a licence coupled with an intereſt is irrevocable. *Dy.* 176. *Nat. Brev.* 223. *Plow.* 457. *Palm.* Rep. 171. 172. *Dyer* 49.

Ad ſecund' Quæſt', all the barons held, that the remedy by petition to the barons was a proper remedy, and that it was in their power to relieve the petitioners, and give judgment for them. *Kielw.* 178. *Stamf.* 73. 75.

A petition of right lies as well for a perſonal as a real due, *Plow.* 377. 434. *Wroth*'s caſe, and *Nevil*'s caſe, 9 *H.* 6. 13. 1 roll. 539. *Lane* 38. 4 Inſt. 415.

Baron *Lechmere e contra:* that the king could not alien or charge this revenue. *Fleta* 183. 3. 549. *Selden*, *Grotius*, *Pryn.* 9, 390. Vindication of the liberties of *Engl. Freemen.*

1. It was given in lieu of a revenue unalienable but by act of parliament, viz. the court of *Wards.*

2. If the king may alien part, he may alien all, and then the ſubjects will bear the burden, for they muſt grant new ſupplies to ſupport the crown.

3. This charge was granted by the king at a time when he had no occaſion for money, but merely for to gratify his prodigality, being at a time when the parliament rained golden ſhowers into his lap.

It appears by the anſwer *Edward* the third gave the pope, that it is not in the power of the king to alien his kingdoms, &c. 4 *Inſt.* 13. 14.

4. The very words of the act of parliament ſhew, that it was the intent of the parliament it ſhould continue in the crown unalienable, there being the words *for ever hereafter to remain to the king and his ſucceſſors* ſeveral times in the act.

5. A power in the act, to enable the king to lett to farm for three years, ſhews the parliament never intended he ſhould have power to alien as he pleaſed.

6. Where the parliament intended a power in the king to alien, it is otherwiſe worded; as in the acts that give monaſteries to the crown it is ſaid, *to do therewith as he pleaſed.*

But judgment was given for the petitioners, upon the opinion of the other three judges.

Extract from 5. Modern Reports 29, *laſt edition.*

The King *and* Hornby's *caſe.* Term. S. Trin. 7. W. 3.

Vide Shower's M. S. Rep. A Petition to the treaſurer and barons of the *Exchequer*, exhibited by *Joſeph Hornby*, *Ter. Hill.* 1 *Gulielmi* & *Marie*, for the allowance of letters patents granted by king *Charles* II. for payment of an annuity out of the *Exciſe*, &c. The attorney-general demurs generally. The court gave judgment for the petitioner *Hornby*; whereupon the attorney-general brought a writ of error.

Argued in the *Exchequer-Chamber*, where the judgment was reverſed.

Record. petition. & morac. ſuperinde & judicium, & brevis de error'.

The arguments of the lord chief juſtice *Treby* for the reverſal, and the lord chief juſtice *Holt* for the affirmance.

Termino Sancti Hillarii *anno* 1° Gulielmi & Marie, *regis & reginæ.*

Lond. Mid. M*Emorandum, quod* Joſephus Hornby *de* Lond. *gen' venit coram baronibus de* Scaccario *viceſſimo primo die* Octobr. *hoc termino in propria perſona ſua & exhibuit curiæ hic quaſdam literas patentes dom.* Caroli *ſecundi nuper regis* Angliæ, &c. *ſub magno ſigillo* Angliæ *confect. geren. dat. triceſſimo die* Aprilis *anno regni dict. dom.* Caroli *nuper regis* Angliæ *viceſſimo nono eid.* Joſepho Hornby, *hæred. & aſſignat. ſuis confect. de annuali redditu ſive ſumma mille trecent. quinquagint. & duar. libr. ſeptendecim ſolid. & decem denar. anuatim ſolvend. recipiend. & percipiend.* [*Anglice* taken] *per præd.* Joſephum Hornby, *hæred. & aſſign. ſuos in perpetuum de redditibus reventionibus proficuis & perquiſit. & emolument. & ſolutionibus reſervat. ſurgen. creſcen. & provenien. eid. nuper dom. regi* Carolo *ſecundo hæred. & ſucceſſoribus ſuis de pro ex ſive ratione debiti* Exciſæ [*Anglice* duty of Exciſe] *ſuper potum lupulat' & illupulat' & alios liquores infra regn.* Angliæ, *domin.* Walliæ; *& vill.* Barwici ſuper Twedam *(virtute actus parliamenti fact. anno regni ejuſdem nuper regis* Caroli *ſecundi) duodecimo, intitul.* An act for taking away the court of *Wards and Liveries*, and tenures in *capite*, and by knights ſervice and purveyance, and for ſettling a revenue upon his majeſty in lieu thereof. *Dat. & conceſſ. ſolvend. quarteriatim* (viz.) *ad feſtum* Annunciationis *beatæ* Mariæ Virginis, Nativitatis *ſancti* Johannis Baptiſt', *ſancti* Mich. *Arch.* & Nativitatis Dom. *per æquas & æquales portiones ſub fiducia in iiſdem literis patentibus expreſſâ. Et præd.* Joſephus Hornby *petit literas patent. de recordo hic irrotulari. Quas quidem literas patent. barones hic receperunt & illas legi & ſub ſerie verborum in iiſdem literis patent. content. irrotulari præceperunt. Et tenor earund. literarum patent' ſequitur in hæc verba. (Scilicet:)*

Charles the ſecond, by the grace of God of *England*, *Scotland*, *France*, and *Ireland*, king, defender of the faith, &c. to all to whom theſe preſents ſhall come, greeting. Whereas ſince the time of our happy reſtoration, we have been involved in great and foreign wars, as well for the ſafety of our government, as for the vindication of the rights and privileges of our ſubjects; in the proſecution whereof, we have been conſtrained for ſome years paſt, contrary to our inclination, to poſtpone the payment of the monies due from us to ſeveral goldſmiths and others, upon tallies ſtruck, and orders regiſtred on, and payable out of ſeveral branches of our revenue, and otherwiſe: and although the preſent poſture of our affairs cannot reaſonably ſpare ſo great a ſum as muſt be applied to the ſatisfaction of thoſe debts, yet conſidering the great difficulties which very many of our loving ſubjects, who put their monies into the hands of thoſe goldſmiths and others, from whom we received it, do at preſent lie under, almoſt to their utter ruin for want of their ſaid monies; we have rather choſe, out of our princely care and compaſſion towards our people, to ſuffer in our own affairs, than that our loving ſubjects ſhould want ſo ſeaſonable relief: and having ſeriouſly conſidered of the way and means to effect this our preſent purpoſe, we could not find any more effectual and leſs prejudicial to us in the preſent poſture of our revenue, than by granting to each of them the ſaid goldſmiths and others, to whom we are indebted as aforeſaid reſpectively, and to his and their heirs and aſſigns, an annual ſum or payment anſwerable, in value yearly to the intereſt of their reſpective debts, at the rate of ſix pounds *per cent. per annum*, for all ſuch monies as are due unto them: the conſideration whereof induced us to command our high treaſurer of *England*, to cauſe all the accompts of the ſaid goldſmiths to be ſtated and made up by *Richard Aldworth*, eſq; one of our auditors, to the firſt day of *January*, 1676, which having been accordingly caſt up and ſettled, it appears thereby that there is due and owing by us unto our truſty and well-beloved ſubject, *Joſeph Hornby* of *London*, goldſmith, the ſum of twenty-two thouſand five hundred forty-eight pounds, five ſhillings and ſixpence. In ſatisfaction whereof, according to our intent in theſe preſents expreſſed, we have reſolved to grant unto him the ſum of one thouſand three hundred fifty-three pounds ſeventeen ſhillings and tenpence *per annum*, out of that part of our revenue of *Exciſe* which was granted to us, our heirs and ſucceſſors for ever, by an act of parliament made in the twelfth year of our reign, intituled, *an act for taking away the court of* Wards and Liveries *and tenures* in capite, *and by knights ſervice and purveyance, and for ſettling a revenue upon his majeſty in lieu thereof.* Know ye therefore, that we, for the conſideration aforeſaid, and in ſatisfaction or lieu of the ſaid debt, or ſum of twenty-two thouſand five hundred forty-eight pounds five ſhillings and ſixpence, by us owing to the ſaid *Joſeph Hornby*, and of our eſpecial grace, certain knowledge, and meer motion, have given and granted, and by theſe preſents, for us, our heirs and ſucceſſors, do give and grant unto the ſaid *Joſeph Hornby*, his heirs and aſſigns, one annual or yearly rent or ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, of lawful money of *England*, to be yearly had, received and taken by the ſaid *Joſeph Hornby*, his heirs and aſſigns for ever, out of the rents, revenues, profits and perquiſites, emoluments and payments reſerved, ariſing, accruing or coming, or that hereafter ſhall or may be reſerved, ariſe, accrue or become due or payable to us, our heirs and ſucceſſors, out of, for or by reaſon of the duty of *Exciſe* upon beer, ale, and other liquors, within our kingdom of *England*, dominion of *Wales*, and town of *Berwick upon Tweed*, by vertue of the ſaid act of parliament; the ſaid ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence *per annum*, to be paid quarterly at the four moſt uſual feaſts in the year, that is to ſay, at the feaſt of the *An-*

nunciation of the bleſſed virgin *Mary*, the *Nativity* of St. *John* the Baptiſt, St. *Michael* the archangel, and the birth of our lord God, commonly called *Chriſtmas*, by even and equal portions, in truſt for ſuch of the creditors of the ſaid *Joſeph Hornby*, as within one year next enſuing the date hereof ſhall, upon notice of theſe preſents, deliver up their ſecurities, and accept of aſſignments of proportionable parts of the ſaid yearly ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, for ſatisfaction of their reſpective debts, according to the true intent and meaning of the covenant in that behalf herein after contained, for ſo much as their proportionable parts ſhall amount unto, and in the mean time ſhall not ſue or proſecute the ſaid *Joſeph Hornby*, his heirs, executors or adminiſtrators, for ſuch their debts: and the reſidue and overplus of the ſaid yearly ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, to remain and be to and for the proper uſe and benefit of the ſaid *Joſeph Hornby*, his heirs and aſſigns, without any truſt or account whatſoever; the firſt payment of the ſaid ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, to commence from the feaſt of the birth of our lord God one thouſand ſix hundred ſeventy and ſix. And we do hereby, for us, our heirs and ſucceſſors, authorize, direct and appoint our high-treaſurer, chancellor, under-treaſurer, chamberlain and barons of our *Exchequer*, and the high-treaſurer and commiſſioners of the treaſury, chancellor, under-treaſurer, chamberlain and barons of the *Exchequer*, of us, our heirs and ſucceſſors that hereafter ſhall be, and all other officers and miniſters of the ſaid court, and of the receipt thereof, now being, or that hereafter ſhall be, that they and every of them, in their reſpective places, do from time to time, upon requeſt of the ſaid *Joſeph Hornby*, his heirs or aſſigns, reſpectively perform all acts neceſſary for the conſtant and due payment of the ſaid yearly rent or ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, to the ſaid *Joſeph Hornby*, his heirs or aſſigns, as the ſame ſhall grow due and become payable, and of every ſuch part and parts as the ſaid *Joſeph Hornby*, his heirs or aſſigns, ſhall grant or aſſign to any perſon or perſons from time to time, according to the truſt and agreement in that behalf herein contained; and as occaſion ſhall be, levy or ſtrike, or cauſe to be levied or ſtricken in the receipt of the *Exchequer*, of us, our heirs and ſucceſſors from time to time, tallies of pro or aſſignment, or other tallies, as the caſe may require, and as ſhall be deſired, upon the commiſſioners, treaſurers, receivers, collectors or farmers of the ſaid duty and revenue for the time being, or upon ſuch other perſon or perſons as ought to be charged or chargeable therewith, or accountable to us, our heirs and ſucceſſors for the ſame, who are hereby required and directed from time to time to make due payment thereof accordingly, ſo that the ſaid *Joſeph Hornby*, his heirs and aſſigns reſpectively, of all or any part or parts thereof, may certainly and duly, and on every of the ſaid quarterly feaſt days aforementioned, for ever hereafter have and receive the ſaid yearly rent or ſum of one thouſand three hundred fifty two pounds ſeventeen ſhillings and tenpence, hereby granted out of our ſaid revenue, without any further or other warrant to be ſued for, had or obtained from us, our heirs and ſucceſſors, in that behalf, and without any accompt, impreſt, or other charge to be ſet upon the ſaid *Joſeph Hornby*, his heirs or aſſigns, or any of them, for the ſame. And if it ſhall happen at any time hereafter, that the rents, iſſues or profits of our ſaid revenue ſhall be paid into the receipt of our *Exchequer*, or elſewhere, to the uſe of us, our heirs or ſucceſſors, before the levying of ſuch tallies, or before payment be made to the ſaid *Joſeph Hornby*, his heirs or aſſigns reſpectively, of the ſaid yearly rent or ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, or any part thereof, according to the true intent of theſe our letters patents; then and in ſuch caſe our expreſs will and pleaſure is, and we do hereby of our further eſpecial grace, certain knowledge, and meer motion, for us, our heirs and ſucceſſors, authorize and require the high-treaſurer and commiſſioners of the treaſury, chancellor or under-treaſurer, chamberlain and barons of the *Exchequer*, of us, our heirs and ſucceſſors for the time being, and all other officers and miniſters of the *Exchequer*, and of the receipt thereof, that they or ſuch of them to whom it appertains, do from time to time, as often as need ſhall be, well and truly pay or cauſe to be paid unto the ſaid *Joſeph Hornby*, his heirs and aſſigns reſpectively, out of ſuch monies as ſhall be ſo paid into our *Exchequer*, or elſewhere, to the uſe of us, our heirs and ſucceſſors, all ſuch or ſo much of the ſaid yearly rent or ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, as ſhall from time to time be in arrear or unpaid after the feaſt days or times of payment aforeſaid, or any of them, without any further or other warrant to be ſued for, had or obtained in that behalf, and without any accompt, impreſt, or other charge to be ſet upon him the ſaid *Joſeph Hornby*, his heirs or aſſigns, for the ſame or any part thereof. And theſe our letters patents, or the exemplification, entry or inrollment thereof, ſhall be unto the high-treaſurer, commiſſioners of the treaſury, chancellor and under-treaſurer, chamberlain and barons of the *Exchequer*, of us, our heirs and ſucceſſors, and all other officers and miniſters of the ſaid *Exchequer*, and to the commiſſioners, treaſurer, receivers, collectors, farmers, and all other officers and miniſters of our ſaid revenue of exciſe, a good and ſufficient warrant and diſcharge for all and whatſoever they or any of them reſpectively ſhall do or cauſe to be done in or about the premiſſes, purſuant to our will and pleaſure herein before declared. And our further will and pleaſure is, and we do hereby of our eſpecial grace, certain knowledge, and meer motion, grant, direct and appoint, that all ſuch tallies of pro or aſſignment, or other tallies as ſhall be hereafter levied or ſtruck upon our ſaid revenue of exciſe at the inſtance and deſire of the ſaid *Joſeph Hornby*, his heirs or aſſigns reſpectively, for or towards the ſatisfaction or ſecuring the payment of the ſaid yearly rent or ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, or any part thereof, ſhall be well and truly paid and ſatisfied out of the ſaid revenue quarterly, and every quarter as aforeſaid, and ſhall be preferrable and preferred before any other quarterly payments out of the ſame, by vertue or colour of any warrant, order or direction whatſoever of any after-date, excepting only ſuch yearly ſums as are neceſſarily payable for the management of our ſaid revenue, and except the yearly ſums amounting to twelve thouſand two hundred and nine pounds fifteen ſhillings and fourpence halfpenny or thereabouts, payable thereout unto our deareſt conſort the queen, as parcel of her jointure, and the yearly ſum of twenty-four thouſand pounds payable to our dear brother *James* duke of *York*; which ſaid ſeveral ſums, we will and do hereby direct, ſhall be paid and ſatisfied unto our ſaid deareſt conſort, and to our ſaid moſt dear brother, out of the ſaid revenue, duly, conſtantly, and in the firſt place before any of the ſaid payments, or any other payments whatſoever to be made out of the ſame. And our will and pleaſure is, and the ſaid *Joſeph Hornby*, for himſelf, his heirs, executors, and adminiſtrators, covenant, grant and agree, to and with us, our heirs and ſucceſſors, that he the ſaid *Joſeph Hornby*, his heirs and aſſigns, ſhall and will at any time or times, within one year next enſuing the date hereof, grant and aſſign proportionable part and parts of the ſaid yearly rent or ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, unto ſuch of his creditors or others by their appointment, as will be content to deliver up their ſecurities, and take ſuch aſſignments in ſatisfaction of their debts, according to the truſts herein before expreſſed; and that he the ſaid *Joſeph Hornby*, his heirs or aſſigns, ſhall not, nor will, during the ſaid ſpace of one year, make any grant or aſſignment of all or any part of the ſaid yearly ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, unto any perſon or perſons but ſuch as are creditors of the ſaid *Joſeph Hornby*, or others by their appointment as aforeſaid: and that if any difference ſhall at any time or times, within the ſpace of one year and an half now next coming, ariſe between the ſaid *Joſeph Hornby*, his heirs, executors, adminiſtrators or aſſigns, or any of them, and the ſaid creditors, or any of them, touching the aſſigning or diſpoſing of all or any part or parts of the ſaid annuity or yearly ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, that then the ſaid *Joſeph Hornby*, his heirs, executors, adminiſtrators and aſſigns, ſhall and will from time to time ſubmit themſelves, and all matters and things relating thereunto, to the comptrol of the lord high treaſurer, or the commiſſioners of the treaſury for the time being, and ſhall and will obſerve and fulfil all ſuch order and directions as the lord high treaſurer, or the commiſſioners of the treaſury, ſhall from time to time make or give concerning the ſame. Provided always, and our further will and pleaſure, intent and meaning is, and is hereby declared to be, that all aſſignments to be made as well before as after the ſaid ſpace of one year, of any part or parts of the ſaid yearly ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence hereby granted, ſhall, within the ſpace of thirty days next after the execution thereof, be enrolled before the auditor of the receipt of the *Exchequer*, or the clerk of the *Pells* for the time being, to the end it may appear what aſſignments have been granted, and payments may be made thereupon according to the intent of theſe preſents, and that every aſſignment not ſo enrolled, ſhall be of none effect. Provided alſo, that when we, our heirs or ſucceſſors, ſhall at entire payments have actually paid the full ſum of twenty-two thouſand five hundred forty-eight pounds five ſhillings and ſixpence, of lawful money of *England*, to the ſaid *Joſeph Hornby*, his heirs and aſſigns, and to ſuch perſon or perſons to whom ſuch aſſignment or aſſignments ſhall be made as aforeſaid reſpectively in proportion amongſt them, after the rate of one hundred pounds principal money, for each and every ſix pounds *per ann.* which they, every, or any of them reſpectively ſhall or ought to have and enjoy of the ſaid yearly ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, hereby granted by vertue of theſe preſents, or ſuch aſſignment or aſſignments as ſhall be made and inrolled as aforeſaid, and ſo after thoſe proportions and rates for greater or leſſer ſums as the reſpective caſes ſhall happen, and alſo the arrears of the ſaid yearly ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, if any be; that then theſe preſents, and the grant of the ſaid yearly ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, ſhall ceaſe and be void, any thing herein before contained to the contrary notwithſtanding. And we do hereby of our further eſpecial grace, certain knowledge and meer motion, for us, our heirs and ſucceſſors, grant unto the ſaid *Joſeph Hornby*, his heirs and aſſigns; and our expreſs pleaſure is, that theſe our letters patents, and every clauſe, article, and ſentence therein contained, whereupon any ambiguity or doubt ſhall or may ariſe, that the ſame ſhall be at all times expounded and taken moſt favourably and beneficially for the advantage of the ſaid *Joſeph Hornby*, his heirs and aſſigns; and that theſe our letters patents ſhall be good and effectual in law, and ſhall be available to the ſaid *Joſeph Hornby*, his heirs and aſſigns reſpectively, for his and their receiving and enjoying the ſaid yearly rent or ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, with all the arrearages thereof in manner aforeſaid, notwithſtanding the not reciting or not mentioning, or not truly and certainly reciting or mentioning of any act or acts of parliament, whereby the ſaid revenue was given and granted unto us, our heirs and ſucceſſors, or by what title we have received or enjoyed the ſame: and notwithſtanding the not reciting or not mentioning in this our grant, any leaſe or leaſes, grant or grants, charge or charges, made of or upon, or out of the ſaid revenue, or any part thereof alone on the ſaid revenue, or on the ſame, and any other part or parts of our revenue of exciſe, or generally on our revenue, or the date or contents of ſuch leaſes or grants, or of the perſons to whom the ſame are made: and notwithſtanding that no mention be herein of the direct and certain yearly and other rents and profits of the premiſſes, or of the certain, true or direct nature of ſuch rents and profits, or how or in what manner they ariſe, become due, or payable unto us, our heirs and ſucceſſors: and notwithſtanding the not mentioning how, and in what manner the ſaid debts due from us to the ſaid *Joſeph Hornby* ariſeth particularly, or any miſtake in the ſtating, or in the quantity or ſum of the aforementioned debt due, or herein mentioned to be due by us to the ſaid *Joſeph Hornby*: and notwithſtanding the ſtatute of *Henry* the fourth, late king of *England*, publiſhed in the firſt year of his reign: and notwithſtanding

ſtanding the ſtatute of *Henry* the ſixth, late king of *England,* made and publiſhed in the eighteenth year of his reign: and notwithſtanding the ſtatute of *Henry* the eighth, late king of *England,* made and publiſhed in the twenty-ſixth year of his reign: and notwithſtanding the ſtatutes or acts of this preſent parliament, made and publiſhed in the twelfth year of our reign, whereby the ſaid revenue was, or was mentioned or intended to be granted, ſettled, and confirmed unto us, our heirs and ſucceſſors, or any article, clauſe, ſentence, or reſtraint therein contained: and notwithſtanding any defect in this our grant, or any act, ſtatute, ordinance, proclamation, proviſion or reſtraint whatſoever made or provided, or any other act, matter, or thing whatſoever to the contrary hereof, in any wiſe notwithſtanding. And laſtly, our will and pleaſure is, and we do hereby of our more abundant grace, certain knowledge, and meer motion, for us, and our heirs and ſucceſſors, covenant and grant to and with the ſaid *Joſeph Hornby,* his heirs and aſſigns, that due payment ſhall be made of the ſaid yearly ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, hereby granted, and all other things hereby directed to be done on our part, ſhall be from time to time done and performed, according to the true intent and meaning of theſe preſents: and that if at any time hereafter, any defect or queſtion ſhall be found or made of or in the validity of this our preſent grant, that then upon the humble petition of the ſaid *Joſeph Hornby,* his heirs and aſſigns, we, our heirs and ſucceſſors, will be graciouſly pleaſed to make ſuch further grant, aſſurance and confirmation of the ſaid yearly rent or ſum of one thouſand three hundred fifty-two pounds ſeventeen ſhillings and tenpence, to the ſaid *Joſeph Hornby,* his heirs or aſſigns, as by our attorney-general ſhall be approved of and adviſed, and by the council learned in the law, of the ſaid *Joſeph Hornby,* his heirs or aſſigns, ſhall be adviſed and deſired, and with ſuch beneficial clauſes therein to be contained, as ſhall be thought expedient and moſt conducing to the performance of our will and pleaſure herein before declared. *In witneſs* whereof, *&c.*

‘ Quibus quidem literis patentibus lectis præd. *Joſephus Hornby* dicit, quod vigore præmiſſorum ipſe idem *Joſephus Hornby* ſeiſit. fuit de & in præd. annuali redditu ſive ſumma mille trecent. quinquagint. & duarum libr. ſeptendecim ſolid. & decem denar. ut de feodo & jur. & ſic inde ſeiſit. exiſten. ipſe idem *Joſephus Hornby* poſtea, ſcilicet quinto die *Auguſti* anno regni domini (nuper regis) *Caroli* ſecundi triceſimo tertio apud *Weſtm.* præd. per quoddam ſcriptum ſuum ſigillo ſuo ſigillat. & in cur. hic de record. debit. modo & debit. Juris forma irrotulat. cujus dat. eſt eiſdem die & anno ult. mentionat. pro conſideration. in eodem ſcript. mentionat. relaxavit præfat. domino *Carolo* ſecundo, hæredibus & ſucceſſoribus ſuis annual. ſum. ſexcent. libr. parcel. præd. annual. ſum. mille trecent. quinquagint. duar. libr. ſeptendecim ſolid. & decem denar. præfat. *Joſepho* ut præfert. conceſs. prout per record. cur. il. liquet & apparet, & ipſe idem *Joſephus Hornby* continuavit, & adhuc ſeiſit. exiſt. ut de feodo & jure de & in annuali redditu ſive ſumma ſeptingent. quinquagint. duar. libr. ſeptendecim ſolid. & decem denar. reſid. præd. annualis redditus ſive ſummæ mille trecent. quinquagint. duar. libr. ſeptendecim ſolid. & decem denar. in literis patentibus præd. mentionat. & per eaſdem eid. *Joſepho* ut præfert. conceſs. & eundem annualem redditum ſive ſummam ſeptingent. quinquagint. & duar. libr. ſeptendecim ſolid. & decem denar. reſid. præd. annualis redditus ſive ſummæ mille trecent. quinquagint. duar. libr. ſeptendecim ſolid. & decem denar. de jure habere & recipere debuit & debet vigore literarum patentium præd.

‘ Et præfat. *Joſephus* ulterius dicit, quod ipſe recepit & ſatisfactus fuit, & exiſtit de & pro omnibus arrearagiis præd. annualis ſummæ ſeptingent. quinquagint. & duar. libr. ſeptendecim ſolid. & decem denar. debit. & ſolubil. ad feſtum & pro feſto annunciationis beatæ *Mariæ* virginis, anno regni domini (nuper regis) *Caroli* ſecundi triceſimo quinto, & quod ſumma quinque mille octogint. & duar. libr. quatuor denar. & unius obuli, pro arrearagiis ejuſdem annualis ſummæ ſeptingent. quinquagint. & duar. libr. ſeptendecim ſolid. & decem denar. poſt præd. feſtum annunciationis beatæ *Mariæ* virginis, anno triceſimo quinto ſupradict. debit. & ſolubil. ad feſtum & pro feſto natalis domini, communiter vocat. *Chriſtmas* ult. præterit. anno primo regnorum dictorum domini regis & dominæ reginæ nunc modo debit. & inſolubil. exiſtit præfat. *Joſepho Hornby,* ſcilicet ſum. cent. octogint. & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno quarterio anni finit. ad feſtum nativitatis ſancti *Johannis* baptiſtæ, anno regni dicti (nuper regis) *Caroli* ſecundi triceſimo quinto, & ſimil. ſum. centum octoginta & octo librarum quatuor ſolidorum quinque denariorum & unius oboli, pro uno alio quarterio anni finit. ad feſtum ſancti *Michaelis* archangeli anno triceſimo quinto ſupradict. & ſimil. ſum. centum octoginta & octo librarum quatuor ſolid. quinque denariorum & unius oboli, pro alio quarterio anni finit. ad feſtum natalis domini anno triceſimo quinto ſupradict. & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno quarterio anni finit. ad feſtum annunciationis beatæ *Mariæ* virginis anno regni dicti (nuper regis) *Caroli* ſecundi triceſimo ſexto, & ſimil. ſum. cent octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum nativitatis ſancti *Johannis* baptiſtæ anno triceſimo ſexto ſupradict. & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum ſancti *Michaelis* archangeli anno triceſimo ſexto ſupradict. & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum natalis domini anno triceſimo ſexto ſupradict. & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum annunciationis beatæ *Mariæ* virginis anno primo (nuper regis) *Jacobi* ſecundi, & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum nativitatis ſancti *Johannis* baptiſtæ anno primo ſupradict. & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum ſancti *Michaelis* archangeli anno primo ſupradict. & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum nativitatis domini anno primo ſupradict. & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum annunciationis beatæ *Mariæ* virginis anno ſecundo regni ejuſdem nuper *Jacobi* ſecundi regis, & ſimil. ſum. cent. octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum nativitatis ſancti *Johannis* baptiſtæ anno ſecundo ſupradict. & ſimil. ſum. centum octoginta & octo librarum quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum ſancti *Michaelis* archangeli anno ſecundo ſupradict. & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro alio quarterio anni finit. ad feſtum natalis domini anno ſecundo ſupradicto, & ſimil. ſum. centum octoginta & octo librarum quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum annunciationis beatæ *Mariæ* virginis anno tertio regni ejuſdem (nuper regis) *Jacobi* ſecundi, & ſimil. ſum. centum octoginta & octo librarum quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum nativitatis ſancti *Johannis* baptiſtæ anno tertio ſupradict. & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum ſancti *Michaelis* archangeli anno tertio ſupradicto, & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum natalis domini anno tertio ſupradicto, & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum annunciationis beatæ *Mariæ* virginis anno quarto regni præd. (nuper regis) *Jacobi* ſecundi, & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum nativitatis ſancti *Johannis* baptiſtæ anno quarto ſupradicto, & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum ſancti *Michaelis* archangeli anno quarto ſupradicto, & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum natalis domini anno domini milleſimo ſexcenteſſimo octogeſimo octavo, & ſimil. ſum centum octoginta & octo librarum quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum annunciationis beatæ *Mariæ* virginis anno regnorum præd. *Gulielmi* & *Mariæ* (nunc regis & reginæ) primo, & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum nativitatis ſancti *Johannis* baptiſtæ anno primo ſupradicto, & ſimil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius oboli, pro uno alio quarterio anni finit. ad feſtum ſancti *Michaelis* archangeli anno primo ſupradicto, necnon aliis conſil. ſum. centum octoginta & octo libr. quatuor ſolid. quinque denar. & unius obuli, pro uno alio quarterio anni finit. ad feſtum natalis domini nunc ult. præterit. & anno primo ſupradicto, attingen. in toto ut ſupra: et petit idem *Joſephus Hornby,* quod præd. breve paten. in forma præd. fact. juxta tenor. & effect. earundem præfat. *Joſepho Hornby* allocentur, & quod præd. ſept. aliæ quarteriales ſummæ centum octoginta & octo librarum quatuor ſolid. quinque denar. & unius oboli, a feſto annunciationis beatæ *Mariæ virginis* anno regni dicti (nuper regis) *Caroli* ſecundi triceſimo quinto uſque ad feſtum & pro feſto natalis domini nunc ult. præterit. attingen. ut ſupra, ad quinque mille octoginta & duas libr. quatuor denar. & unum obulum, ſicut præfertur debit. & aretro, & inſolut. exiſten. præfat. *Joſepho Hornby* ſolventur, quodque etiam præd. annual. reddit. ſive ſum. ſeptingent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. reſid. præd. annual. reddit. ſive ſum. mille trecent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. in literis patentibus præd. mentionat. a præd. feſto natalis domini ult. præterit. præfat. *Joſepho Hornby,* hæred. & aſſign. ſuis, ad præd. ſeparalia feſta in dictis literis patentibus ſpecificat. in poſterum per æquas & æquales portiones ſecundum formam & effectum literarum patentium præd. ſolvetur, quodque talis toties quoties caſus requireret, levand. ad recept. hujus ſcaccar. pro dicto annuali redditu ſive ſumma ſeptingent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. reſid. præd. ſum. mille trecent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. quando & quoties idem reſid. reddit. ſive ſum. ſeu aliqua pars vel parcel. inde deveniret, debit. levarentur ſecundum formam, effectum & directionem earundem literarum patentium, & ſecundum curſum recept. hujus ſcaccarii, & quod omnes poteſtat. remed. & res quæcunque in & per dict. liter. patent. conceſſ. & mentionat. tangen. ſolution. denar. ſum. in dictis literis patent. mentionat. & pro beneficio præfat. *Joſephi Hornby,* hæred. & aſſign. ſuorum exequerentur & capiant effectum ſecundum formam & effectum liter. patent. præd. cum hoc quod idem *Joſephus Hornby* verificare vult, quod ad præd. feſtum natalis domini ult. præterit. ſufficien. fuer. & ad hoc ſufficien. exiſtunt de reddit. revention. proficuis, perquiſition. [*Anglice* perquiſites] emolumen. & ſolution. renovan. provenien. recept. & ſolut. de & pro debito de l' exciſe præd. virtute actus parliamenti præd. ad ſolvend. & ſatisfaciend. præfat. *Joſepho Hornby* præd. ſummam ſeptingent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. ſicut præfertur ei debit. & aretro exiſten. ultra & præter omnes annual. ſum. neceſſar. & ſolubil. uſque tempus illud pro gubernation. [*Anglice* management] dict. revention. & ultra & præter præd. ſum. duodecim mille ducent. & novem libr. quindecim ſolid. quatuor denar. & unius oboli, aut eo circiter, ſolubil. exinde *Catherinæ* reginæ, tunc conſort. nunc reginæ dotal. dicti domini (nuper regis) *Caroli* ſecundi, ut parſel. juncturæ ſuæ, in literis patentibus præd. mentionat. & ultra & præter præd.

ſum. viginti & quatuor mille libr. ſolubil. præd. *Jacobo*, tunc duci *Eborac.* fratri domini (nuper regis) *Caroli* ſecundi, in literis patent. præd. conceſſ. cum hoc etiam quod præd. *Joſephus Hornby* verificare vult, quod nec præd. dominus *Carolus* ſecundus, nuper rex *Angliæ*, *&c.* nec præd. dominus *Jacobus* ſecundus, nuper rex *Angliæ*, nec præd. dom. *Willielmus* & *Maria*, modo rex & regina *Angliæ*, aut eorum aliqui vel aliquis huc uſque non ſolverit ſeu ſolvit præfat. *Joſepho Hornby* aut aſſignat. ſuis præd. ſum. viginti duar. mille quinquagint. quadraginta & octo libr. quinque ſolid. & ſex denar. in dictis literis patent. mentionat. ſeu aliquam inde partem ſeu parſel. ultra ſeu præter ſum. decem mille libr. exiſten. conſid. in dict. ſcript. relaxat. per præfat. *Joſephum Hornby* præfat. *Carolo* ſecundo, nuper regi *Angliæ*, *&c.* ut præfertur fact. & pro qua ſum. ipſe idem *Joſephus Hornby* relaxavit eidem domino nuper regi præd. annual. ſum. ſexcent. libr. parſel. præd. annual. ſum. mille trecent. quinquaginta & duarum libr. ſeptendecim ſolid. & decem denar. ſuperius mentionat.

To this the attorney-general demurs generally, and the ſaid *Joſeph Hornby* the petitioner joined in demurrer.

And the court gave judgment for the petitioner *Joſeph Hornby*; whereupon the attorney-general brought a writ of error in the *Exchequer-Chamber*. Note, the judgment is recited in the writ of error; which is as follows:

‘DOM. rex & dom. regina nunc *Gulielmus* & *Maria* mandaverunt theſaurario & baronibus de ſcaccar. ſuo breve ſuum clauſum in hæc verba, ſcilicet; *Gulielmus* & *Maria* Dei gratia *Angliæ*, *Scotiæ*, *Franciæ* & *Hiberniæ*, rex & regina, fidei defenſores, *&c.* theſaur' & baronibus ſuis de ſcaccar. ſuo ſalutem quia in record. & proceſſ. ac etiam in redditione judicii loquelæ cujuſdem petitionis cujuſdam *Joſephi Hornby*, quæ fuit in curia noſtra coram vobis præfat. baronibus noſtris de ſcaccar. noſtro præd. termino ſancti Hillarii anno regni noſtri primo exhibit. de allocatione quarundam literarum patent. dom. nuper regis *Caroli* ſecundi præd. *Joſepho Hornby*, & hæredibus ſuis confect. & ſolution. cujuſdam annual. reddit. per eaſd. literas patent. per eundem nuper regem eidem *Joſepho Hornby*, & hæredibus ſuis conceſſ. ſolvend. & percipiend. de revention. proficuis & ſolution. ſurgen. & provenien. nobis, hæred. & ſucceſſores, de pro & ratione debit. exciſæ, ſup. potum lupulat. & illupulat. & alios liquores, nec non arrearag. ejuſdem annual. reddit. pro ſeperal. quarter. anni finit. ad feſtum nativitat. domini anno primo ſupradict. error. intervenit manifeſtus ad grave damnum noſtrum. Ac cum in ſtatuto in parliamento dom. *Edward.* nuper regis *Angliæ* tertii, progenitoris noſtri apud *Weſtm.* anno regni ſui triceſimo primo tent. edit. inter cæterum concordat. fuit & ſtabilit. quod in omnibus caſibus regem aut alias perſonas tangen' ubi quis queritur de errore facto in ſcaccar. cancellar. theſaur. venire fac. coram eis in aliquam cameram conſilii juxta ſcac. record. & proceſſ. hujuſmodi extra dict. ſcaccar. & aſſumptis ſibi juſticiariis & aliis peritis talibus quales ſibi videbitur fore aſſumen. vocari fac. coram eis baron. de ſcaccar. præd. ad audiend. informationes ſuas & cauſas judiciorum ſuorum & ſuper hoc negotium hujuſmodi debite fac. examinari. Et ſi quis error invent. fuit illum corrigi & rotulos emendari ac poſtea eos in dict. ſcaccar. ad executionem inde faciend. remitt. fac. ſicut pertinet prout in eod. ſtatuto plenius continetur. Nos igitur volentes errorem ſi quis fuerit juxta formam ſtat. præd. corrigi & celerem juſtitiam fieri in hac parte vobis mandamus quod ſi judicium inde redditum ſit tunc record. & proceſſ. præd. cum omnibus ea tangen. coram dom. commiſſionariis ad cuſtod. ſigillum magnum *Angliæ* & vobis vos præfat. theſaur. in cameram conſilii juxta ſcaccarium præd. [vocat le *Council-Chamber*] die martis videlicet nono die inſtantis menſis *Februarii* venire fac. Ut quod dom. commiſſionarii & vos præfat. theſaur. viſis & examinat. record. & proceſſ. præd. auditiſq; informationibus veſtris vos præfat. barones ulterius in hac parte de conſilio juſticium & aliorum peritor. hujuſmodi fieri fac. quod de jure & ſecundum formam ſtat. præd. fuerit faciend. *T.* nobis ipſis apud *Weſtm.* 1° die *Februarii*, anno regni *W.* 3. Fiſh. alloc. *R. Atkins.*

‘Record. & proceſſ. de quibus in brevi de errore ſit mentio ſequitur, *&c.*

‘Et ſuper hoc *Georgius Treby* miles attorn' dictor. dom. regis & dom. reginæ, nunc general. quæ pro eiſdem dom. rege & dom. regina in hac parte ſequitur, præſen. hic in curia in propria perſona ſua pro eiſdem dom. rege & dom. regina dicit quod in record. & in proceſſ. præd. nec non in redditione judicii præd. de & ſuper præd. morac. in lege manifeſte eſt errat'. In hoc videlicet quod præd. literæ patent. ſuperius recitat. & materia in eiſdem content. & ſpecificat. ac præd. materia per dict. *Joſephum Hornby*, in forma præd. allegat. minus ſufficien. in lege exiſtunt ad ipſos dom. regem & dom. reginam nunc de aut cum ſolution. denar. prædict. de arrearag. pro præd. ſeperalibus quarteriis anni aut cum præd. ſolution. præd. annual. reddit. ſive ſum. præfat. *Joſepho Hornby* in forma præd. onerand'. Eo tamen non obſtante adjudicat' exiſtit' per barones præd. quod præd. literæ patent. præfat. dom. nuper regis *Caroli* ſecundi præfat. *Joſepho Hornby*, ut præfertur conceſſ. & ſuperius recitat. & irrotulat. juxta tenorem & effectum earundem ipſi præfat. *Joſepho Hornby* allocar' Et quod præd. ſumma quinq; mille octogint. & duarum librarum quatuor denar. & un. obol. pro arrearagiis dict. annual. reddit. ſive ſum. ſeptingent. quinquagint. duarum librarum ſeptendecim ſolidor. & decem denar. reſid. præd. annual. reddite ſive ſum. mille treſcentar. quinquagint. duar. librar. decem ſolidor. & decem denar. ut literis patent. præd. mentionat. a præd. feſto annunciationis beatæ *Mariæ* præd. virginis anno regni dict. dom. nuper regis *Caroli* ſecundi triceſimo quarto, uſque ad feſtum & pro feſto natalis dom. anno primo regni dom. *Gulielmi* & dom. *Mariæ* nunc regis & reginæ ſupradict. ſic ut præfertur aretr. & inſolut. exiſten' ipſi præfat. *Joſepho Hornby* ad recept. hujus ſcaccar. per man. commiſſionar. theſaur. & camerar. ejuſdem recept. qui modo ſunt & per man. commiſſionar. theſaur. & camerar. ejuſdem recept. pro & tempore exiſten. de theſauro provenien. accreſcen. ex illa parte revention. de le exciſe in literis patent. præd. mentionat. fore conceſſ. dicto nuper regi *Carolo* ſecundo, hæred. & ſucceſſ. ſuis imperpetuum per actum parliament. fact. anno regni ejuſdem nuper regis duodecimo in man. eorund. commiſſionar. theſ. & camerar. jam exiſt. & in manus commiſſionar. theſ. theſaur. & camerar. impoſterium exiſten. ſolvetur poſt & ultra annual. ſum. neceſſar. ſolubil. pro gubernation. [*Anglice management*] dict. revention. de le exciſe, & poſt & ultra annual. ſum. attingen' ad duodecim mille ducent. & novem libras quindecim ſolid. & unum obul. ſeu eo circiter in literis patent. prædict. mentionat. fore ſolubil. exinde annuatim *Catherinæ* nuper reginæ conſort' dicti nuper regis *Caroli* ſecundi & modo dom. reginæ dotiſſæ *Angliæ* & parcel. juncturæ ſuæ, & poſt & ultra præd. ſummam vigint. & quatuor mille librarum in literis patent. præd. mentionat. fore ſolubil. *Jacobo* tunc duci *Ebor.* fratre dict. dom. nuper regis *Caroli* ſecundi & quod præd. annual. reddit. ſive ſumma ſeptengint. quinquagint. & duarum librarum ſeptendecim ſolid. & decem denar. reſid. præd. annual. reddit. ſeu ſum. mille treſcentar. quinquagint. & duarum librarum ſeptendecim ſolid. & decem denar. in præd. literis patent. mentionat. eidem *Joſepho Hornby* ſic ut præfertur conceſſ. a præd. feſto natalis dom. anno regni dict. dom. *Gulielmi* & dom. *Mariæ* nunc regis & reginæ *Angliæ*, *&c.* primo ſupradict. ipſi eidem *Joſepho Hornby*, hæred. & aſſig. ſuis ad recept. hujus ſcaccar. per manus commiſſionar. theſ. theſaur. & camerar. ejuſdem recept. pro tempore exiſten. de theſauro de tempore in tempus provenien. accreſcen. & emergen. de præd. hæreditar. revention. de le exciſe in man. ſuis de tempore in tempus exiſten. poſt & ultra annual. ſummam neceſſar. ſolubil. pro gubernation. [*Anglice management*] dict. revention. de le exciſe, & poſt & ultra annual. ſummam attingen. ad duodecim mille ducent. & novem libras quindecim ſolid. quatuor denar. & unum obol. aut eo circiter in dictis literis patent. mentionat. fore ſolubil. exinde annuat. præfat. *Catharinæ* modo reginæ dotiſſæ *Angliæ* ut parcel. junctur. ſuæ & poſt & ultra annual. ſummam viginti quatuor mille librarum in eiſdem literis patent. mentionat. fore annuat. nuper ſolubil. præfato *Jacobi* duc. *Ebor.* & modo annuat. ſolubil. dom. regi & dom. reginæ nunc ad præd. ſeperal. feſta annunciationis beatæ *Mariæ* virginis, nativitatis ſancti *Johannis* baptiſtæ ſancti *Michaelis* archang. & nativitat. dom. dei noſtri [communiter vocat' *Chriſtmas*] per æquas & æquales portiones annuatim ſolvetur. Et quod tall. toties quoties caſus requiret levand. ad dict. recept. ſcaccar. pro præd. annual. redditu ſive ſum. ſeptingent. quinquaginta & duarum librarum ſeptendecim ſolid. & decem denar. reſid. præd. annualis redditus mille trecentarum quinquagint. duarum librarum ſeptendecim ſolid. & decem denar. idem reſid. redditus ſeu aliqua inde parcel. deveniret debit. ſecundum formam & effectum literarum patent. præd. ſuper commiſſionarium theſaurarium receptor' collector' ſive firmarium dict. hæreditariarum revention. de l' exciſe per officiar' recept. hujus ſcaccar. pro tempore exiſten. ad quos *Levat. Tallior.* in ead. recept. pertinet ſeu pertinebit de tempore in tempus ad requiſition. ejuſdem *Joſephi Hornby* hæred. & aſſign. ſuorum leventur ſecundum formam effectum & directionem literar. patent. prædict. & ſecundum curſum dict. recept. ſcaccar. ſalvo ſemper jure regis & reginæ nunc ſi, *&c.* Ideo in eo manifeſte eſt erratum. Errat' eſt etiam in hoc quod per record. præd. apparet quod judicium præd. in forma præd. reddit. reddit. exiſtit pro præfat. *Joſepho Hornby* verſus eoſdem dom. regem & dom. reginam ubi per legem terre hujus regni *Angliæ* judicium ill. reddi debuiſſet pro eiſdem dom. rege & dom. regina nunc verſus præfat. *Joſephum Hornby*. Ideo in eo manifeſte eſt erratum. Et ſic idem attornat. general. proeod. dom. rege & dom. regina dicit quod in record. & proceſſ. præd. ac in recordo judicii præd. manifeſte eſt errat. & ſuper inde idem attornat. dictor. dom. regis & dom. reginæ pro eodem dom. rege & dom. regina petit quod judicium illud ob errores præd. & alios in record. & proceſſ. exiſten. revocetur adnulletur & penitus pro nullo habeatur, ac etiam breve dictor. dom. regis & reginæ ad premuniend. præfat. *Joſephum Hornby*. eſſend. coram præfat. dom. cuſtod. magni ſigill' *Angl'* & domino theſaurario ad certum diem auditur. record. ac proceſſ. præd. errores. Et ulterius ad faciend. & recipiend. quod fuit juſtum in premiſſis, *&c.* Et ei conceditur, *&c.*

‘Super quo idem *Joſeph' Hornby* dicit quod nec in record. & proceſſ. præd. neq; in redditione judicii præd. de & ſuper præd. morac. in lege in ullo eſt erratum. Et petit, quod curia dict. dom. regis & dom. reginæ nunc hic procedat tam ad examinationem record. & proceſſ. præd. quam materiæ præd. ſuperius pro erroribus aſſignat. Sed quia curia vult adviſari in premiſſis antequam, *&c.* ideo dies dat. eſt partibus præd. in ſtatu quo nunc ſicut uſq; a die paſch. in unum menſem proximum anno quarto regni dom. *Gulielmi* & dom. *Mariæ* nunc regis & reginæ de judicio ſuo modo audiend. eo quod curia dict. dom. regis & dom. reginæ nunc inde nondum, *&c.* Ad quem diem vener. hic partes præd. & ob cauſam præd. habend. diem ulterior. in ſtatu quo nunc uſq; in octab. ſanct. Trin. ad judicium ſuum inde audiend. eo quod curia hic inde nondum, *&c.*

The argument of lord chief juſtice Treby.

THERE are two points in this caſe:

1. Whether theſe letters patents are valid in law, and ſufficient to bind the king?
2. Whether that the remedy that theſe petitioners have taken be proper?

As to the firſt, I am of opinion, that the letters patents are valid and ſufficient to bind the king.

It is objected, that the word [ſucceſſors] in the ſtatute by which this revenue is given, intends that it ſhall be fixed in the crown, and unalienable. To this I anſwer, that there are ſeveral other ſtatutes by which lands and other revenues were given to the king by the ſame words that are in this ſtatute; and yet the kings of *England* had always power to alien

Vid. *Plowd.* 234 to 243.

them, as appears by *Berkley*'s caſe in *Plowd.* and by the ſtatute of monaſteries, *Vaugh.* 62. 2 *Rol. Abr.* 198. *&c.* So king *Charles* II. having an eſtate of inheritance in this branch of his revenue, had the ſame power to alien this, as he had to alien any other part of it.

Skin. Rep. 601. 6. 2. 603 *&c.*

It has been ſtrongly objected, that if the king ſhould have a power to alien all his lands and revenues, it might be of pernicious conſequence to his ſubjects; and that then our *Exchequer* in *England* would be like the *Spaniſh Exchequer*, of which it's ſaid that it receives taxes and revenues from the general, only to pay them out to ſome particular perſons.

To this I anſwer, that this might be ſome reaſon to induce the making an act of parliament to reſtrain the king's power of alienation; but ſince here the parliament has thought fit to give the king ſuch a power, we ought to acquieſce and ſubmit to it.

If the barons can award the king's treaſure out of the *Exchequer.*

But that, which I ſhall chiefly proceed on, is the judgment, which I think to be very extraordinary, and ſuch as the barons could not give; for I do not think, that they can award the king's treaſure out of the *Exchequer*. Then I take this judgment to be very erroneous and deficient in ſeveral particulars.

1. It leaves out the treaſurer, who is the chief officer concerned in diſpoſing the king's money.

Plow. 378. 381.457.458.

2. The chamberlain of the *Exchequer* ought to have been mentioned as well as the treaſurer; and ſo is the judgment in *Nevile* and *Wroth*'s caſe in *Plowd.* and alſo in *Cotton*'s Records.

3. This judgment appoints tallies to be ſtruck from time to time, and orders the method of payment of the ſeveral ſums of money, which I take it the barons cannot do; for they ſeem to undertake to do what is proper work for an act of parliament, which only can appoint the treaſurer to make payments in ſuch an order. 9 *H.* 4. 28.

Poph. 203. 211 *Noy* 89. *Lat.* 176. 177 188. Vide 8 *Roll. Ab.* 771.774. 1 *Rol. R.* 228. *Telv.* 130. 2 *Cro.* 386. 632. *Hob.* 194. 3 *Cro.* 442.

In the next place, I take it that this judgment cannot be amended, becauſe theſe are faults in ſubſtance, and the law is very nice and curious in judgment. So if a *miſericordia* be entered for a *capiatur*, the judgment is erroneous. So it is if it be *conceſſum eſt*, inſtead of *conſideratum eſt*, *&c.* *Latch.* 177. ſo is *Poph. caſu ultimo.*

Now I come to the remedy, which I take to be the great and difficult point of the caſe.

And I am of opinion, that no judgment can be given upon this petition to the barons; for I do not think that the court of *Exchequer* has any power to diſpoſe of the king's treaſure, and therefore I cannot ſee how this judgment can have any effect. Indeed it's ſaid, that the petitioner will have a writ to the officers of the *Treaſury*, or to the treaſurer himſelf; and if they do not obey this *liberate*, that then they will enforce to it by action. But this they cannot do; for I hold that the treaſurer may chooſe, upon a bare warrant, to pay in what order he thinks fit.

Then they have ſhewn no precedent that ever any ſuch action was brought; though indeed my lord *Coke*, in his 4th *Inſtit.* 116. ſeems to hint at it, and ſo does *Plo. Com.* 186. and 2 *H.* 7. 8. 9. 10. But there the *liberate* always went to the ſubordinate officer, but never to the treaſurer himſelf. By the treaſurer, I mean the treaſurer of the *Exchequer*, and not the lord high treaſurer of *England*; for that great officer has long been diſcontinued; and when he was in being, the greateſt uſe of him was when he had the honour to have been your lordſhip's collegue in this place.

So that I take it, that the treaſurer may if he pleaſed pay theſe annuities to the petitioners; but whether he will do it or no, is left to his conſcience and diſcretion; but he cannot be compelled to it but by authority of parliament.

Then this remedy is not warranted by the courſe of the *Exchequer*. If there were any ſuch uſage there, I agree it would be the law of the land; and ſo is *Rawlin*'s caſe, 4 *Rep.* and *Plo.* 32. But there has been no ſuch uſage there; and in this point I concur with my brother *Lechmere*, who perhaps has the greateſt experience in the court of *Exchequer* of any judge that ever ſat there; for I think I lately heard him ſay, it was ſixty years ſince he practiſed there.

5 *Mod.* 13.14.

I have reaſon to think, whatever Mr. *Plowden* ſays, that theſe *liberate*'s were granted upon petitions to the king himſelf, and not to the barons. You may ſee abundance of them in *Ryley*'s *Placita Parliamentaria*. It appears indeed in *Broke*, *tit. Talley de Exchequer pl.* 4. that upon delivery of this writ to the officer, and aſſets in the *Exchequer*, an action lay againſt the officer for non-payment. But that ever it could be brought againſt the treaſurer or chamberlain, was never heard of.

But, ſay they, there is a clauſe in the patent, which empowers the treaſurer, *&c.* to make payments, *&c.* and this they call a perpetual warrant.

But this makes againſt the petitioners: for if it is ſo, why do they prefer a petition to the barons of the *Exchequer?* If they can have their debt without a petition barely upon this patent, where there is a grant, a command, and warrant to the treaſurer and officers to pay the money, (which, ſay they, amounts to a *liberate*) then it's a vain thing to ſue in the *Exchequer* for a judgment: for it cannot be preſumed, that a *liberate* under the ſeal of the *Exchequer*, *teſte* chief baron, ſhould be of more force than a *liberate* under the ſeal of *England*, *teſte meipſo. Reg.* 192.

To clear this point, it's neceſſary to enquire into the power of the court of the *Exchequer*.

The power of the court of *Exchequer* over the king's treaſury.

I do agree that they are ſupreme auditors, and have authority over the king's treaſure; but it is *in tranſitu*, as upon the ſheriff's accounts, or any other of the king's officers concerning the bringing in of the king's revenues into the *Exchequer*; but when the money is there, it is in its center, and the barons have nothing to do with it. They are only conduits, but not products, 2 *Inſt.* 197. 4 *Inſt.* 115. And it would be of dangerous conſequence for ſo many to have to do with the treaſury, leſt (as *Vernon* ſays in his book) there be too many leaks in the ciſtern.

I confeſs, the court of *Exchequer* does uſe to enrol charters in the *Exchequer*, and that is the foundation of the accounts, *&c.* and ſo is *Plowd.* But whether the barons of the *Exchequer* have a power to comptrol and command the treaſurer is a great and arduous point. It is in effect, whether the barons ſhall have the power to turn out the treaſurer when they pleaſe; and whether the petitions, that were formerly preferred to the king, ſhall be now exhibited to the barons of the *Exchequer?* Which matters I muſt own I cannot be brought to imagine, though I would think as favourably as poſſible in this caſe; for I give this opinion, not becauſe I would, but becauſe I muſt.

But I take this power in the barons, to be againſt the nature and inſtitution of the court of *Exchequer*; for they are originally empowered by the king to get in his revenue, and 'tis for the ſake of the revenue that they have any thing elſe to do. And all they do is to convey the king's treaſure to its proper place; but they cannot diſpoſe of it; for there is no correſpondence between the barons and the officers of the treaſury.

On reverſal of attainders no reſtitution of money paid to the king.

Upon reverſal of attainders, we know there is no reſtitution of the money paid to the king; and the reaſon is, becauſe the barons cannot in ſuch caſe comptrol the treaſury. I remember ſeveral years ſince, there was a ſolicitor, who brought the rolls of a forfeited eſtate in diſpute into court; and they ordered the money to be put into the hands of the Remembrancer; for they ſaid, if it was once paid into the treaſury, there was no getting it out again.

The caſe in ſhort is no more than this:

Suppoſe the king be indebted to the petitioners, and alſo to the army, the fleets, *&c.* Now who ſhall direct the payment of theſe debts, the barons, or the treaſurer? Who is the beſt judge of the ſtate of the kingdom, and of its neceſſities? So that ſuppoſe there was only 4000l. in the *Exchequer*, and we were threatened with a foreign invaſion, how ſhall this money be diſpoſed? Says the treaſurer, to raiſe men to pay the army and our fleets, that by their aſſiſtance we may prevent the enemy from coming amongſt us. No, ſay the barons, we muſt pay the bankers with this money, though at the ſame time we open the gates, and let in *Hannibal* to our utter ruin and deſtruction. My lord *Coke*, in his 4th *Inſtitut.* treating of the court of the *Exchequer*, takes notice of the oaths taken by the treaſurer, and alſo by the barons. In the treaſurer's oath it is mentioned, that he is to keep and diſpenſe the king's treaſure ſafely; but in the baron's oath, there is not a word of this matter taken notice of: which to me is an argument that the treaſurer is judge in point of iſſuing money, whether it be due and payable or not, and to whom, in what manner, and when it ſhall be paid, *&c.* And this I take to be the true reaſon why no action can be brought againſt the treaſurer, becauſe he acts as a judge, and not as a miniſter of the court; for he is not attendant to it, as ſheriffs, bailiffs, *&c.* are. So I take it, "may be paid," is enough for the barons to ſay; but "muſt be paid," is only for the treaſurer to ſay. *Cro. El.* 545. *Babington*'s caſe.

The treaſurer of the *Exchequer*, his oath.

The nature of his office. Vide *Moore* 475. 11 *Co.* 90.92.

Then it is treaſon to counterfeit the great or privy-ſeal, becauſe they only have to do with the king's revenue; but it was never thought treaſon to counterfeit the *Exchequer* ſeal, which has nothing to do with it. *Plowd. Com.* 223.

In the conteſts heretofore between the king and people, what was meant when they complained that the king's treaſure was miſpent and miſemployed? Not that 'twas paid away without letters patents, or taken away without the king's grant; but it was this. They blamed the treaſurer, becauſe he paid away the king's treaſure to perſons unworthy, to minions and favourites, though they had grants from the crown by letters patents: but yet it was left to the treaſurer's diſcretion to have paid them or not; which he ſhould not have done, when perhaps the public good required it.

Now I come to our authorities in our books.

I ſhall begin with 2 *Ed.* 3. 25. & 38 Aſſ. *pl.* 20. wherein it's ſaid by the chief baron, that we ſhall take conuſance of all matters that may turn to the king's advantage, but not a word concerning the diſpoſal of the treaſury. *Vid.* 19 *H.* 6. 62. 63. and 2 *Roll. Rep.* 301. are expreſs.

So in *Stradling* and *Morgan*'s caſe, *Plowd.* 207. it's ſaid, that no pleas ſhall be held in the *Exchequer*, but for the advantage of recovery of the king's debts, and bringing in his revenues; ſo that the *Common Pleas* in the *Exchequer*, are only founded on getting in of the king's revenue. I chooſe to cite Mr. *Plowden*, becauſe his book is ſo mightily relied on the other ſide, I mean the caſe of *Nevil* and *Wroth*.

I believe it was the authority of thoſe caſes that raiſed all this duſt, but I ſhall anſwer them by and by; and at preſent ſhall only obſerve, that there is not one law book that gives theſe caſes the credit to mention them, I mean as to this point of proceeding by petition to the barons, *&c.* So in the earl of *Devonſhire*'s caſe, 11 *Rep.* 92. there is no notice taken of *Nevil*'s or *Wroth*'s caſe, though there was opportunity enough to have mentioned them, if they thought they had been of any weight and authority. So 2 *Rol. Abr.* 160. and 180. and 183. the reſolution in the earl of *Devonſhire*'s caſe is cited, but not a word of *Nevil*'s or *Wroth*'s.

Vide *Moore* 476. 2 *Inſt.* 555. *Lit. R.* 91. 2 *Ro. R.* 183.

In the next place, I ſhall mention ſome treatiſes concerning the court of *Exchequer*.

1. There is *Gervaſius Tilburienſis de rebus in ſcaccario geſtis*; who ſets forth the juriſdiction of the court of *Exchequer*, but mentions nothing of this power in the barons to comptrol the treaſury. The *capitalis juſticiarius Angliæ* had indeed a comptrol over the treaſurer himſelf, as appears from *Spelm. Gloſſ.* 71. 331. So when *Hugo de Burgo*, who was the laſt great juſticiary, was in diſgrace, he was charged to render an account of the miſpending of the king's revenue, which ſhews that he had a power over the treaſurer. But ever ſince this great office has been diſcontinued, the treaſurer has acted according to his own diſcretion.

The next book, that I ſhall quote, is called the *Diverſity of Courts*. It's mentioned in my lord *Coke*'s preface to the 10th *Report*; but there is nothing of this power in the barons mentioned there, neither is it taken notice of in the *Mirror of Juſtices*, *c.* 1. *ſect.* 14. 4 *Inſt.* 110. *Fleta*, *lib.* 2. *c.* 25. *Britt.* 2. 6. *Crompt. Juriſdiction of Courts*, 105. which book was printed 15 years after Mr. *Plowden*'s, nor in 2 *Inſt.* 551. nor in 4 *Inſt.* where the full authority of this court is fully ſet forth. And I can but alſo obſerve, that Mr. *Prinn*, in a book which he printed on purpoſe to animadvert on my lord *Coke*, 4 *Inſt.* does not take notice of any ſuch power. I ſhall beg leave alſo to mention *Vernon*'s *Conſideration on the Court of Exchequer*, and Mr. *Cambden* and ſir *Tho. Smith*, who were great and learned men, though their books I confeſs are not of authority. But if there had been any ſuch power in the barons of the *Exchequer*, 'tis probable they would have taken notice of it.

Next, there are *Savil*'s *Reports*, *Lane*'s and my brother *Hardreſs*'s *Reports*, which treat chiefly of the court of *Exchequer*; but yet they give not the leaſt countenance to any ſuch power. So in 1 *Rol. Abr.* 538. 539. in *Lane*'s caſe, 2 *Rep.* 2 *Rol. Rep.* 294. there is not one ſyllable of it.

I ſhall conclude this point with this obſervation: that ſince there were two great powers in the barons, (as is pretended) one of bringing in money into the *Exchequer*, and the other of paying it out, that yet theſe books ſhould be all ſilent as to the greateſt power of paying it out, is very ſtrange and unaccountable: which indeed does induce me to believe, that there is no ſuch power in the barons, and that thoſe petitioners have mentioned in their petition the only way of having their annuities; that is, as their former payments were made *(viz.)* by warrant from the lord treaſurer.

Now I come to the objections.

1. They quote *Ryly*'s *Pla. Parl. pa.* 251. 253. 257. 262. 337. 526. 529. *&c.* but, if I can apprehend them, thoſe words make againſt the petitioners.

Then *Margery Parker*'s caſe, 9 *H.* 6. 12. 13. was mightily inſiſted on; and indeed at firſt I thought there was ſomething in it; but, upon a ſtrict peruſal, I find it's conſiſtent enough with my opinion, Indeed *Babington* mentioned here a remedy by petition to the barons, but this was only a word ſlipped out; but the court gave no regard to it, and were of opinion againſt it, that there was no ſuch remedy. And it's obſervable, that *Brook* in his *Abridgment* takes no notice of *Babington*'s opinion, though he does of all the reſt of the caſe.

The next thing objected is, that the barons do every term ſend a *liberate* to the officers of the treaſury under the *Exchequer* ſeal, to pay money for paper, pens, and other neceſſaries for the court of the *Exchequer*; the charge of which, I am told, comes to 2 or 300l. *per ann.*

To this I anſwer, that firſt this writ goes without any judgment at all: ſo that according to this, the petitioners needed not have had any judgment. But the true reaſon of iſſuing forth this writ is grounded on this. In the treaſurer's commiſſion there is this clauſe, that he ſhall pay out ſuch ſums of money as are required *pro neceſſariis ſcaccarii*: but of this writ they take no further notice than as a certificate, when they make up their accounts.

Now for the precedents.

Plow. 230. 320. 2 *Rol.* 524. *Cro. Car.* 513. 528.

The court of *Exchequer* is guided by multitudes of precedents, 2 *Rep. Lane's* caſe, *Mo.* 565. but here they have not one precedent for ſuch a power over the king's revenue, to which the law has ſo great a regard; for there is nothing in the law ſo fenced, ſo guarded, and ſo ſecured, as the king's inheritance. Where that is concerned, there muſt be petition *de droit*, an inquiſition found, beſides ſearches, *&c.* ſo careful is the law of the king's inheritance and revenue.

9 *H.* 3. ſtat. 1. c. 29. 3 *Ed.* 1. c. 24. 25 *Ed.* 3.

But now here the king muſt loſe his freehold without trial, which his ſubjects ſhall not do, as appears by *magna charta*.

ſtat. 5. *c.* 4. 28 *Ed.* 3. *c.* 3. 52. *H.* 3. *c.* 22. 15 *R.* 2. *c.* 12. 16 *R.* 2. *c.* 2.

In the next place, I ſhall anſwer the caſes which indeed give life to the preſent caſe, and are the foundation of it. Firſt, as to *Nevil*'s caſe, I obſerve the petitioners council do not agree in their title to it. Some ſay, it was grounded on a petition of right; others, that it was a *monſtrans de droit*; and others, that it was a complaint againſt the officers of the treaſury. But true it is, Mr. *Plowden* is preciſe and expreſs in the point, though it ſeems to me to be but his own private opinion: and I muſt take the boldneſs to ſay, that he is miſtaken, as will appear from theſe books, 13 *H.* 7. *Pl.* 15. 4 *Ed.* 4. 23. *b.* 1 *Leo.* 190. 1. *And.* 253. *Savile* 125. all which caſes happened but twelve years after *Nevil*'s, and yet are contrary to it. By the ſame books and the ſame reaſons it appears, that *Wroth*'s caſe ought to have no more weight than *Nevil*'s, *&c.*

Therefore I conclude, that this judgment given by the barons of the *Exchequer* is an erroneous judgment, and ought to be reverſed.

Vide infra, the argument of the lord chief juſtice *Holt*, *contra*.

The argument of the lord chief juſtice Holt.

Holt. Ch. J. IN this caſe, here have been two points made:

1. Whether this grant be good.
2. Whether here be a proper courſe taken by the patentees.

There has indeed been a third point ſtarted by my brother that argued laſt, and that does reſpect the entring of the judgment.

Comb. 270. 271. 272.

As to the firſt queſtion, I hold the grant to be good; and all, that have argued here, have concurred in the ſame opinion. I do confeſs this is the great point of the caſe; but ſo much has been ſaid to it, that little more can be added: but I muſt ſay ſomething to it, though I cannot but repeat.

Whether and in what caſes the king may alien his revenue.

I hold that king *Charles* II. might charge this branch of his revenue, and my reaſon for my opinion is but ſhort.

That the law will not permit the king to do wrong to the ſubject (*& a fortiori* to the whole kingdom.) Vide *Co. Lit.* 19. *b.* 2 *Inſt.* 681. 1 *Co* 44. *b.* 7 *Co.* 12. *b.* 11 *Co.* 72. 1 *Rol.R.* 167. *Noy* 182. *Mor.* 416. *Godb.* 317. *Dav.* 75. *Cro. Argum.* 60. *Plo.* 246. 487. *b.* 13 *Ed.* 4. 8. 1 *H.* 7. 10.

It is, becauſe the king was ſeiſed of an eſtate in fee of this revenue; for to ſuch an eſtate a power of alienation is incident. *Lit. Sect.* 360. And I take it to be the intent and the expreſs words of the act, that the king ſhould have a right and liberty of alienating and charging this eſtate.

It is no objection, that this revenue was given to the king under a truſt; for notwithſtanding that, he might alien it. So ſeveral kings of *England* have founded corporations of charitable uſes, and yet theſe perſons incorporated might, notwithſtanding ſuch truſt, alien their eſtates; ſo may a dean and chapter theirs; ſo may a biſhop with the conſent of dean and chapter; ſo a parſon, with the conſent of the patron and ordinary, might have aliened the land of which he was ſeiſed in the right of his church: but the king has no body required to conſent to his alienations. To ſay, that he may alien by the conſent of the eſtates of the realm, is as much as to ſay, he cannot alien without an act of parliament, which he may clearly do.

And indeed this revenue comes to the king by purchaſe; for he gave a recompence for it, *(viz.)* part of his ſtanding revenues, it being the profits that did ariſe from his wards and liberties.

But it is objected, that this power in the king of alienating his revenues may be a prejudice to his people, to whom he muſt recur continually for ſupplies. I anſwer, that the law has not ſuch diſhonourable thoughts of the king, as to imagine he will do any thing amiſs to his people, in thoſe things in which he hath power ſo to do.

2 *Sid.* 137. 138. 139. 140. 141. 142. Vol. 1. *Hales Pl. C.* 61. 101. *Co. Lit.* 16. a.

But that which I inſiſt on is, that it is abſurd in its nature to reſtrain the king from a power of aliening his revenues of which he is ſeiſed in fee. It is againſt the nature of the being of a king, that he ſhould have leſs power than his people; for before he was king, he had power to alien. Now when the crown deſcended upon him, he is ſeiſed in *jure coronæ*; and ſhall he then have leſs power over thoſe very lands than he had before the deſcent of the crown? Shall he now be diſabled to alien by being a king? This would be againſt a common principle of law, that the deſcent of the crown takes away all diſability. *Plo.* 105. *Dier.*

Then it is repugnant to the conſtitution of the government. Suppoſe a king ſhould be under a preſent danger of being invaded: if the king could not raiſe money by alienating his revenue, the nation might periſh; for he cannot otherwiſe raiſe money than by an act of parliament, for which there might not be time: and therefore heretofore the kings of *England* have borrowed ſeveral ſums of money by mortgaging their lands. *Cotton*'s *Poſthum.* 175.

And there ought to be a power in all governments to reward perſons that deſerve well; for rewards and puniſhments are the ſupporters of all governments; and it has been the conſtant uſage of the kings of *England* to reward perſons deſerving of the government out of the crown revenues, by penſions, and giving eſtates to ſupport the titles of earl and other dignities. *Seld. Tit. of Honour* 838. 7 *Rep.* 12. *Calvin*'s caſe. And this has been allowed of by act of parliament, as appeareth by 34 *H.* 8. *c.* 20.

But ſome perhaps will ſay, I have been talking little to the purpoſe; for that they do not deny that the king might alien his own demeſnes, or any lands that came to him by deſcent or purchaſe: but ſay they, this revenue was ſettled by act of parliament on the crown, and therefore it cannot be aliened. But I do not find any ſuch diſtinction in our law-books, nor any authority from common or ſtatute law, that reſtrains the kings of *England* from aliening any ſort of their revenues.

Ancient demeſne lands alienable becauſe poſſeſſed by the king in his perſonal capacity.

As for the lands in ancient demeſn, they ſeemed moſt appropriated for the king's uſe of any of his revenues; for they had ſeveral privileges, all relating to the king; as, not to be impleaded out of the manor, to be free of toll for all things concerning their ſuſtenance and huſbandry, not to be impannelled on any inqueſt. And yet notwithſtanding all this thoſe lands were always alienable: and if theſe lands are alienable, what eſtates in the crown are not alienable? And our books do take notice that theſe eſtates are alienable; and ſo is *Fitz. N. B.* 13. *c.* 166. *f.* & 226. *Staunford Prer.* 38.

9 *Co.* 24.

See 27 *H.* 8. *c.* 24.

Then what reaſon can be given why ſome eſtates ſhould be aliened, and others not? Why may not the king as well alien theſe eſtates as he may the flowers of his crown, as appears in the abbot of *Strata Marcella*'s caſe? For he may grant a county-palatine, which has *jura regalia*; ſo he has granted a power to pardon treaſon or felony, *&c.* Indeed theſe prerogatives are reaſſumed to the crown by the ſtatute *H.* 8. but the grants were not void.

27 *H.* 8. *c.* 28. 31 *H.* 8. *c.* 13. 32 *H.* 8. *c.* 24.

Then if an eſtate be ſettled on a ſubject by act of parliament, it will not be denied but that he may alien ſuch eſtate; and why ſhall not the king have the ſame privilege? It appears in fact, that he has always done it. So all the lands that belonged to the abbies and monaſteries were aliened by the king, and yet they were given to him by act of parliament, and by general words, as it is here. So the cuſtoms have been always granted and charged by the king, and yet they were granted to him by act of parliament. The authorities in our books are full to this purpoſe, as 21 *Ed.* 3. 47. 29 *Ed.* 3. *Pl.* 1, 2. 4 *Inſt.* 45. *Davis* 7, 14. *Knighton* 1684.

But it is objected, that this revenue was given in lieu of inheritances that were unalienable, *(viz.)* the wards, liveries, purveyances, *&c.*

Tho' how the nature of theſe inheritances can affect inheritances of another nature, I cannot ſee. But even theſe inheritances were always in effect alienable, for they might have been releaſed. The king's grant to be free of priſage, ſir *Thomas Waller*'s caſe; and ſo were ſervices *in capite*, and purveyances, *&c.*

Some opinions have been urged, which ſay that the crown revenues could not be alienated, as *Fleta* and *Bracton*. But theſe books are only ornaments to the law; they are not looked on as authentick, eſpecially where the practice has been always to the contrary. But *Britt.* 87. is otherwiſe, and ſo is *Selden* 549, and 552. And *Bracton* himſelf in his ſecond book, *c.* 57. ſeems to be of another opinion, where he ſaith, that even *res ſacræ* are alienable by the common law, tho' perhaps by the canon law they are not to be aliened. So the ſtatute of *Bigamis*, *c.* 7. alſo admits, that the king may grant away his revenues. *Forteſcue* in his book *de Laudibus Legum Angliæ* ſays, that the government is not only regal, but legal and political, and then diſcourſes of the particulars wherein the regal power is reſtrained: and if our conſtitution had been ſo that the king could not alien his lands or revenues, it cannot be imagined but that he would have mentioned a thing ſo remarkable, eſpecially in a time when there were ſo many grants made by the crown, tho' indeed at that time there were many acts of reſumption made, as there were before and after, as in 6 *H.* 4. 14. and in the time of king *Henry* the eighth, *&c.* which are a great demonſtration that thoſe grants could not be revoked or avoided but by act of parliament.

Fee farm rents granted by act of parliament and why.

It is objected, that the fee-farm rents in the time of king *Charles* the ſecond were granted by act of parliament. But they might have been granted without that act. It was only made to encourage purchaſers, to make good the letters patents beyond all ſcruple, and to give power to ſue for the arrears of rent, and to diſtrain, *&c.*

Then it's objected, that if this grant of the revenue ſhould be alienable to the ſubjects, that then the king's officers of exciſe would be the ſubjects officers.

But that does not follow; they are only a means to convey to their fellow ſubjects their right, and that which is granted to them by the king's letters patents. So the juſtices in *eyre*, and of *oyer* and *terminer*, *&c.* are the king's juſtices; and yet they convey juſtice to the people. 4 *Inſt.* 162.

As for theſe letters patents themſelves, it's plain by the whole tenour of the patents, that the king was not deceived in his grant; and the conſideration being executed, though it be falſe, yet that will not avoid the grant. *Plo.* 554.

So that I conclude this point, that theſe letters patents which charge this branch of the revenue, are good and firm in law.

I come now to the ſecond point; and that is, concerning the remedy taken by the patentees.

And I hold they have taken a very proper and legal remedy. We are all agreed that they have a right; and if ſo, then they muſt have ſome remedy to come at it too.

Remedies to recoveragainſt the king. *Skin. Rep.* 608. 609.

The remedies at common law, to recover againſt the king, were by petition, or *monſtrans de droit.*

Indeed, there is a new remedy now given by ſtat. 2 *Ed.* 6. *c.* 8. and that is by way of traverſe to the king's title, 4 *Rep.* 54. 2 *Inſt.* 688.

Petition of right, the value of it.

But firſt, a petition of right is not neceſſary in this caſe: not but that a man may proceed in this way, and admit himſelf out of poſſeſſion if he pleaſeth. But it's not neceſſary, for two reaſons;

1. Becauſe a petition of right is grounded always upon a naked matter of fact ſuggeſted, and not of record; and upon ſuch a ſuggeſtion, there is a commiſſion iſſues out of *Chancery. Cok. Entr.* 462. 9 *H.* 4. 4.

But here the title is derived by letters patents which are of record; ſo that here is no matter of fact to be enquired of.

2. The patentees do not endeavour to deſtroy the king's title: but petitions of right do ſo, and are generally inconſiſtent with the king's title.

Then this annuity is not turned to a right, as if there had been an attainder, *&c.* Therefore why ſhould there be a petition of right?

Monſtrans de droit, where lies.

I take this remedy to be by a *monſtrans de droit*; and this remedy is to be ſued at common law, when the party's title appeared of record. *Kell.* 178. *Monſtrans de droit*, or *ouſter le maine*, (which is all one in effect) always lies where the title or right of the ſubject appears as well by matter of record as the king's title; and this appears fully, *Sadler's* caſe, 4 *Rep.* and *Hob.* 334.

Alſo it's plain, that a *monſtrans de droit* lies in the *Exchequer:* I think there is no doubt of that.

It is objected, that the petition ſhould be firſt ſued to the king: but by the records in *Ryley's Placita Parl.* 351, 257. *Staundf.* 72. it appears, that theſe petitions of right have been ſued to the court of *King's-Bench.* But indeed this petition differs from thoſe; for this being only by way of complaint, there needs no indorſement, as in the other caſes.

The next objection is, that in this precedent there was a *liberate.*

1. This writ is in its nature a writ of allowance, *Reg.* 192. But this writ does not give any manner of juriſdiction; for the court may hold plea, and proceed without it.

Power of the barons of the *Exchequer* to anſwer demands of the treaſurer.

2. But the next anſwer that I give to this, and which may be ſatisfactory to any body, is the ſtatute of 5 *R.* 2. *c.* 9. which directs the barons of the *Exchequer* to anſwer every demand, without any writ or letter from the king. So is 4 *Inſt.* 110. So that I take it to be very plain, that the barons might proceed here without any writ at all.

But it is objected, that the writ ſhould have been directed to the treaſurer, *&c.*

But this needs not be; for the treaſurer hath nothing to do with civil pleas. *Reg.* 137.

Indeed, *Fitzh. N. B.* 129. doth mention the treaſurer: but that is a common error, and the writs need not be ſo directed.

It's true, as my lord *Coke* obſerves, that the legitimation of any caſe may be ſuſpected that has no caſe of kin to it; and I agree to that rule. But I think I have found out ſome kindred to this preſent caſe, and that is the caſe in *Coke's Entries*, 93. *tit. Claim of Liberties*; for there the barons did allow certain liberties, and alſo the payment of a rent-charge granted by the king to my lord *Hunſdon.* So the caſe of *Margery Parker* in 9 *H.* 6. 13. is a conſiderable authority to this point. She had an annuity out of the *Magna Cuſtuma* of *London*, granted by the queen out of a ſum aſſigned for her dower to receive of the cuſtomers. The queen ſhall not have action againſt the cuſtomers, but muſt ſue to the barons of the *Exchequer*; and *Margery Parker* may ſue for it in the *Exchequer*, in the ſame manner as the queen might for her portion. Then there is my lady *Braughton*'s caſe, which happened in 25 *Car.* II. My lady *Braughton* forſeited the keeper's place of the *New-Priſon* to the king, who thereupon made a ſeiſure: upon this the dean and chapter of *Weſtminſter* came into the court of *Exchequer*, and claimed the inheritance, and the king's hands were amoved. Indeed this matter was firſt ſtirred in the *King's-Bench*, for they gave judgment to ſeize the priſon. Now if the court of *King's-Bench* might hold plea there of a *monſtrans de droit*, becauſe the ſeizure was there; why may they not as well proceed in the *Exchequer* by *monſtrans de droit*, becauſe the money is there?

'Tis true, money comes into and iſſues out of the *Exchequer* without the barons: but, with ſubmiſſion, the right of bringing in, and iſſuing out of the money, belongs to the barons. And if you make the barons only judges of the right of coming in of the king's money, you make them judges but of half their buſineſs which belongs to that court; for the barons have the judicial power over the whole court of *Exchequer.* And to ſay that the treaſurer and his officers have no correſpondence with the barons, is not true; for all the books take notice of them, as perſons that all belong to the *Exchequer.*

Some have objected, that this court ought regularly to hold pleas only where the king is party; and that this court uſed to be prohibited to proceed in any pleas that do not concern the king. 2 *Inſt.* 551. There you may ſee what pleas they may hold.

But here the plea does concern the king; for here is the king's grant, and the ſuit is to the king: and this determination of the barons in this caſe is not thus any judgment of their own; but the king himſelf, by reaſon of ſuch his letters patents, hath obliged himſelf to make ſuch payments. As in the caſe of an obligation where debt is brought upon it, and a recovery is had; 'tis not ſo much the judgment of the court as binds the property, as the obligor himſelf, who by his bond has ſubjected his property to be determined by the judgment.

Now as to the authorities which ſeem directly to govern this point, and the objections againſt them.

1. There is ſir *Tho. Wroth*'s caſe in *Plowden*, which I rely upon as a clear and full authority in this caſe, notwithſtanding all the objections that have been made againſt it.

King *Hen.* VIII. had appointed ſir *Tho. Wroth* to be gentleman-uſher of the privy-chamber to prince *Edward*; and he granted to the ſaid ſir *Thomas* for the exerciſe of the ſame office an annuity of 20 *l.* to be had and yearly taken to the ſaid ſir *Thomas*, from *Lady-Day* then laſt paſt, during his natural life, by the hands of the treaſurer of his court of *Augmentations* of the revenues of the crown for the time being, of ſuch his treaſure of the ſame revenues, as ſhould remain in the hands of the treaſurer at two times in the year, *&c.*

Court of *Augmentations.*

The chief objection againſt this caſe is, that there the grant was under the ſeal of the court of *Augmentations*, which was incorporated with the court of *Exchequer.* But that I deny, for that court was never legally united to the court of *Exchequer*, as was adjudged in *Dier*, 216. So that the objection, that ſir *Tho. Wroth*'s grant was under the ſeal of the *Augmentation* court, and under the ſurvey of it, is gone.

Then it does not appear to me, that ever the court of *Augmentations* had any power expreſsly given them to relieve the grantees of ſuch rents. I have looked over the act of parliament, by which that court is conſtituted, but I cannot find any ſuch power. But I think, the court of *Augmentations* did proceed in ſuch manner, that it might be alſo reputed a court of *Exchequer*; and the court of *Augmentations* is by expreſs words made a court for the new revenues that ſhould come to the crown, which are exempted from the juriſdiction of the other court: but that which I infer from hence is, that if this new court of *Exchequer* did in ſome caſes relieve grantees of rents, *&c.* certainly the old court of *Exchequer* ſhall have the ſame privilege.

There are other courts which have alſo proceeded in the ſame manner; as the court of *Wards* did uſually hold plea of theſe matters, 2 *Croke* 78. Queen *Elizabeth* granted to *Allen* under her great ſeal, an annuity of 40 *l. per ann.* to be paid by her receiver of the court of *Wards.* This, being payable by the receiver, is in the nature of a rent-charge. So the court of *Surveyors*, erected by 33 *Hen.* 8. did proceed in the ſame manner, and did relieve grantees of rent-charges, *&c.*

As to *Nevil*'s caſe, alſo in *Plowden*, I take it likewiſe to be a full authority in point. An yearly rent-charge of 3 *l.* 10 *s.* was granted to ſir *H. Nevil* and another for the exerciſe of the office of keeper of a park, out of a manor for their lives. One is attainted. The manor comes to the poſſeſſion of the king. The king ſhall neither have the office nor the rent: and the arrears of the ſaid annuity were paid to ſir *H. Nevil* at the receipt of the *Exchequer*, by the hands of the treaſurer and the chamberlain. I grant that thoſe lands were alſo under the ſurvey of the court of *Augmentations*; but that I conceive makes nothing againſt me for the reaſons before-mentioned.

Money iſſuing out of the *Exchequer* by order of the *Exchequer.*

There are ſeveral other records which have been already quoted, but I ſhall not trouble you with the repetition of them. I ſhall only mention ſome few which I think have been omitted, as *Trin.* 1°. *Mar. Rot.* 126. 2 *El. Rot.* 145. *Mich.* 13. *Q. Rot.* 347. *Hill.* 13 *El. Rot.* 143. *P.* 1 *Q. Rot.* 108. In all theſe records it alſo appears, that money iſſued out of the *Exchequer* by order of the court of *Exchequer*, and it is highly reaſonable that they ſhould have ſuch a power.

Suppoſe the king purchaſed land that is charged with a rent, the king muſt take the land together with it's burden; but in ſuch caſe it would be too hard to drive the grantee of the rent to his petition of right to the king. No, certainly he may come to the court of *Exchequer* by way of petition to the barons, who may give him relief.

It has been objected, that money which once comes into the *Exchequer* can never be taken out. *Reg.* 193. But if this is true in a general ſenſe, that none of the king's revenues that are brought into the *Exchequer* can be paid out, this would deſtroy all annuities, rent-charges, and other payments which the crown is obliged to make.

Reſtitution of outlawed goods and on attainder.

'Tis true, if a man be outlawed in the *King's-Bench*, and the party's goods are ſeiſed into the king's hands, and then the outlawry is reverſed, there can be no reſtitution. The reaſon of this is, for that the court of *King's-Bench* cannot ſend a writ to the treaſurer, and the court of *Exchequer* have no record before them to iſſue out a warrant for a reſtitution. So if an attainder be reverſed, the mean profits taken into the *Exchequer* cannot be reſtored for the ſame reaſon; and alſo for that the king cannot be made a diſſeiſor, and the ſtatute gives a remedy only as to parliament.

There remains after all a great objection, had it any weight, and that is, *cui bono?* If the patentees ſhould have judgment for them, what will it ſignify if they cannot come at any money?

As to this, I do think, that as ſoon as the writs are delivered to the officers of the *Exchequer*, I mean the treaſurer and chamberlain, the property is altered, and the officers become debtors to the parties, as appears by 2 *H.* 7. So as ſoon as a *fieri fac'* is delivered to the ſheriff, and upon it goods are levied, the property of the goods is altered, and the ſheriff becomes a debtor to the plaintiff. So an action of debt * will lie upon a *liberate*, and ſo it has been adjudged.

I ſhall only obſerve one thing more, and ſo conclude; and that is in anſwer to my brother who argued laſt, for he ſtruck very hard at the judgment given by the barons. He thought that it was very erroneous, and therefore void. But

with

* Action of debt on a *liberate*, and why. Vide 5 *Mod.* 13. 14. 48. *Skin. Rep.* 257. 1 *Salk.* 323. 2 *Ventr.* 95. 2 *Sand.* 47. 344.

with ſubmiſſion, I take this judgment to be as well as it can be. And whereas it is ſaid in the judgment, that the money ſhall be paid by the commiſſioners and chamberlain of the *Treaſury*, it muſt be underſtood of the receipt of the treaſury, and not of the lord high treaſurer, which office is long ſince expired.

As for the levying of the tallies mentioned in the judgment, it does not hurt; it is at moſt but ſurpluſſage. But that which I inſiſt on is, that though this judgment, in reſpect of form, or any material point of it, ſhould be erroneous, yet if your lordſhips ſhould be of opinion in the two firſt points with me, you will then give a new judgment, ſuch as the court of *Exchequer* ought to have given; for that is the law of this place, as appears by 31 *Ed.* 3. c. 12. And this laſt point was ſo ruled upon a debate in the houſe of lords, and was the caſe of the *King* and *Sainthell*, 30 *Car.* 2.

So that upon the whole I am of opinion, that the judgment given by the barons ought to be affirmed.

Petition to the king, and not to the barons.

But afterwards the lord keeper was of opinion to reverſe the judgment, and accordingly it was reverſed. The ground upon which he gave his opinion was, that the patentees had not taken a proper remedy by petition to the barons, who have no power or comptrol over the king's treaſury, &c. and that their only remedy was by petition to the king himſelf. He inſiſted much upon the ſame reaſons and grounds which my lord chief juſtice *Treby* went on. (a)

(a) To avoid repetition we have omitted *Skinner*'s report of *Holt*'s argument. But we think it proper, to apprize the reader, that in ſeveral parts it is more full than the report which we have extracted from *5th* Modern. Editor.

The argument of the lord keeper Sommers, *on his giving judgment in the bankers caſe: delivered in the* Exchequer-Chamber, June 23, 1696.

THE four following cauſes depending in the *Exchequer-Chamber*, ſtood for the judgment of the court.

The attorney general againſt
Joſeph Hornby,
Robert Williamſon,
Thomas Smith,
and
Sir *Jeremy Snow*.

Lord Keeper. THESE cases differ in ſeveral particulars; but as to the points which have been chiefly ſpoken to, they are the ſame.

I ſhall therefore only put the caſe, as it ſtands upon the record where *Williamſon* is party; which I will do ſhortly, becauſe it has been opened ſo often already, upon the ſeveral arguments.

Robert Williamſon comes before the barons, and exhibits letters patent under the great ſeal, dated 30 *April*, 29 *Car* 2. granting to ſir *Robert Vyner*, his heirs and aſſigns, the yearly rent or ſum of 25,003*l.* 9*s.* 4*d.* to be yearly paid, received, and taken, of the rents, revenues, and profits ariſing to the king, his heirs and ſucceſſors, out of the duty of exciſe, by virtue of the act made 12 *Car.* 2. for taking away the court of wards and liveries, &c. and ſettling a revenue in lieu thereof; and prays that theſe letters patent may be inrolled of record.

The barons cauſe them to be read and intolled; and the letters patent are ſet forth at large in the record.

The effect of them is,

The king takes notice, that he had been conſtrained to poſtpone the payment of monies due to the goldſmiths, and others, upon tallies and orders regiſtered.

That he could not ſpare ſuch a ſum, as would ſatisfy thoſe debts; but was willing to grant to the perſons to whom he was indebted, an annual ſum anſwerable to the intereſt of their debts, after the rate of 6*l. per cent.*

To that end, he had commanded the accounts to be ſtated to the firſt of *January*, 1676; whereupon there appeared due to ſir *Robert Vyner* 416,724*l.* 13*s.* 1½. In ſatisfaction whereof, the king reſolved to grant him 25,003*l.* 9*s.* 4*d. per annum*, to be had and taken by him, his heirs and aſſigns, out of the rents, revenues and profits, which ſhould ariſe or become due or payable to the king, his heirs and ſucceſſors, out of, for, or by reaſon of the duty of exciſe, and by virtue of the ſaid act, to be paid quarterly, in truſt for ſuch of his creditors, as within a year after the date of the letters patent ſhould deliver up their ſecurities, and accept aſſignments of proportionable parts of the ſaid yearly ſum, in ſatisfaction of their debts reſpectively due, and in the mean time ſhould not ſue ſir *Robert Vyner* for their debts; the reſidue thereof to the uſe of ſir *Robert Vyner* and his heirs.

The king directs the high treaſurer, chancellor, under-treaſurer, chamberlains and barons of the *Exchequer*, which then were, and the high treaſurer, commiſſioners of the treaſury, &c. which ſhould be, and all other officers and miniſters of the court of *Exchequer*, and of the receipt thereof, in their reſpective places, upon requeſt, to perform all acts neceſſary for the due payment of the ſaid rent to the ſaid ſir *Robert Vyner*, his heirs and aſſigns; and to ſtrike tallies of *pro*, or aſſignment, or other tallies, as the caſe ſhall require, or as ſhall be deſired, on the commiſſioners, treaſurers, receivers, collectors, or farmers of the duty, who are required to make due payment accordingly; ſo as the ſaid yearly ſum may be received without other warrant. And if the profits of the ſaid revenue ſhould be paid into the receipt before the levying ſuch tallies, or payment made, then he authoriſes and requires the high treaſurer, and commiſſioners of the *Treaſury*, chancellor, under-treaſurer, chamberlains, and barons, and other officers and miniſters of the *Exchequer*, and of the receipt thereof, to whom it appertains, to pay out of ſuch monies as ſhall be paid into the *Exchequer*, the ſaid yearly ſum, without other warrant: and the letters patent ſhall be a ſufficient warrant for the purpoſes aforeſaid.

That tallies of *pro*, or aſſignment, or other tallies ſtruck upon the exciſe, at the deſire of ſir *Robert Vyner*, his heirs or aſſigns, ſhall be preferrable to other quarterly payments; except ſuch yearly ſums as are payable for the management of the ſaid revenue; and except certain ſums payable to the queen, and the duke of *York*, which are to be paid in the firſt place.

Sir *Robert Vyner* covenants at any time within a year, to make aſſignments of proportionable parts of the ſaid rent to ſuch of his creditors as will take the ſame in ſatisfaction of their debts, and will deliver up their ſecurities; and that he will not, during the year, aſſign any part of the ſaid yearly ſum, except to creditors, or others by their appointment; and if, within one year and an half, any difference ariſe between him and his creditors, touching the aſſigning any part of the ſaid yearly ſum, to ſubmit the matter to the high treaſurer, or commiſſioners of the *Treaſury*, and to perform ſuch orders as he or they ſhould make.

It is provided, that all aſſignments be inrolled within thirty days after the execution thereof, before the auditor of the receipt, or clerk of the pells; to the end it may appear what aſſignments have been granted, or otherwiſe to be of no effect.

And alſo, that when the king, his heirs or ſucceſſors, ſhall, at entire payments, have paid the ſum of 416,724*l.* 13*s.* 1½*d.* to ſir *Robert Vyner*, his heirs or aſſigns, in proportion among them, after the rate of 100*l.* principal money, for every 6*l. per cent. per ann.* and alſo the arrears of the ſaid yearly ſum of 25,003*l.* 9*s.* 4*d.* then the grant ſhould be void.

The letters patent are to be favourably taken for ſir *Robert Vyner*, his heirs and aſſigns; and to be good *non obſtante* the not reciting of that act of parliament, whereby the revenue is granted, or the not mentioning any former grants or charges of or upon the ſaid revenue, or the not mentioning the certain yearly rents or profits of the ſaid revenue, or the certain nature thereof, or how the debts due to ſir *Robert Vyner* did particularly ariſe; and notwithſtanding the ſtatute 1 *H.* 4. or 18 *H.* 6. or 26 *H.* 8.* or the act of 12 *Car.* 2. whereby the revenue was granted, or any other defect.

The king covenants, that due payment ſhall be made, and all things done on his part: and that if there be any defect in the preſent grant, he, his heirs and ſucceſſors, upon petition, will make a further grant, as the attorney general ſhall adviſe.

Then *Williamſon* ſets forth, that by virtue of the letters patent ſir *Robert Vyner* was ſeized *ut de feodo & jure*, and was indebted unto him in 1000*l.* And that the 9th of *April*, 32 *Car.* 2. by deed of aſſignment (which he brings into court,) reciting that he had delivered up his ſecurities to ſir *Robert Vyner*, and had diſcharged him, the ſaid ſir *Robert Vyner*, grants and aſſigns to him and his heirs 60*l.* part of the ſaid yearly ſum, being his proportionable part, in ſatisfaction of the ſaid debt, under the condition in the letters patent; and prays the aſſignment may be read and inrolled; which is ordered, and the tenor is enter'd.

Williamſon further ſays, that he delivered up his ſecurities and accepted the aſſignment, in ſatisfaction of his debt, according to the intent of the letters patent; and that he never after ſued ſir *Robert Vyner*; and that the aſſignment was inrolled within thirty days before the auditor of the receipt; and that the principal ſum is not paid; and that the arrears of the yearly ſum of 60*l.* were paid to *Lady-day* 35 *Car.* 2. and that from that time 405*l.* is due for ſix years and three quarters, ending at *Chriſtmas* laſt †. Then he prays the letters patent and aſſignment may be allowed, and the arrears paid, and the yearly ſum paid for the future; and that tallies may be ſtruck as it becomes due; and that he may have the benefit of the remedies and powers mentioned in the letters patent: and avers that at *Chriſtmas* laſt there was ſufficient to pay his arrears, beſides what was payable for management, and to queen *Catharine*, and the duke of *York*.

To this the attorney-general demurs; and *Williamſon* joins in demurrer.

Whereupon the barons of the *Exchequer* give this judgment: that the letters patent to ſir *Robert Vyner*, and the aſſignment to *Williamſon*, *juxta tenorem & effectum earundem eidem* Roberto Williamſon *allocentur:* and that the ſum of 405*l.* being the arrears to and for *Chriſtmas* 1 *W.* & *M.* ſo as aforeſaid in arrear, be paid to him at the receipt of the *Exchequer*, by the hands of the commiſſioners of the *Treaſury*, and chamberlains of the receipt who now are, and by the hands of the commiſſioners of the *Treaſury*, treaſurer and chamberlains of the receipt for the time being, out of the treaſure ariſing from that part of the exciſe in the letters patent mentioned to be granted to king *Charles* II. his heirs and ſucceſſors, and in the hands of the commiſſioners of the *Treaſury* now being, and in the hands of the commiſſioners of the *Treaſury* and chamberlains for the time being; to be paid after, and beſides the neceſſary ſums for the management of the ſaid revenue, and the annual ſums payable to the queen dowager and the duke of *York*. And that the ſaid yearly ſum of 60*l.* from *Chriſtmas* 1 *W.* & *M.* be paid to *Williamſon* and his heirs, at the receipt of the *Exchequer*, by the hands of the commiſſioners of the *Treaſury*, treaſurer and chamberlains of the ſaid receipt for the time being, out of the ſaid treaſure ariſing from the ſaid hereditary revenue of exciſe in their hands being, *ultra & poſt*, &c. And that tallies *toties quoties*, &c. be ſtruck at the ſaid receipt, for the ſaid yearly ſum upon the commiſſioners, treaſurers, receivers, collectors or farmers of the ſaid hereditary revenue of exciſe, by the officers of the receipt of exciſe to whom it belongs, upon requeſt, *&c.* according to the letters patent, and the courſe of the *Exchequer*, *ſalvo jure domini regis, & dominæ reginæ nunc ſi, &c.*

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* The ſtat. meant, ſeems to be 6 *H.* 8. *cap.* 15. for there is no ſtat. of 26 *H.* 8. applicable to the caſe: but the patents have been ſearched, and in them it is 26 *H.* 8.

† *i. e.* For the remainder of the reign of king *Charles* II. and the whole reign of king *James* II. and not quite a year of the reign of king *William* and queen *Mary*.

Upon this judgment the writ of error is brought.

There have been two principal queſtions made in the arguments upon theſe caſes.

1ſt. Whether the grants, made by king *Charles* II. of the ſeveral annual ſums out of the hereditary exciſe, to the goldſmiths, their heirs and aſſigns, be effectual in law, and do charge this revenue in the time of his ſucceſſors?

2d. Whether the remedies which the parties have purſued in this caſe be proper, and ſuch as are warranted by law, or juſtified by the courſe of the court of *Exchequer?*

I do not take notice at preſent of the objections which have been made to the form of the judgment, as it is enter'd, that being a matter of a different conſideration; becauſe, admitting the law to be for the parties who demand the arrears and growing payments of theſe annuities in this manner, if there be any error in the entring of the judgment, that is to be reformed in this court, and we are to make it ſuch as it ought to have been in the court of *Exchequer.*

The firſt general queſtion has been divided, as well by the council at the bar, as by my lords the judges, who argued this caſe, into two points.

1ſt, If this revenue of exciſe be ſuch an inheritance, that the king could alien the whole, or any part of it, in perpetuity from the crown?

2dly, Admitting that he might, whether it be effectually done by the grants to the goldſmiths?

My lords the judges, who have argued theſe caſes upon the writs of error, have all agreed in opinion, that the letters patent are good in law to paſs an intereſt to the patentees and their heirs, and to bind king *Charles* II. and his ſucceſſors.

Mr. baron *Lechmere* was of another opinion in the court of *Exchequer.*

The firſt of theſe points is a ſubject of the higheſt importance, at leaſt as to the conſequences of its determination either way; and perhaps, is not to be diſcourſed of adequately to the extent of it in an ordinary court of law.

As to my own part, being extreamly deſirous, as far as is poſſible, to avoid the repetition of what has been already ſaid very often; and having formed the opinion which I ſhall deliver in theſe caſes, upon the ſecond general queſtion; I ſhall not ſpeak at all at this time to either part of the firſt queſtion.

As to the ſecond general queſtion, whether this manner of ſuit, and the proceedings in it, be warranted by the courſe of the *Exchequer*; ſo that the parties here can come immediately to the barons, and demand their annuities, and thereupon the barons by their judgment, can in a regular courſe preſcribe to the treaſurer and chamberlains to iſſue money out of the receipt?——this is what I cannot hitherto be convinced of, either by what I have heard in the debate of this matter, or by what I have been able to obſerve upon the beſt endeavours I could uſe to inform my ſelf, in which I have ſpared no pains.

I take this to be a point of as great moment as ever came to be diſcuſſed in *Weſtminſter hall:* not ſo much in reſpect of the value of what is in demand, and of what does depend upon the ſame queſtion, (tho' that amounts to about 42,385*l.* 17*s.* 6*d. per annum*, beſides the arrears;) as becauſe it does in ſo high a degree concern the government, and diſpoſal of the publick revenue, and the treaſure of the crown; whereof the law has always had a ſuperlative care, as that upon which the ſafety of the king and kingdom muſt, in all ages, depend.

I eſteem it a great unhappineſs, that I cannot be ſo far convinced in my thoughts upon this point, as to concur with the greater number of the judges who have aſſiſted in this court: for tho' my own underſtanding muſt be my guide, which I am bound to follow in delivering my judgment; yet I am ſo ſenſible of my defects as to diſtruſt myſelf exceedingly, when I differ from ſo many learned men; and ſhould be extreamly well ſatisfied, that my opinion was not to be the meaſure by which the judgment is to be given in this caſe.

And therefore, having heard that ſome judges have made a doubt of this matter, I have already propoſed it as a point for the conſideration of all of them; whether in this court the judgments ought to be affirmed or reverſed according to the opinions of the chancellor, or the chancellor and treaſurer, when there is one; or according to the opinions of the majority of the judges, who are called to aſſiſt?

Before I proceed to deliver the reaſons, upon which I think myſelf obliged to conclude the ſame way with my lord chief juſtice of the *Common Pleas* as to this ſecond queſtion, I will take notice of two things.

1ſt, That the nature of the debate as to this queſtion ſeemed to me to be very much changed upon his argument.

All the judges who ſpoke before him, did, as to this point, in a manner rely upon the two caſes of *Nevil* and *Wroth* to warrant their opinions. Theſe caſes, which are reported in *Plowden*'s *Commentaries*, I ſhall be oblig'd to put at large hereafter, and do therefore only name them at preſent.

My lord chief juſtice *Treby* particularly applied himſelf to ſhew, that the proceedings in thoſe caſes were adjudged upon particular reaſons, and not at all upon the courſe of the *Exchequer*, or any power lodged originally in the barons by the common law; and were therefore not applicable to the caſes before the court: and therefore, as he expreſs'd himſelf, *proceeding upon new topicks, he differed from them in the concluſion.*

My lord chief juſtice of the *King's-Bench* only has had the opportunity of ſaying any thing in anſwer to his arguments. What weight they have had with any of the other judges, I do not know.

2dly, The ſecond thing I will take notice of is, that in ſeveral of the arguments much was ſaid of the ſubjects property; how it was concerned in the event of theſe caſes, and what regard there ought to be had of it.

With this I do readily agree. No man can be more tender of property, and careful to preſerve it than I have been always, and always ſhall be: but I freely own, that we, who are concerned in judicature in this reign, ought to aſcribe leſs merit to ourſelves for our care of property, than moſt of thoſe who went before us. We run no hazard in doing of it: no man has cauſe to think he ſhall be ill looked upon for giving his judgment for the ſubject according to law, though it be againſt the intereſt of the crown.

No man can think more hardly than I do, of the arbitrary *ſhutting up of the Exchequer*, as it is commonly called, which was the unhappy occaſion of raiſing the preſent queſtion: no man can have more commiſeration for the perſons concerned; I mean thoſe who only truſted the goldſmiths with their money, and had no ſhare in the temptation to truſt, from the unjuſt and unreaſonable profit which was made from the crown.

But I think the word *property* could hardly be brought into any caſe leſs aptly than it is into this.

There has been no difference of opinion, as to the intereſt and property which the ſubject takes by the letters patent, amongſt the judges who have argued in this court.

We are all agreed that the ſubject has, in this caſe, all the ſame remedies for recovering his right, which in any ſuch caſe the common law of *England* did ever allow, or which are given to him by any ſtatute; ſo that the ſubject is as ſafe in his property, and as ſecure in the method of coming at it, if it be detained from him, as by the *Engliſh* conſtitution he ought to be.

The only queſtion is, whether this be ſuch a remedy as the law allows, for recovering from the king the arrears, and growing payments of the annual ſums in queſtion?

If it be not, I am ſure none of us ought to make the parties caſe better than the law has made it. We muſt judge of property according to the rules which the law has fixed, and can make no new ones, nor invent new remedies, however compaſſionate the caſe may appear, or however popular it may ſeem to attempt it.

The queſtion then is, if an annual ſum be granted by the king, under the great ſeal, out of any branch of the revenue, to a ſubject and his heirs, in the manner of theſe grants, and the annual payments happen to be in arrear; whether by any law, now in force, the party may come to the barons of the *Exchequer* immediately, and they upon prayer to them, may inroll and allow the letters patent, and may thereupon order the treaſurer and chamberlains to pay, out of the *Exchequer*, the arrears, and alſo the growing payments for the future?

I think it may be proper to premiſe, that we are not now ſpeaking of the *Exchequer* in general, as it comprehends that great college of the revenue made up of all the officers of the upper and lower *Exchequer*; nor of the juriſdiction of the *Exchequer-Chamber* before the lord treaſurer and chancellor; nor of the court of *Equity* before the treaſurer, chancellor, and barons; but only of the authority of the court of *Pleas* holden before the barons: nor is the queſtion now of the barons' power over the receivers, collectors, and other officers of the revenue; but of their power over the king's treaſure, when it is lodged in the receipt of the *Exchequer*, and over the treaſurer and chamberlains, in whoſe cuſtody it is.

In ſpeaking to this matter, I ſhall proceed by theſe ſteps:

Firſt, to obſerve that no authors ancient or modern, who have wrote of the juriſdiction and buſineſs of the court of *Exchequer*, have mentioned any ſuch power to be lodged in the barons of the *Exchequer*, as will be ſufficient to warrant the judgments in theſe caſes.

Secondly, that theſe judgments cannot be defended by any thing which I can find, upon the beſt ſearch I can make, in any records or acts of parliament:

Nor *thirdly*, by any authorities in our law books.

I. As to the firſt, I will not go about to repeat a catalogue of writers who have publiſhed particular diſcourſes of the court of *Exchequer.* My lord chief juſtice of the *Common Pleas* was very large in this matter, and I will avoid the affectation of naming them over again: I believe I have peruſed all of them. I have alſo looked over ſeveral manuſcripts, yet unpubliſhed, treating of that court, which were written in the time of king *James* the firſt, and king *Charles* the firſt: and I can no where find the leaſt mention of any power in the barons, to command the iſſuing of any money out of the receipt of the *Exchequer.*

Since then ſo many authors of learning and judgment have ſet themſelves to write, with expreſs deſign, of the juriſdiction of the court of *Exchequer*, and not one of them but does treat in particular of the power of the barons, in bringing in the treaſure and revenue of the crown, and of their power over it whilſt it is *in tranſitu*, tho' ſome of them more largely than others; and yet there is not one word to be found in any of them, which implies a power in the barons over the treaſure, when it is once lodged in the receipt; what can be more reaſonably inferred, than that ſuch a power was wholly unknown to them?

It muſt be admitted, that the power to command the iſſuing of the king's treaſure is of the higheſt nature, and of the greateſt conſequence; and therefore it cannot be believed that it was forgotten by all of them, or if it had been remembered, that it could be paſſed by without remark or obſervation.

By what was ſaid in ſome of the arguments in this caſe, it ſeemed to be taken, as if the barons of the *Exchequer* had been inveſted by law with a general ſuperintendency over the treaſure of the crown, and were to take care to ſee it diſtributed and anſwered to all ſuch, at leaſt, as made any juſt demand upon it, whether it was or was not brought into the king's coffers: but this is to make them much greater officers than the law has yet made them.

My lord chief juſtice *Coke*, when he comes to treat of the court of *Exchequer* in his fourth *Inſtit. c.* 11. ſeems to chooſe out two ancient authors, who had wrote of that court, as the foundation of his diſcourſe; which is, for the moſt part, as a commentary upon them: I mean *Britton*, and the *Mirror of Juſtice.*

3

Britton's

Britt. c. 1. fol. 2. b. *Britton*'s account is ſhortly this ; *our treaſurers and barons from henceforth ſhall have juriſdiction of all cauſes, which touch our debts, and our fees, and the incidents thereof, and to take conuzance of debts which are owing to our debtors, that we may come at our debts the ſooner.*

When my lord chief juſtice *Coke* has ſet down theſe words, he then proceeds to ſet down the words of the *Mirror*; *viz. that the* Exchequer *is only ordained for the king's profit, to hear and determine torts done to the king and his crown, in right of his fiefs and franchiſes, and the accounts of bailiffs, and of the receivers of the king's money, and the adminiſtrators of his goods, by the view of a ſovereign, who is the treaſurer of* England. *Mirr. cap.* 1. § 14.

Theſe words of the *Mirror* are a ſhort, but effectual deſcription of the court of *Exchequer* ; and my lord chief juſtice *Coke* comments upon and expounds them in their full extent : nothing falls from him as if this account were defective, or did include only one part of the buſineſs of the court.

In the *Mirror*, *cap.* 1. § 14. we are told what is the uſe of the ſeal in the *Exchequer*, *viz. to make acquittances, and to ſeal writs and eſtreats under green wax, iſſuing out of this place* pour le prou le roy, *i. e. for the king's profit.* The uſe of the ſeal, to command the treaſurer and chamberlains to iſſue monies out of the receipt, was unknown when the *Mirror* was wrote, or this was a very defective account.

II. And as theſe ancient authors have thus confined the buſineſs of the court, ſo it does appear, in the *ſecond place*, by the ancient records, that the barons of the *Exchequer* have not intermeddled in other matters, than what my lord chief juſtice *Coke*, and theſe ancient authors aſſign to their juriſdiction : unleſs as their power has been from time to time enlarged by acts of parliament ; or in caſes where they have acted by particular authority given to them by writs under the great or privy ſeal ; or where they have acted by virtue of the king's anſwer indorſed upon petitions made to his perſon, either in or out of parliament ; which anſwers to ſuch petitions generally order a writ to iſſue out of *Chancery*, which gave a juriſdiction to the treaſurer and barons reſpectively, to act according to the effect of the anſwer. And upon this ground it is, that amongſt the abuſes and Cap. 5. § 1. No. 27. uſurpations in the ſeveral courts, which are enumerated in the *Mirror*, in that chapter which is entitled, *Abuſion de la Commen Ley*, this which follows is mentioned for one ; *abuſion eſt que les miniſteres del eſcheque eient juriſdiction de autre choſe que des deniers le roy, de ſes fiews, & ſes franchiſes, ſans bre' original de le chancellery ſouth blanche cere.*

It is ſo far from appearing by any ancient author or record, that the barons of the *Exchequer* had ſuch a power as is contended for in theſe caſes, that on the contrary it appears, their authority was very much reſtrained in that which was immediately their buſineſs, *viz.* matters of account depending before them ; in which they could make very few allowances, however juſt and reaſonable in themſelves, without a particular authority under the great or privy ſeal.

By the ſtatute of *Rutland*, 10 *Ed.* 1. notice is taken, *that upon ſuggeſtion of the king's bailiffs, writs for divers allowances had been made to the king's grievous damage* ; it is therefore ordained, *that of ſuch allowances to be made from thenceforth, view ſhall be in our* Exchequer ; *and the ſame view being faithfully made, the ſame treaſurer and barons ſhall certify our chancellor of the due allowances ſo to be made, and that writs of allowances ſhall be made according to the ſame certificate.*

The ſtatute directs that it ſhould be conſidered in the *Exchequer*, what allowances were proper to be made, and that the treaſurer and barons ſhould certifie the lord chancellor what they found was juſtly to be allowed ; and after all, the great ſeal was to iſſue thereupon to warrant the allowance.

Here was a new uſe appointed for the ſeal of the *Exchequer*, *viz.* to make the certificate ; but the parliament would not innovate ſo far as to make the *Exchequer ſeal* more than a certificate, whereupon the chancellor might iſſue a writ of allowance under the great ſeal.

This would have been a ſtrange circuity, if it had been imagined at that time, that the barons could have made the allowance by their own juriſdiction, and have ſent a writ accordingly to the treaſurer and chamberlains.

There are many inſtances to be found how much the juriſdiction of the barons was reſtrained, even in particulars, which one would think to be moſt properly of their cogniſance.

I will at preſent only inſtance ſome few, which are printed in Mr. *Ryley*'s *Placita Parliamentaria.*

The executors of *John Baſin* petition the king, that whereas the king *teneatur dicto Joh'i* in 34*l.* for wax delivered to his uſe, by the hands of *Roger Liſle* clerk of the great wardrobe, and for which they had a bill ſigned by the then maſter of the great wardrobe ; and that a like ſum of 34*l.* was demanded of the ſaid *Baſin* by extents of the green wax, *quod placeat d'no regi dictorum debitorum hinc inde debitam facere allocacionem* : the anſwer is, *habeant bre' de* Cancellaria *theſ. & baronibus de ſcacc. quod ſi ipſi inveniant debitum eſſe clarum, quod tunc faciant allocacionem de uno deb'o ad aliud.* 35 *Ed.* 1. *Ryley* 334.

An anſwer of the ſame nature is given to another petition, very much of this kind, made by the executors of *Robert de Baſynges*. *Ryley* 326.

The citizens of *York* petition for an allowance of 8*l.* 4*s.* 10*d.* and 102*l.* 12*s.* 11*d.* with which they are charged in the *Exchequer*, for wine ſold to them by *Robert de Dacre* the king's butler, who had acknowledged the receipt of the money before the barons : the anſwer is, *mandetur per bre' de* Cancellaria *theſ. & baron' quod ſcrutatis rotulis videant, ſi recognitio ſit ſic facta ut dicunt, tunc exonerentur cives de eadem pecunia &* Rob'tus de Dacre *inde oneretur.* 33 *Ed.* 1. *Ryley* 252.

In the ſame year, *Ryley* 248. *Harcla* petitioned the king for an allowance of his arrearages for the time when he was ſheriff of *Cumberland*, for that he could not levy the ſame by reaſon of the waſte and deſtruction which the *Scots* have made ; and alſo for an allowance of 38*l.* which the king owed him for wool taken to the king's uſe : and the anſwer is, *de damnis quæ ſuſtinuit habeat gratiam per bre' de canc' theſaurario & baronibus de ſcaccario dirigendum ſecundum diſcretionem theſaurarii & baron.' Et de lanis captis examinentur & allocentur in arreragiis ſuis. Et ſuper hoc fiat breve de* Cancellaria *theſaurario & baronibus de ſcaccario.*

In the ſame book, *pag.* 249, 250, 258, there are petitions for allowances of ſums laid out for the king's uſe, and writs under the great ſeal ordered, requiring allowance to be made by the treaſurer and barons.

Plomier petitioned that he might he permitted to account for the time he was *cuſtos* of the *Templars* land in *Eſſex* ; *& unde incepit computari coram* Rogero de Wingfield *ſub cujus ſigillo rotuli ſui adhuc reſtant ſignati.* The anſwer is, *habeat bre' de canc' theſ. & bar' de ſcac' in quo contineatur iſta peticio, & per idem bre' mandetur, quod inſpecta peticione, ſi ſuggeſta vera ſint, procedant ad computum ſuum audiend' & ulterius faciant in hac parte juſtitiæ complementum.* 14 Ed. 2. Ryley 419.

Upon petition of the tin merchants, to be allowed two days for payment of their coinage, this being alſo certified to be for the king's profit ; the anſwer is, let there be a writ to the treaſurer and barons for that purpoſe, and the like to the ſheriff of *Cornwall*. *Ryley* 248.

Upon petition for inſtallment of debts, the anſwer is ſometimes, let a writ go, commanding the treaſurer and barons to do it, *juxta diſcretionem*, *Ryley* 291. and at other times, *quod ſcrutari faciant debita, & inde certificent regem, & quod interim habeant reſpectum, ſed non atterminetur ſine rege.* Ryley 254.

And that the juriſdiction of the barons was originally very reſtrained, will appear yet plainer, by the ſtatute made the 26th of *Edw.* 1. *Ryley* 225. Whereby it is enacted, *that the treaſurer and chamberlains of the* Exchequer *make a roll indented of all ſums of money delivered for the king's uſe, without warrant, ſince the beginning of the war between the king and the king of* France ; *one part to remain with them in the* Exchequer, *and the other part with the chancellor, 'pro warranto ſuo ad faciend' ſuper hoc br'ia in debita 'forma predictis theſ. & camerariis de predictis parcellis.'*

I might proceed to very great numbers of inſtances where the ſubject was put to his petition, for the allowance of juſt and reaſonable pleas by way of diſcharge, upon accounting in the *Exchequer* ; ſome few I thought neceſſary to mention ; but I will not enlarge on this matter, becauſe I think the ſtatute 5 *R.* 2. *cap* 9. which increaſed the authority of the court of *Exchequer* in this point, ſhews plainly, how defective the juriſdiction of that court was, before that time, even in that which ſeemed abſolutely requiſite for the doing juſtice upon accounts.

That ſtatute takes notice, *that perſons impeached in the* Exchequer *of debts and accounts, tho' they have offered to plead for diſcharge of thoſe impeachments according to law, have not always been received thereto heretofore, without having expreſs commandment by writ or letter of the great or privy ſeal, to their miſchief and delay, and no advantage to the king.* And it is thereby ordained, *that the barons ſhall from henceforth have full power, to hear every anſwer of every demand made in the* Exchequer, *ſo that every perſon, that is impeached or impeachable of any cauſe by himſelf, or by any perſon, ſhall be from henceforth received to plead, ſue, and have his reaſonable diſcharge, without tarrying for, or ſuing any writ or other commandment.*

By this act of parliament, a power *for the future* is given to the barons of the *Exchequer* to allow a lawful diſcharge when pleaded. The natural inferences which were to be drawn from this ſtatute were ſo plain, that, to elude the force of them, two things have been urged in the ſpeaking to theſe caſes.

1*ſt*, That this act gives no new power, but was only made in affirmance of the common law.

2*dly*, That this act might be extended ſo as to give an authority to the barons of the *Exchequer*, to relieve the ſubject in the caſes which we have before us.

But I think both of theſe aſſertions are miſtakes ; at leaſt it muſt be yielded, upon ſecond thoughts, that if this act was merely a declaration of what was law before, ſuch declaratory laws are not to be extended by equitable conſtructions beyond the words themſelves.

As to the firſt, to prove that this act did not introduce a new law, my lord chief juſtice *Coke*, in his fourth *Inſt. fo.* 110. has been cited : I confeſs in that place he ſays two things upon occaſion of this ſtatute.

1ſt, *That it does appear by this ſtatute that the parties ought, by law, to have been received to have pleaded their diſcharges, without any ſuch writ or letter.*

2dly, *That from thence it may be collected, that ſuch courſe of the* Exchequer *as tends to the diſquietneſs, miſchief, and delay of the ſubject, and no advantage to the king, is againſt law.*

The firſt of theſe two concluſions of his, upon this act, is contrary to his obſervations immediately preceding in the ſame page, *viz. that ſo great care was taken by the court of* Exchequer, *(which is the center of the king's revenue and profit,) that no man might plead for his diſcharge of any debts, account, or other demand, without having an expreſs commandment by writ or letter of the great ſeal.*

As to his ſecond concluſion, it is not very eaſy to apprehend what is meant by ſaying, *that a concluſion may be drawn from this act, that ſuch courſe of the* Exchequer, *as tends to the delay of the ſubject, and no advantage to the king, is againſt law.* If the meaning be no more, than that ſuch courſe is fit to be remedied by a law, it may be juſtly collected from the act, which was made expreſly for that purpoſe : but that it can be inferred from that act, either that any thing can be the courſe of the *Exchequer* which is againſt law ; or that the act declares it to be againſt law, to refuſe the receiving ſuch pleas without being authorized under the great or privy ſeal, may be denied upon good grounds ; becauſe there is nothing to be found in that act, to warrant either of thoſe inferences.

1*ſt*, That the act was introducing of a new law, as to one point, *viz.* the admitting of perſons to plead by attornies in the *Exchequer*, (which they could not do before, unleſs by a ſpecial writ under the great ſeal,) is agreed by my lord chief juſtice *Coke* ; and is plain that it was ſo, by the *Mirror of Juſtices*, *Abuſion* N° 29. 4 Inſ. 110.

2*dly*, The words of this ſtatute are enacting, and not declaratory. They give a new power ; *from henceforth the barons ſhall have power, and every perſon that is impeached ſhall be from henceforth received.*

3*dly*, The words ſeem to be miſtranſlated from the original *French*, *touts voyes n'ont mye eſte receutz*, which ſhould not be rendered *have not always been received* ; but thus, *always have not been received* ; that is, *have never been received.*

But, 4*thly*, The petition of the commons, upon which this act is framed, and which is *Rot. Parl.* 5 *R.* 2. Nº 97. ſhews this matter plainly beyond all queſtion.

The petition does not complain of any abuſe in the barons, or officers of the *Exchequer*, but of a defect in the law, which the commons pray may be amended for the eaſe and quiet of the king's people.

And it is remarkable, that as the preamble of the ſtatute is drawn up, as far as it goes, almoſt in the words of the petition; ſo the enacting part is framed in the words of the king's anſwer. As the words are printed in *Engliſh* in the ſtatute-book, they run thus; *when they offered to plead in diſcharge according to law, they have not been always thereto received heretofore:* But the original *French* words of the petition are, *n'ont mye eſte a ce receutz nient foits devant ces heures*, i. e. *they have never heretofore been received*; which, as to this point, is a very material variance, and ſhews plainly how the *French* words in the ſtatute itſelf ought to have been tranſlated.

The petition does in expreſs terms give as a reaſon why they had heretofore never been received; *viz.* that the barons of the *Exchequer* declared, that they had no power to hear the pleas and anſwers of the ſaid impeachments without writs or letters of the great or privy ſeal, commanding the treaſurer and barons to do right to the ſaid parties impeached. This is what the barons had then declared to be law; nor is this declaration complained of by the petition, nor cenſured by the parliament; but a law is made to remedy this for the future, giving the barons a new power: and therefore this act, one need not doubt to ſay, was more than an affirmance of the common law.

The next chapter of this ſtatute, 5 *R.* 2. *cap.* 10. is a farther explanation of the matter we are now ſpeaking of.

Notice is taken, *that perſons retained to ſerve the king, received money at the receipt, or elſewhere by aſſignment, which ſums had been put upon them as received by way of loan; and altho' they, or their heirs, or executors, have demanded to be admitted to account of the ſaid ſums, the ſame had not been granted, but they were conſtrained to purſue their grant by the great or privy ſeal to the treaſurer and barons, commanding them to account with them in that behalf*, &c. And it is ordained, *that of all perſons, who ſhall be retained to ſerve the king, their covenants ſhall be put into writing, and ſent into the* Exchequer *to remain on record: ſo that when perſons come to account thereof at the* Exchequer, *they ſhall be received, and have allowance on their account, according to the contents of their covenants; ſo that by the ſight of the ſame the barons ſhall do right to the party, according as reaſon demandeth. And if any thing be due to them on the ſaid account, that thereof, by certificate of the ſame* Exchequer, *the treaſurer and the chamberlains ſhall make payment or aſſignment, without any other warrant by the great or privy ſeal.*

This ſhews what the courſe was before; and in this particular caſe makes a proviſion which is wholly new, *viz.* that upon a certificate of the barons the treaſurer and chamberlains may pay: in all other caſes the law is left open, and a great or privy ſeal is requiſite to warrant a payment, notwithſtanding any certificate of the barons.

So much to ſhew the ſtat. 5 *R.* 2. did introduce a new law.

As to the other thing which was mentioned, as if the ſtat. 5 *R.* 2. might be extended by an equitable conſtruction to give the barons power to order the payment of money out of the receipt, in ſuch manner as in the caſes now before the court; I muſt ſay, I cannot ſee any the leaſt colour for ſuch a notion.

The power is moſt directly reſtrained to the receiving of pleas in diſcharge of perſons impeached for debts, or accounts; and can never be extended to caſes where parties come as plaintiffs, to recover demands originally againſt the king: nor is there the authority of any law-book pretended to warrant ſuch interpretation.

If then the power of the barons was ſo ſhort and reſtrained, in matters relating to the taking and ſtating the accounts of the revenue, (which is acknowledged to have been their antient and proper buſineſs,) that they were in ſo very many caſes to expect an additional authority under the great or privy ſeal; can it be thought, that at the ſame time they were intruſted with ſuch a juriſdiction as is now contended for, of ſending orders requiring the treaſurer and chamberlains to make payment at the receipt, when perſons demanded of them to inroll and allow their grants and order ſuch payments?

I have cauſed the *liberate* rolls, and the bundles of petitions at the *Tower*, to be ſearched from the beginning of king *John*'s time, as low as the records there go, and have had ſome extracts made of them; and during all that time, I cannot find that any payments were made at the receipt of the *Exchequer*, but by warrant under the great or privy ſeal.

There are infinite numbers of writs to be found, for payment of ſums of money for wages, for ſervice done, for debts owing, and for almoſt all occaſions which can be imagined to occur; but for every one of theſe, how ſmall ſoever, the warrant is either a great or privy ſeal.

In like manner, the warrants for payment of all annuities, fees, and ſalaries, tho' granted by letters patent under the great ſeal, yet were, from time to time, directed to be paid by writs under the great or privy ſeal.

If the payment was, by the letters patent, to be at the receipt of the *Exchequer*, the *liberate* went to the treaſurer and chamberlains: if it was to be paid by the cuſtomers, or the ſheriff, there was a *liberate* directed to the officer who was to pay, and a writ *de allocatione facienda*, directed to the treaſurer and barons, to allow of ſuch payment by the ſheriff or cuſtomer, which writ of allowance recited the *liberate*. *Reg.* 192, 193.

Rot. lib. 43 *H.* 3. *m.* 1. There is a liberate *de theſauro noſtro dilecto & fideli noſtro* Hugoni de Bigod, *juſticiario noſtro mille marcas, quæ ſibi per magnates de concilio noſtro ſunt provis', percipiend' per annum ad ſcaccarium noſtrum, ad ſe ſuſtentandum in officio juſticiarii noſtri.*

The great ſtation of the perſon, and the authority by which the annuity was granted, was not enough without a particular warrant for payment from the king under his ſeal.

So all along in the *liberate* rolls, 55 *H.* 3. *m.* 1. 1 *E.* 3. *m.* 3. 1 *E.* 2. *m.* 4. 4 *E.* 3. *m.* 3. *&c.* there are *liberates* for the ſalaries of judges: *liberate de theſauro noſtro dilecto & fideli noſtro* Stephano Heyne, *uni juſticiar' noſtrorum in banco, vigint' libr' de termino* S. Mich' *prox' præterito de annuo feodo ſuo* 40 *librar', quas ei conceſſimus percipiend' per annum ad ſcaccarium noſtrum ad ſuſtentationem ſuam in officio juſticiar', quamdiu ſteterit in eodem.* Nay the barons of the *Exchequer* themſelves, in thoſe ages, never once thought of directing the treaſurer and chamberlains to pay annuities and ſalaries, tho' granted to themſelves under the great ſeal; but purſued the ſame method that others did, and procured *liberates* for their ſalaries of 40 marks, as all other ſubjects, in the like caſes, did.

Rot. lib. 1 *Ed.* 2. *m.* 2. *Liberate* Will'o *de* Carlton, *uni baron' noſtrorum de ſcaccario noſtro, vigint' marcas de termino paſchæ prox' præterito, de annuo feodo ſuo quadragint' marcarum, quod ei conceſſimus per literas patentes percipiend' in officio ſuo ſupradicto.*

The like are to be found, 4 *Ed.* 1. *m.* 3. 1 *R.* 2. *m.* 15. 1 *H.* 4. *m.* 7. 1 *H.* 5. *m.* 6. And when payment was not made according to the command of theſe writs, the method was not then to go to the barons of the *Exchequer*, but to apply to the king by petition for another writ to enforce the former. *Rot. lib.* 2 *Ed.* 1. 20. *m.* 4. *Mandamus vobis, quod dilecto & fideli noſtro* Roger de Brabanzon, *nuper capitali juſticiario* Edwardi, *quondam regis* Angliæ, *patris noſtri, ad placita coram eodem patre noſtro, liberetis, juxta tenorem brevium dicti patris noſtri de liberate quæ penes vos inde reſident in ſcaccario antedicto.*

And the like writ may be found to enforce a former *liberate* in the caſe of the earl of *Oxford*, *Rot. lib.* 1 *Ed.* 3. *m.* 1. and in other places.

The like courſe alſo appears to be taken in the caſe of the converted *Jews.* 2 *Ed.* 2. *Ryley* 517.

I will make mention of one more precedent, which is the letters patent granted 2 *H.* 6. which are to be found in the patent rolls of that year, and alſo in a ſchedule annexed to the parliament roll. In which the king takes notice of the treaty of peace between his father and grandfather, the kings of *England* and *France*; and alſo of the marriage articles of his mother, queen *Katherine*, the *French* king's daughter, with king *Henry* the fifth, *A. D.* 1420; whereby it was agreed, that ſhe ſhould have for her dower to the value of 40,000 *ſcuta per annum*, of which two were to make a noble; which treaty and articles were confirmed in parliament: and then proceeds, by conſent of parliament, to grant to the queen divers lands, parcel of the dutchy of *Cornwal*, and county palatine of *Cheſter*, and alſo ſeveral annuities out of the alnage, and 2274*l.* 18*s.* 1½*d.* out of the firſt profits of the ſheriffs and eſcheators at the receipt of the *Exchequer*, and out of any other revenue that ſhould be order'd there, to be paid by the hands of the treaſurer, in full of her dower, until the king, or his heirs, ſhould grant to her lands and tenements to the ſame value: *et quod eadem mater noſtra habeat tot & talia brevia de liberate curren', & allocat' dorman', ac alia brevia & warran', quot & qualia ei in hac parte, pro ſolutione ſummarum ſibi, ut præmittitur, conceſſarum & aſſignatarum, & pleniori execucione præmiſſorum, neceſſaria fuerint & opportuna: et quod cancellarius noſter* Angliæ, *ac cuſtos privati ſigilli noſtri, & hered' noſtrorum, pro tempore exiſten', brevia & warranta illa de tempore in tempus, quandocunque & quotieſcunque ex parte præfat' matris noſtræ racionabiliter fuerint requiſit', tenore præſentium fieri faciant indilate.*

Per ipſum regem in concil' in parl'.

It appears by theſe, and the former records mentioned, what was the antient and conſtant method of proceedings in theſe caſes; and that it was not enough to have letters patent under the great ſeal, for granting the annuity or ſum, but that there muſt be an authority under the great ſeal or privy ſeal, to warrant any payment thereupon: otherwiſe the parliament, when they had been making ſuch an extraordinary proviſion for the ſecurity of the queen, would have taken a ſhorter method, and have ſent her to the barons of the *Exchequer* for ready payment in caſe of arrears.

I might alſo mention the caſe of another queen, *Johan'* the relict of *Hen.* the 4th, who in her petition in parliament, in the ſecond year of *Hen.* the 6th, *Rot. Parl.* 2 *H.* 6. 11, 35. (whereby ſhe prays to be reſtored to her dower, which had been ſeized in the ſeventh year of *Hen.* the 5th, and was afterwards ordered to be reſtored in the tenth year of his reign, but could not be done effectually without the aſſiſtance of an act of parliament,) concludes with a prayer, that for the time to come ſhe may have, *en la cancellerie noſtre ſeigneur le roy, & ſes heirs & ſucceſſors, ſi bien lettres de liberate currantes, & allocate dormanz, come autres lettres patents, & choſes en celle partie al dite royne beſoignable*; which is granted.

This was then the method, and has been continued to this day; and no treaſure is, or can be iſſued out of the receipt, without ſuch a warrant under the great or privy ſeal.

'Tis true, in time *liberates* current, and dormant writs of allowance grew more common, ſo that the ſuing out of new writs in every particular caſe became leſs frequent. And it is alſo true, that of later times, more general privy ſeals have been brought into uſe, authorizing at once the iſſuing of ſeveral payments; which has been practiſed eſpecially ſince the beginning of the reign of queen *Elizabeth.* But the thing in ſubſtance is the ſame: no money is iſſued out of the receipt, without the authority of the great or privy ſeal; nor is there any more waiving the applying to the perſon of the king than before: no payments being made upon thoſe general privy ſeals, but by virtue of the king's particular warrants counter-ſigned by the lord treaſurer, or commiſſioners of the treaſury.

I have ſhewn what were the methods anciently taken by ſubjects for obtaining payment of annuities granted by the crown; and that theſe methods, in the manner I have mentioned, have been continued down to this time.

It has alſo been obſerved, how narrow the juriſdiction of the barons of the *Exchequer* was at common law; unleſs where their authority was enlarged by writs under the great ſeal, or by the king's anſwer to petitions in parliament: and that the enlargement of their juriſdiction by the ſtat. 5 *R.* 2. added no new powers in relation to the matters in queſtion.

The next ſtatute, which does conſiderably enlarge the juriſdiction of the *Exchequer*, is that of 33 *H.* 8. *c.* 39; which gives ſeveral new powers, of great conſequence, to the *Exchequer*, and to ſeveral other courts which were then in being: but I did not obſerve that it was inſiſted on, that any of the clauſes of that act extend to this caſe; and therefore I will not go about to anſwer what is not, nor I think can be objected.

Indeed, if I did not miſtake my lord chief juſtice, he inſiſted that the power which the barons of the *Exchequer* have taken upon them to exerciſe in this caſe, muſt be warranted by the common law, as originally incident to a court of revenue.

But, upon the beſt ſearch I could make into the records of the *Exchequer*, I have not found any thing which does in the leaſt countenance this power ſuppoſed originally incident to a court of revenue, which has been exerciſed in theſe caſes, but was never exerciſed before: unleſs about the time of the diſſolving of the court of *Augmentations*, in the firſt year of queen *Mary*, and the annexing it to the court of *Exchequer*; when ſomewhat of this nature was done in the court of *Exchequer*, with reſpect to ſome caſes which were formerly under the ſurvey of the court of *Augmentations*; the reaſon of which I ſhall ſhew hereafter, and that the ſame is no way applicable to the cauſes before us.

I do not forget that it was urged, as of weight to prove this power in the barons, that the courſe is, at the end of every term, for the barons to ſend *liberates* down to the receipt for neceſſaries of the *Exchequer*. But of that an account was given by my lord chief juſtice of the *Common-pleas*; and I ſhall ſhew yet more clearly, that the writ imports no more than a certificate of the *quantum* of the expence, and has been never look'd upon as a warrant for the payment.

It is ſtrange, if this power was veſted in the barons by the common law, that no ſubject ſhould once apply to them for relief. It is plain there were occaſions for ſuch applications. Annuities we ſee were in arrear, and writs of *liberate* were diſobeyed; and yet nothing does appear, before the firſt year of queen *Mary*, that the barons ſent down writs to the treaſurer and chamberlains to do their duty, and iſſue money out of the receipt.

Since the 15th of queen *Elizabeth*, when ſir *Thomas Wroth*'s caſe was, one hundred and twenty years are paſt; and ſince that time, eſpecially ſince the beginning of the reign of king *James* the firſt, more and greater annuities and penſions have been granted than from the foundation of this monarchy, and with as full and liberal clauſes as in the caſes now in queſtion; and annuities and penſions have been worſe paid than in antient times. Yet no man, ſince that time, has come to the barons to recover his arrears, according to theſe precedents of *Nevil* and *Wroth*: and yet, the remedy (admitting the law to have been ſo ſettled in thoſe caſes) is more ready and eaſy to be had than in any action againſt a common ſubject in any caſe. Admitting this juriſdiction might have ſlipt unobſerved in the more antient times, yet after two caſes ſettled ſo ſolemnly as thoſe of *Wroth* and *Nevil*, it ſeems very ſtrange that no patentee, who was unpaid, and could not recover the arrears of his annuity any other way, ſhould once think of deſiring the barons to inroll and allow his letters patent, and order payment to him out of the receipt.

As therefore a conſtant and fixed courſe of the *Exchequer* is the law of that court, and indeed the law of the land; ſo the negative argument hath its force, that what has not been at all practiſed in the court, eſpecially in relation to caſes which happen very frequently, cannot be taken to be the law, or courſe of the court.

So far are we from having infinite precedents, (which, by what is ſaid in the caſe in *Plowd.* 321. *a.* and *Lane*'s caſe, 2 *Co.* 16, 17. and in *Agard*'s caſe, *Mo.* 565. appear to be requiſite to give a practice the denomination of the *courſe of the Exchequer*,) that we are to ſeek for a precedent; except ſome few caſes, which, as I ſaid, happened upon the union of the court of *Augmentations* to that of the *Exchequer*: and of theſe not one has been cited in any law book, as an authority to prove this juriſdiction in the *Exchequer*; which is the matter for which they have been ſo much urged in the arguing of theſe caſes.

III. And now I will proceed to the third thing I mentioned, which was; that as none of the authors, who wrote *ex profeſſo* upon the juriſdiction of the *Exchequer*, aſſerted any ſuch power as this in the barons, and as nothing did appear in any act of parliament, or by any record, which did make out ſuch a power; ſo I conceived, that no authorities were to be found in any of our law books, which did warrant the judgments in theſe caſes. I ſhall reſerve myſelf as to the caſes of *Nevil* and of *Wroth*, and the precedents about that time till hereafter; and ſhall at preſent ſpeak to the other caſes, which have been urged as authorities, more antient in point of time.

And thoſe, as I remember, were three; *Everle*'s caſe, the abbot of *Wardon*'s caſe, and *Margery Parker*'s caſe.

Some others were ſpoken of, but they are (as I think) directly againſt what they were brought to ſupport; and as theſe three only have been inſiſted on by my lord chief juſtice, I ſhall not think it worth while to take any notice of the reſt.

Everle's caſe was 33 *Ed.* 1. and is in *Ryley* 251. The caſe is this. He petitions king *Edward* the firſt, that he would command that an annuity of ten marks, which king *Henry*, father of the king who now is, had granted to him, and *John* his brother, *et quod donum rex nunc eis per literas ſuas confirmavit, et unde habet bre' currens de liberate in cuſtodia theſaurarii & camerariorum de ſcaccario*, ſhould be paid to him with the arrears.——*Ita reſponſum eſt, habeat bre' de canc' theſ. & baronibus de ſcaccario, quod videant cartam & faciant juſtitiam, habito reſpectu ad breve currens.*

Upon this caſe two inferences were made.

1ſt. That the court of *Exchequer* might hold plea of an annuity granted by the king, and might relieve the party.

2dly. That the court of *Exchequer* might compel the treaſurer and chamberlains to make payment of ſuch an annuity.

Let us ſee if either of theſe concluſions are warranted from this caſe; and whether upon examination it will not appear to be a ſtrong authority to ſhew, that there is no legal courſe to inforce the payment of an annuity, though granted under the great ſeal, without applying to the perſon of the king by petition.

No circumſtance is wanting to make that caſe ſtronger than the caſes before us.

There was a grant of an annuity under the great ſeal from the king's predeceſſors, as there is in this caſe: there was alſo a confirmation from the king then reigning, which is wanting in the caſes before the court: and, more than that, there was a *liberate* current lodged with the treaſurer and chamberlains.

If in any caſe of a demand of the arrears of an annuity, granted by the crown, the party might go to the barons for an order for payment, *Everle* was ripe for it.

But ſuch a method of enforcing payment was unknown at that time, as has been ſhewn already, and therefore *Everle* proceeds in the common courſe: he applies by petition to the king, and the king endorſes the petition, that a writ under the great ſeal ſhould be directed to the treaſurer and barons, empowering them to conſider the letters patent, and do him right, reſpect being had to the *liberate*.

No juriſdiction in the barons can be inferred from thence, nor power of commanding the treaſurer. The great ſeal is the commiſſion by which they act. The ſame writ, which impowers the barons to conſider the letters patent, impowers the treaſurer to iſſue the money; and that not as the barons ſhould appoint, but it was to be with reſpect to the *liberate*, which was to determine where the payment was to be made; whether at the receipt of the *Exchequer*, or by levying tallies on the inferior officers concerned in the receipt of particular branches of the revenue.

But to take off the force of ſuch an anſwer, it was urged, that this petition was not a *petition of right*, but *of complaint* againſt the king's officers. And to ſhew that it was ſo, it was ſaid, that if it had been a *petition of right*, it muſt have had another indorſement, *viz. ſoit droit fait al partie*, and then have been ſent into *Chancery*; and that in ſuch caſes the petition is the original upon which the proceeding is; and that *petitions of right* muſt be ſo anſwered.

As to this; in the *firſt* place, there needs not much labour to ſhew that this was not a *petition of complaint*. It imports nothing like it. The petitioner ſtates his caſe; he prays what he wanted, and what was neceſſary, and it was granted him; that is, a warrant under the great ſeal, impowering the reſpective proper officers, the barons, to ſee if he had right, and the treaſurer, if it were ſo, to pay him his arrears. Nobody is complained of in the petition, and nobody is blamed in the anſwer: a writ is to go, the charter is to be ſeen, and juſtice is to be done.

In the *ſecond* place, the anſwer given to this petition is a very proper anſwer to a *petition of right*. And therefore there was no ground to ſay that this was not a *petition of right*, becauſe the anſwer was not general, *ſoit droit fait*.

There are more petitions to the king in *Ryley*'s *Placita Parliamentaria*, than in all the books which are printed; and throughout the whole book there is not one in twenty which is ſo anſwered; and yet nothing is ſo plain as that theſe were *petitions of right*.

It were endleſs to cite particulars, there being ſcarce a leaf in the book which does not ſhew what I aſſert.

And if more authorities were wanting, the bundles of petitions in the *Tower*, which I have cauſed to be looked into, are full of *petitions of right*, otherwiſe anſwered than in thoſe general words.

The truth is, the manner of anſwering petitions to the perſon of the king was very various: which variety did ſometimes ariſe from the concluſion of the party's petition; ſometimes from the nature of the thing; and ſometimes from favour to the perſon: and according as the indorſement was, the party was ſent into *Chancery*, or the other courts.

If the indorſement was general, *ſoit droit fait al partie*, it muſt be delivered to the chancellor of *England*, and then a commiſſion was to go to find the *right* of the party; and *that* being found, ſo that there was a record for him, thus warranted, he is let in to interplead with the king: but if the indorſement was ſpecial, then the proceeding was to be according to the indorſement in any other court. This is fully explained by *Stamford* in his treatiſe of the *prerog. cap.* 22.

3 *Inſt.* 215, 216. 13 *Co.* 19. *Mo.* 639. *Co.* Ent. 419. b. 422. a.

The caſe *Mich.* 10 *H.* 4. 4. n° 8. is full as to this matter. The king recovers in a *quare impedit* by default againſt one who was never ſummoned; the party cannot have a *writ of deceit* without a petition. If then, ſays the book, he concludes his petition generally, *que le roy luy face droit*, and the anſwer be general, it muſt go into the *Chancery*, that the right may be inquired of by commiſſion; and, upon the inqueſt found, an original writ muſt go directed to the juſtices to examine the *deceit*; otherwiſe the juſtices, before whom the ſuit was, cannot meddle: but if he conclude his petition eſpecially, *that it may pleaſe his highneſs to command the juſtices to proceed to the examination*, and the indorſement be accordingly, *that* had given the juſtices a juriſdiction. They might in ſuch caſe have proceeded upon the petition without any commiſſion, or any writ to be ſued out; the petition and anſwer indorſed giving a ſufficient juriſdiction to the court to which it was directed. And as the book I have mentioned proves this, ſo many other authorities may be cited.

Fitz. Traverſe 51. *Bro.* pet. 34.

Ex Bund. Pet. Parl. an. 4. *Ed.* 3. *n.* 64. *John Ibe*, abbot of *Feverſham*, petitions the king, ſetting forth that his predeceſſor, in the reign of *Ed.* 2. in regard of the good ſervice of ſir *Barth. de Baddleſmere*, had releaſed to the ſaid ſir *B. B.* for his life 4*l.* 16*s.* 4*d.* of the rents, cuſtoms and ſervices of 300 acres which he held in gavelkind of the abbot and covent; and that the land remained in the king's hands by the forfeiture of the ſaid ſir *B. B.*; and that the rents and cuſtoms were in arrear, after the death of the ſaid ſir *B. B.* for four years whilſt the land ſo remained in the king's hands: and prays, that the king would be pleaſed to ſend to the barons of the *Exchequer*, that if by inqueſt to be taken, it ſhould be found that this rent was due to the abbot and his ſucceſſors, as the right of the church, after the death of ſir *Bartholomew*, the king's officers, who were in poſſeſſion of the lands during the minority of the heir, might anſwer them the rent for that time. And the petition is indorſed, *ſoit ceſt* *peticion mande as treaſorer & barons de l' eſchequer, que eux appellez que ſont eſtre appellez, & oyes les reaſons, facent droit.*

To the like effect is the anſwer to the petition of *Manent Franceys* in the ſame year, n. 9.

And as the indorſements upon *petitions of right* were various, according to the nature of the caſe, ſo above all others they were different in the caſes belonging to the revenue; and, I think, there is not an inſtance to be found where ſuch petitions were anſwered, *ſoit droit fait aux parties.*

Sometimes the indorſement is, *mandetur iſta peticio theſ. & bar' de ſcaccario & ſequatur coram eis.* Ryley 408. Or, *ſequatur coram theſaur' & baronibus de ſcaccario & ibi faciant eis juſtitiam ſuper contentis in petitione.* Ryley 408, 423.

So upon the petition of the abbot of *Feverſham* the indorſement is, *ſoit ceſte peticion mande devant treſ' & barons del eſchequer, & mande a eux que oye la pleynte le dit abbe face droit.* Ryley 646.

Sometimes, *mandetur per breve de magno ſigillo theſ. & baron' de ſcac' quod contineat effectum petitionis,* &c. *Cottingham*'s caſe, *Ryley* 402.

Sometimes, *habeat bre' de canc' theſ. & baronibus de ſcacc' quod fiat ſecundum formam petitionis, & ita rex vult. Walter*'s caſe, *Ryley* 259.

When there was no doubt likely to ariſe of the parties title, as in *Aynſham*'s caſe, (who petitioned for money due for work done at *Carnarvan* caſtle,) the barons are not taken notice of, but the anſwer is, *fiat bre' de canc' de liberate theſaurario & camerariis quod liberent ei tantam ſummam & onerent Hugonem* Camerarium de Carnarvan. *Ryley* 251.

Sometimes the chancellor of the *Exchequer* is joined: as in *Ryley* 249. The biſhop of *Ely* petitions the king, that one *Pecche* his tenant, who held of him four knights fees, parcel of his barony, had granted the ſame fees to the king; and that he, the biſhop, was ready to make out his title: the anſwer is, *ſequatur coram theſaurario cancellario & baronibus de ſcaccario, & ſi ita ſit tunc theſ. & bar' conveniant cum eo ſuper hoc, ita quod eccleſia conſervetur indemnis, & ſuper hoc fiat bre' de canc': et prius inquiratur per quæ ſervicia maneria tenentur & de quo &c. cum omnibus circumſtanciis.*

Sometimes the juſtices are joined, as in the caſe of the abbot and convent of *Hide*, *Ryley* 256. Who petition, that they had, by miſtake, acknowledged the king's title upon a *quare impedit* brought in the king's name; and pray that they might be admitted to proſecute their right to the ſaid advowſon, or that the king upon a gracious fine would reſtore them to the advowſon: the anſwer is, *fiat bre' canc' theſ. & bar' de ſcacc' quod vocatis juſticiariis audient rationes abbatis. Et ſi abbas oſtendere poterit coram eis per cartas vel monumenta vel alias evidencias quod habet jus in dicta advocatione, tunc vult rex quod theſ. & bar' per conſilium juſticiariorum capiant aliquem finem de abbate & conventu, & reddatur eis dicta advocatio non obſtante judicio inde prius reddito pro rege.*]

And in the like manner on the petition of *Floria*, the widow of *Thomas Belhouſe*, the anſwer is, *habeat bre' de canc' theſ. & bar' de ſcacc' quod viſa carta ſua de conjuncto feofamento &c. faciant ſecundum quod de jure fuerit faciendum, & ſecundum quod hactenus uſitatum fuerit in regno: et quod hoc fiat per conſilium juſticiariorum.* Ryley 253.

That theſe were *petitions of right* of ſeveral natures is not to be denied, and yet the general anſwer is given to none of them.

So that when *Everle*'s caſe is conſidered, it ſeems to be a good authority to prove, that in caſes of this nature the ſubject had a proper remedy by a *petition of right* to the perſon of the king. And if in theſe caſes now depending, the parties had taken the courſe to have ſued by ſuch petition, and had been ſo anſwered, *Everle*'s caſe might have been properly cited as an authority: but then, as in almoſt an infinite number of other caſes, the anſwer to the petition is a warrant for a writ under the great ſeal; and that writ gives a juriſdiction to the treaſurer and barons to act according to the tenor of it.

The next caſe inſiſted on, was the abbot and covent of *Warden*'s caſe. *Ryley* 262. That caſe is thus: the petitioners pray a remedy, *quod ubi rex* Henricus, *pater regis nunc, per cartam ſuam eis conceſſiſſet viginti* marcas *annuas pro damnis quæ fecit in boſcis ipſorum tempore obſidii caſtri de* Bedeford, *de quibus vigint'* marcis *annuis ſeiſiti fuerunt ad totam vitam dicti regis* Henrici, *& etiam tempore regis nunc uſque ad viginti annos ex nunc, &c.* The anſwer is, *veniant per bre' ad ſcaccarium & oſtendant cartam, & ubi aſſignatio facta fuit ejuſdem pecuniæ, & fiat juſticia per theſ. & bar'.*

Here was an annuity granted *upon a valuable conſideration* by the king's father: it had been anſwered during the time of the king who granted it, and for thirteen years during the reign of king *Edward* himſelf; and yet the payment had been ſtopped for twenty years together. No other remedy was then thought of for the grantee, but to apply by *petition of right* to the king: and the king's anſwer is, *let a writ under the great ſeal go to the treaſurer and barons*; *let the charter be produced*; *let the petitioner ſhew upon which branch of the revenue the annuity is charged*; *and let them do juſtice.*

One might challenge any body to produce a caſe *in itſelf* more like the preſent caſes than this of the abbot of *Warden*, or more different *in the remedy* taken by the parties. If the ſame method had been purſued in the caſes before us, as was by that abbot and convent, this caſe would have been a good precedent. But here the ſuitors paſs by the king, and come directly to the barons; who proceed to act without being authorized under the great ſeal, as in that caſe, and command their ſuperior officers, who, according to the precedent, ought to have been authorized, together with them, to have done their reſpective parts for the relief of the petitioner.

The next book that was cited was *Trin.* 9 *H.* 6. 12, 13. *Margery Parker*'s caſe; and this was an authority upon which much weight was laid.

The caſe, as it appears in the book, was thus.

Margery Parker brought a writ of annuity againſt the queen, for 20*l.* which ſhe had granted to her for life, to receive *de quadam ſumma aſſignata in partem dotis ipſius reginæ de magna cuſtuma London*, by the hands of the collectors of the ſame cuſtoms.

The queſtion in the caſe was, if this grant, ſo worded, was an annuity, and did charge the perſon of the queen.

In the debate of that queſtion it is ſaid by *Babington*, *that the letters patents, in that caſe, were no more than an acquittance to the cuſtomers to diſcharge them of ſo much*; *and that if the cuſtomers did not pay the queen, ſhe had no action againſt them*; *but muſt ſue for her payment to the barons of the* Exchequer.

Cotteſmore ſays, *if that be ſo, then the queen's perſon muſt be charged, otherwiſe the grantee would be without remedy.*

Rolf ſaid, *the grantee might ſue in the* Exchequer *for her penſion, as the queen might.*

But after all this diſcourſe amongſt them, the plaintiff had judgment to recover the annuity and the arrears: ſo that no regard was had to this ſuppoſed remedy mentioned by *Babington*, but the judgment was given againſt the queen.

This, at moſt, was but a thing dropt by *Babington*, in the debate of the caſe, and ſeems to be very crude and undigeſted: for he neither ſays how ſhe was to ſue, nor whether he meant more than that ſhe was to ſue by a motion to the court, (in which vulgar ſenſe ſometimes the word ſuit is taken, as my lord chief juſtice *Treby* obſerved;) nor what remedy the barons could give her.

It appears to be but a ſudden ſaying: and, perhaps, the judges of the *Common Pleas* might not be ſo perfectly ready in the courſe of proceedings relating to the revenue, upon the ſudden ſtarting of the queſtion.

All that can be concluded of certainty from that caſe, as far as I ſee, is, that *Margery Parker* brought a writ of annuity againſt the queen, and had judgment to recover.

IV. Having inſiſted thus far in ſhewing that I have met with nothing in the authors, who have wrote upon the juriſdiction of the *Exchequer*, or in the law books, or in the records, which countenance ſuch a power as is aſſumed by the barons of the *Exchequer* in theſe caſes; I ſhall mention a *fourth* thing which confirms my opinion, *viz.* that in the oath of the barons, there is nothing expreſſed which does relate to any ſuch truſt lodged in them.

And, perhaps, there is not a better meaſure to be taken of what is the natural and proper buſineſs of theſe antient officers, than what is compendiouſly and ſignificantly expreſſed in the oaths, which have with great care and wiſdom been formed and inſtituted for them to take.

The oath of the lord chancellor, the oath of the lord treaſurer, and of the treaſurer of the *Exchequer*, (which are both the ſame,) of the keeper of the privy ſeal, of a privy councellor, of the chamberlains and other officers of the *Exchequer*, are as adequate deſcriptions of the duty and buſineſs of thoſe ſeveral officers, as can be met with elſewhere.

The oath of the judges does amount to a very concluſive account of their duty: and the barons of the *Exchequer* have a known and undiſputed juriſdiction as to all matters contained in the oath which they take.

They are truly to charge and diſcharge the people: they are upon no conſideration, nor by any ingene *to let the king's right*; *nor to diſturb or reſpite the right of any other perſons contrary to law*; *nor to put the king's debts in reſpite, where they may be levied: they are to ſpeed the king's buſineſs before all others: for no gift to conceal, diſturb, or let the king's profit: to take nothing of any perſon to delay or deliver the people, but to do it, as they may, without hurt to the king: to redreſs what they think may turn to the prejudice of the king, and if they cannot to diſcover it to him.*

But this great and important point of commanding the treaſurer, and other officers of the receipt to do their duty, and to iſſue money out of the receipt of the *Exchequer*, according to *their* opinions, is not mentioned in the oath; nor ſuch guard, for the king's ſecurity, ſet upon this tranſcendent power as there is upon all the reſt of their buſineſs: and yet, if they have ſuch a power, it is of a higher nature, and much greater conſequence, than all the reſt of their duty taken together.

The public treaſure is of the higheſt eſtimation in the conſideration of the law. Sir *Edward Coke*, 11 *Rep.* 91. *b.* ſays, *it is the ligament of peace, the ſinews of war, and the preſerver of the honour and ſafety of the realm*: conſequently the power of iſſuing this treaſure is of the higheſt importance.

The lord treaſurer (whoſe known buſineſs it is,) is expreſly ſworn *truly to keep and diſpend the king's treaſure*; but if this notion prevails, he muſt from time to time diſpend that treaſure according to the opinion and directions of other officers, who are unſworn in that point.

V. In the *fifth* place I ſhall obſerve, that to ſuppoſe a power lodged in the barons to iſſue writs requiring the lord treaſurer, or the treaſurer of the *Exchequer* to do their duty, is to ſuppoſe a direct abſurdity in the original inſtitution of the *Exchequer*; ſince it is to inveſt the barons, who are ſubordinate, with a right of commanding their ſuperior officers.

In the *Mirror cap.* 1. § 14. it is ſaid, *that the buſineſs of the barons is done under the view or inſpection of a ſovereign, who is the treaſurer of* England.

The words of *Gervaſius Tilburienſis*, ſpeaking of the treaſurer in his chapter of that officer, are; *in omnibus enim & per omnia, quæ vel in inferiori ſcaccario vel inſuperiori geruntur, ipſius ſollicita diligentia neceſſaria eſt. Dial. de Scacc. lib.* 1. *c.* 5.

Upon the conſtitution of a treaſurer, there goes a writ under the great ſeal to the barons, as well as other officers, to be attendant upon him, as my lord chief juſtice *Coke* ſets it down. 4 *Inſt.* 105.

The phraſe that he uſes to the barons is, *we will and require you*; ſo it appears *ex parte Remem. regis, paſch.* 3 *Ed.* 6. *Rot.* 4. where ſir *Roger Cholmley* brings into court a writing under the ſeal *of the duke of Somerſet*, then lord treaſurer, in that form.

The next officer in order is the treaſurer of the *Exchequer*, who is commonly the ſame perſon with the treaſurer of *England.*

Theſe two offices have gone ſo long together, that it is no eaſy matter to diſtinguiſh what is the proper buſineſs of the one and of the other. It ſeems to be the treaſurer of the *Exchequer*, to whom the record, which is cited by ſir *Edward Coke*, 4 *Inſt.* 105. is to be applied; becauſe he mentions that his *letters patent* are recited in the writ: for it is the treaſurer of the *Exchequer* who is conſtituted by *letters patent*; as the lord treaſurer is by delivery of the white ſtaff, and, as the ſame ſir *Edward Coke* ſays, in former times by delivery of the keys of the *Treaſury*. 4 *Inſt.* 104.

Mich. 14. *Eliz. Rot.* 355. *ex parte Remem. reg.* The queen ſends her writ to the barons, informing them that ſhe had conſtituted ſir *William Cecill*, lord *Burleigh*, treaſurer of the *Exchequer*, and commands them to be attending upon him, *prout decet.*

I might add, if it were neceſſary in a matter ſo very plain, that his ſuperiority appears in all the writs directed to them, in all which he is firſt named.

The next officer, in point of order, is the chancellor of the *Exchequer.*

After him are the chamberlains; which was antiently an office of very high dignity, and truſted to perſons of the higheſt quality in the kingdom: but the office being ſuch as might be executed by deputies, the chamberlains by degrees made themſelves uſeleſs, by leaving all the buſineſs to their deputies; the conſequence of which was, the office itſelf ſunk by degrees to little more than a name. This might be eaſily ſhewn, if it were not to digreſs; but that they are named before the barons in divers writs and acts of parliament is certain.

The act of 26 *H.* 8. *c.* 3. which gives the firſt-fruits to the crown, obſerves that order throughout, *treaſurer*, *chancellor*, *chamberlains and barons.*

I could mention many other acts and authorities. But I am ſenſible it is but an ungrateful ſubject to be leſſening the rank of officers, who preſide in one of the great courts of *Weſtminſter*, and at the ſame time that this is not very neceſſary; ſince it will be granted that the treaſurer of *England*, and the treaſurer of the *Exchequer*, are certainly ſuperior to the barons; which is enough for me to found myſelf upon, in ſaying that it carries a very great abſurdity, that ſuperior officers, in the proper buſineſs of their office, ſhould be under the command of other officers of the ſame court, who are acknowledged to be inferiour to them.

It muſt be confeſſed to be true, as my lord chief juſtice obſerved, that if my lord chief baron has a ſuit in the court of *Exchequer*, he muſt ſubmit to the judgment of the barons: and I readily own the treaſurer himſelf, and every body elſe who comes into that court as a ſuitor, muſt ſubmit to the judgment of the court; for as a ſuitor he can be conſidered no otherwiſe than any other private perſon, and is not acting in his office. But then it muſt be granted, that all the other barons together have no power of commanding the chief baron as ſuch; and conſequently nothing can be inferred from thence to take away the abſurdity which muſt enſue in ſuppoſing that the barons of the *Exchequer*, who in the order of the *Exchequer* are placed below him, can command the treaſurer to do his duty, and iſſue out the king's money according to their judgments.

It has been ſaid upon this occaſion that it is not the barons, but the king's writ, which the treaſurer muſt obey. And it is moſt true, when the king's pleaſure comes ſignified to him under the great or privy ſeal, he muſt obey it; becauſe theſe are the fixed methods whereby the king's pleaſure is to be known for the iſſuing of money: but that is no anſwer to the impropriety of his being commanded to act by writ, which comes to him under the *teſte* of his ſubordinate officers only; nor a proof that ſuch writ is an authority for him to act by, much leſs an obligation upon him to act according to the tenor of it.

I will only add, to ſhew the abſurdity of the notion that the barons can command the treaſurer by their judgment, that even that judgment of theirs is put under the correction of the treaſurer; for the law has made the lord chancellor and treaſurer the judges, who are to determine whether the judgments of the barons be erroneous, or not. Can any thing be more incongruous than to ſay, the barons by their judgment can require the treaſurer to do a thing, and the treaſurer can review that judgment, and determine whether it be fit for him to do it, or not?

It was ſaid further, that the treaſurer of the *Exchequer* is inferiour to the court held before the barons, and that he is only miniſterial as to *Common Pleas.* All that I ſhall ſay to this aſſertion is, that it was only ſaid, and not proved; and therefore, till I ſhall hear upon what reaſon the aſſertion is founded, I will conſider it no further.

VI. The *ſixth* thing which I ſhall mention is, that the *Exchequer*, if it be conſidered as it comprehends the whole buſineſs of the revenue, as well relating to the *exitus* as the *introitus*, may be taken as one entire body, of which the treaſurer is the head, and all the ſubordinate officers are parts and members; and in this extent and latitude it is treated of by *Gervaſius Tilburienſis:* but if it be conſidered in its ſeveral parts, as to what is entruſted diſtinctly to the treaſurer, and chamberlains, and what is put under the direction and government of the barons, it comprehends diſtinct courts, and ſuch as have no proper communication one with another; tho' perhaps, as to ſome things, the treaſurer, chamberlains, and barons, are intruſted jointly; as my lord chief juſtice *Coke*, 4 *Inſt.* 105. ſays they are with the cuſtody of the judicial records.

That the *Receipt of the Exchequer* is a court, and wholly under the treaſurer, appears by the oaths of the officers belonging to it.

Particularly in the *Black Book*, the oath of the writer of the tallies is, *truly to write all the tallies, and counter-tallies of all payments and aſſignments in the* Court of Receipt; *and to give attendance and diſpatch, according to the antient cuſtom of that court.*

Officers of the receipt are ſworn *to be faithful and true to the lord treaſurer*; as appears by the oath of the lord treaſurer's clerk, or auditor of the receipt. *Book of Oaths*, 20, 21

The under-treaſurer is ſworn *to ſerve the king in the* Exchequer, *and in the receipt of the ſame; and to ſurvey and order the receipts of all ſums of money paid to the king's uſe in the ſaid receipt, and the iſſue of the ſame.* Book of Oaths, 212.

The chamberlains are *to enter and ingroſs the receipts of all monies received to the king's uſe at the receipt, as alſo the payments of the ſame; and not to aſſent to the deliverance of any of the king's money in the* Treaſury, *without ſufficient warrant.* Book of Oaths, 219.

If any orders are fit to be aboliſhed or altered in the receipt, or any new orders to be made, it is to be done by the lord treaſurer; and uſually with the concurrence of the chancellor and under-treaſurer: but the barons are not conſulted, or conſenting. This appears in the *Black Book*, *fol.* 76. 13 *Eliz.*

If the king thinks fit to command by privy ſeal, which has been often done, that any new order or method ſhould be obſerved in any part of the receipts, it is uſually directed only to the treaſurer and the chancellor and under-treaſurer. And if it be thought proper that it ſhould be publiſhed and inrolled in the court of *Exchequer*, to the end that all officers and accountants might the better take notice of it, the lord treaſurer and chancellor and under-treaſurer come into the court of *Exchequer*, and the treaſurer commands it to be publiſhed and inrolled, together with his own aſſent to it, and the aſſent of the chancellor and under-treaſurer. But no notice is taken of the barons, tho' preſent, in any part of the buſineſs.

The whole form of this is particularly mentioned in the *Black Book*, *fol.* 82. 39 *Eliz.* when the lord *Burleigh* was treaſurer.

Add to this, that according to the conſtitution of the *Exchequer*, the barons are not at all privy to the ſtate of the treaſure in the receipt, nor by law ought to be made privy; ſo that all they act muſt be merely as ſuitors apply to them, without any knowledge of what there is in the receipt to anſwer the writ, or of the publick occaſions of the ſtate, from which it may be fatal to divert the money in the king's coffers.

VII. *Seventhly*, this method of proceeding does directly break through ſeveral received notions, which have been looked upon, in all ages, as maxims and rules of law.

As *firſt*, that no part of the king's treaſure could be iſſued but by warrant under the great or privy ſeal; for which reaſon it is, that the law has put ſuch guard upon theſe ſeals, that the counterfeiting them is high treaſon.

Gervaſe of *Tilbury*, ſays in direct terms, *Dial. de ſcacc. lib.* 1. *c.* 6. *theſaurarius & camerarii, niſi regis expreſſo mandato, vel præſidentis juſticiarii, ſuſceptam pecuniam non expendunt: oportet enim ut habeant auctoritatem reſcripti regis de diſtributa pecunia.* The *præſidens juſticiarius* was the *cuſtos regni*; that great officer was ſometimes called by that name, and ſometimes by other names. And leſt there ſhould be a miſtake of what is ſaid of the *preſident juſticiary*, he is careful to ſet the matter right by adding, that what was ſaid as to him is only to be underſtood *de brevibus præſidentis juſticiarii cum rex abſens ſit, & cum ſigilli ejus impreſſione jura regni ſtatuuntur.* Ibid.

I will not trouble myſelf to cite authorities to prove ſo known a poſition, as that no money can be iſſued out of the receipt but by warrant of the great or privy ſeal. I will only mention what was ſaid by my lord chief juſtice *Coke*, in his report of ſir *Walter Mildmay*'s caſe, in the earl of *Devonſhire*'s caſe: and I chooſe to mention it, becauſe the reporter was cotemporary to the judgment, given in the caſe of *Wroth*, if not in that of *Nevil*; and that his book was publiſhed ſeveral years after thoſe judgments were given.

Sir *Edward Coke* ſays, 11 *Rep.* 91. *b. That it was reſolved in that caſe, that no officer of the king, nor all of them together, can iſſue out or diſpoſe of the king's treaſure* ex officio, *tho' it be for his honour or profit, unleſs by a warrant from himſelf.* Theſe words are as appoſite to the preſent occaſion, as if they had been framed on purpoſe to deſtroy ſuch a notion as is contended for in the caſes before us.

The law has intruſted the king himſelf only with his treaſure, when once it comes into his coffers, which is the receipt; and only he, or ſuch as are impowered by his warrant, can diſpoſe of it: no court has any thing to do with it.

This caſe of ſir *Walter Mildmay* was adjudged, *Mich.* 37 and 38 *Eliz.* after the two caſes of *Nevil* and *Wroth*; but not ſo long after as that it could be poſſible either of thoſe caſes ſhould be forgotten: and therefore, the barons, who had ſir *Walter Mildmay*'s caſe before them, could not but know it, if the point, now in queſtion, of the authority of the ſeal of the *Exchequer*, had been ſettled in thoſe caſes of *Wroth* and *Nevil*; or if in the debate of thoſe caſes it was taken to be known law, and the courſe of the *Exchequer.* According to ſir *Edw. Coke*'s report, the queſtion was directly before them, *what ſeals of the king might be a ſufficient warrant to iſſue out the king's treaſure.* One would think upon ſuch a queſtion they ſhould not have forgot the ſeal of the *Exchequer*, which, as it ſeems now to be inſiſted on, is not only a ſufficient warrant, but a better and higher authority than any other, and ſuch as can inforce the iſſuing of the king's treaſure, when the great ſeal itſelf fails. Yet there is not the leaſt notice taken of the *Exchequer* ſeal in the book. It is laid down there firſt *negatively*, that every warrant of the king's is not ſufficient: as for inſtance; his warrant by word of mouth is not; his warrant under the ſignet is not; and yet, as it is obſerved there, in ſome caſes the law takes notice of the ſignet: then *affirmatively* the book ſays in expreſs words, *the warrant which is ſufficient in law to iſſue the treaſure of the king, ought to be under the great or privy ſeal.* 11 Co. 92. a.

To evade the force of this argument, it has been ſuggeſted, as if what was found in the law books, to the effect which I have mentioned, was to be underſtood only of the common and ordinary methods of iſſuing the king's treaſure.

The truth is, if the method now inſiſted on was a legal method, one would wonder it ſhould not have been a very uſual and ordinary one, ſince it is ſo very eaſy and ready for the ſubject.

I think it might be a ſufficient anſwer to this ſuggeſtion to ſay, that it is an evaſion to ſerve a purpoſe only, and has no proof or foundation for it to be found in the books.

But if the caſe, which was then before the court, be conſidered, there will appear to be no pretence for ſuch a ſurmiſe. For the queſtion there was, whether a warrant under the hands of the treaſurer, and under-treaſurer of the *Exchequer*, directed to the four tellers, for the payment of 100*l. per annum* to the chancellor of the *Exchequer* for his extraordinary and neceſſary ſervices, was good in law; payments having been made according to ſuch a warrant, and the money being demanded back again of the executors of the chancellor of the *Exchequer.*

Nothing could have been more natural than to have taken notice, upon ſuch an occaſion as this, that tho' the treaſurer and under-treaſurer could not by their warrant impower any payment out of the receipt, yet the barons by their judgment, and by iſſuing thereupon a writ under the *Exchequer* ſeal, could do it. And if the barons, on ſo fair an opportunity, had omitted to aſſert this power, yet it is very unlikely that ſir *Edw. Coke* (who in his Reports does not confine himſelf to the caſe before the court, but does generally lay together all the learning in the law which comes under that title, ſo as to make them in the nature of common-places,) ſhould omit to take notice of it: and 'tis yet more unlikely, that he ſhould again make the ſame omiſſion in his *fourth Inſtitutes*; where he particularly treats of the juriſdiction of the *Exchequer*, and where it was not only proper but neceſſary to take notice of it, if he did not intend to leave his work imperfect.

There was another thing ſaid by way of anſwer to this objection: that, in the caſe now depending, the judgment of the barons was not properly an iſſuing of the king's revenue, but that the revenue was iſſued by virtue of the great ſeal, and the authority of the letters patent: ſo that what the court did was but a determining of the right, a judgment that the letters patent were legal, and did bind the ſucceſſor; and therefore the barons command that the revenue be iſſued out according to the letters patent.

If it be ſo, that the letters patent, and not the judgment of the court, are the warrant for iſſuing the money in this caſe, then the authority of the barons, as to the iſſuing of money out of the receipt, is given up.

But what then becomes of the authority of thoſe caſes of *Nevil* and *Wroth*? What was the warrant upon which the money was iſſued there? For in neither of thoſe caſes was there a warrant of the great or privy ſeal. And therefore, either thoſe judgments muſt be founded upon ſome particular reaſon proper to thoſe caſes; and conſequently thoſe caſes are not to be applied as precedents for warranting the judgments now in queſtion; or elſe they prove a direct power in the barons of commanding the treaſure out of the receipt, by no other warrant but the *Exchequer* ſeal.

If this anſwer be conſidered the other way, and it be taken, that the great ſeal is to be the warrant to the commiſſioners of the *Treaſury*, in this caſe, for iſſuing the money, and not the judgment, or the *Exchequer* ſeal, what does this whole proceeding ſignify? What is done by this judgment? And what is to be done by the writ that is to iſſue upon it?

The authority of the great ſeal for the iſſuing money was the ſame before the judgment as it continues after: the judgment is drawn up in the words of the letters patent; and what was ſaid before under the great ſeal, is now ſaid again under the ſeal of the *Exchequer*; a ſeal much leſs conſidered in the law: and if after all it be admitted, that the money, if iſſued, muſt be by warrant of the great ſeal, the conſequence then muſt be, that after all theſe proceedings the thing is but juſt where it began.

If it be underſtood, that this writ is no more than a certificate to the lords of the *Treaſury* of the barons opinion, that the letters patent are good in law, and continue in force in the time of the ſucceſſor, it is perhaps what the barons might properly do: eſpecially, if the queſtion had come judicially before them in any ſuit depending; or, according as the ancient courſe was, if a direction had gone under the great ſeal to the treaſurer and them, to have looked into the letters patent, and conſidered of their validity. But then, it is but a certificate: it is not a judgment upon which a writ of error will lye; and we are all in a miſtake, while we are debating here as if a proper judgment was regularly brought before us.

Therefore, I take it for granted, this was ſaid only to make the thing a little more plauſible. It looked not only new, but harſh, I will not ſay abſurd, to affirm directly, that if the barons iſſued out a writ under the *Exchequer* ſeal, commanding the lord treaſurer to pay a ſum out of the receipt, he muſt obey it; and therefore the letters patent were mentioned. But I think it is plain, unleſs a writ under the ſeal of the *Exchequer* be a good warrant and diſcharge to the treaſurer and chamberlains in point of law if it be obeyed, and be compulſory upon them to obey it, the whole proceedings in this caſe are ineffectual, and carry things no farther than juſt where they were when the ſuits began.

Secondly, The judgments given by the barons in theſe caſes, are not conſiſtent with another known maxim; that when once money is paid into the receipt of the *Exchequer*, no court has any power over it, nor is there any legal method to fetch it back again; altho', in ſeveral caſes, if it had not been actually paid into the receipt, it might have been reſtored to the party.

To this purpoſe nothing can be more ſtrong than the common caſes of reverſals of outlawries and judgments; where, tho' by the judgment of reverſal, the party is to be reſtored to all that he has loſt; yet whatever has been actually brought into the receipt of the *Exchequer* is gone paſt redemption: and yet when the outlawry, or judgment is reverſed, it is to all purpoſes as if it had never been. And theſe are caſes of reſtitution which are moſt favoured in law, and the relief extended as far as poſſible.

In like manner, when upon an *office*, or *inquiſition*, a title is found for the king, and the meſn profits are paid into the receipt, if upon a *traverſe*, or *monſtrance de droit*, judgment be afterwards given for the ſubject, and an *amoveas manus* awarded, yet as to profits paid into the receipt there ſhall be no reſtitution.

This is ſo known, that in caſes before the barons, where there is a queſtion touching the profits of an eſtate whereof the title is found for the king, if they conceive a doubt upon a ſuggeſtion of a ſubject's right, which may hereafter appear, they will in diſcretion direct the money to remain in the chamberlains hands for a time, and not to be paid immediately into the receipt; becauſe when it is once there, it is out of their power, and cannot be brought back again.

It cannot be but that in theſe caſes the law is ſo. But my lord chief juſtice endeavoured to aſſign ſeveral reaſons, which might diſtinguiſh theſe from other caſes. He ſaid, that judgments and outlawries are reverſed in the *King's Bench*, and that the *King's Bench* cannot ſend a writ to the treaſurer and chamberlains requiring them to pay money out of the receipt; 'tis only the barons can do it: nor can the barons do it in thoſe caſes, becauſe the record of the judgment is in the *King's Bench*, and there is only a tranſcript in the *Exchequer*, upon which they cannot ſend a writ.

I can eaſily agree, that the *King's Bench* cannot ſend a writ to the treaſurer and chamberlains to command money out of the receipt of the *Exchequer*; and I think I have proved there is no ſuch power in the barons: but if the barons have ſuch a power in any caſe, I am inclined to think it would be no good reaſon why they might not exerciſe it in theſe caſes, that they have not the record itſelf, but only the tranſcript of the record; becauſe the proceſs of the *Exchequer* iſſues every day upon *eſtreats*, which are tranſcripts, or indeed extracts of records only.

As to the other caſes, of money levied upon *offices* or *inquiſitions* found, my lord chief juſtice obſerved, that there was a difference between a judgment upon a *petition of right*, and a judgment upon a *traverſe*, or a *monſtrance de droit*. That in the firſt caſe, the judgment was general, *that the king's hands ſhould be amoved, and the party reſtored to the poſſeſſion*: but in the other caſe the judgment was, *that the party ſhould be reſtored una cum exitibus & proficuis inde medio tempore perceptis*: and ſo he compared a judgment on a *petition of right* to a real action at common law againſt a ſubject, in which there were no damages; and a judgment on a *monſtrance de droit* to a poſſeſſory action, in which damages were recovered at common law.

To this I anſwer, that the caſes of ſubjects are not to be compared to the caſe of the king; but that at the common law, before the ſtatute of *articuli ſuper chartas*, the ſubject, in no caſe of an *amoveas manum*, could have any judgment for reſtoring *iſſues*, however falſe *the office* appeared, as ſir *Edward Coke* expreſly affirms. But be that as it may, yet this diſtinction makes nothing to the preſent queſtion. For in caſes of *monſtrance de droit* or *traverſes*, where the judgment is to reſtore the party to the meſn profits, it is generally expreſſed *unde dicto domino regi nondum eſt reſponſum*; and where theſe words are omitted, the ſame are underſtood. If the profits remain in the tenants hands, or if they are *in tranſitû* in the hands of the receivers, though the receivers have accounted for them, the party is reſtored to them; but if they are anſwered into the receipt, they are loſt to him. This is affirmed by my lord chief juſtice *Coke*, in his commentary upon the ſtatute of *articuli ſuper chartas*, *c.* 19. which act was made 28 *Ed.* 1. and the ſtatute *de eſcheatoribus*, which was made the year following. And yet the words of the ſtatute are very full, that upon an *ouſter le main*, becauſe there was no cauſe to ſeize, *ſoient les iſſues pleinment rendus a celuy a que la terre demurt, & avera le damage reſceive.*

2 *Inſt.* 572, 573.

It is not a very difficult matter to find out a ſeeming reaſon to ſupport a concluſion one is determined to make; but it is loſt time to diſpute of the ſtrength of ſuch arguments, where it is eaſy to come to as much certainty as is conſiſtent with the nature of the thing.

There are many of theſe judgments upon *traverſes* and *monſtrance de droit* to be found upon record, where the party is to be reſtored to the poſſeſſion, *una cum exitibus & proficuis inde medio tempore receptis*. If it could be made appear, that upon any ſuch judgment money was paid back out of the receipt of the *Exchequer*, or if any writ could be produced, requiring the treaſurer and chamberlains to make reſtitution, it would be to me a much more cogent argument, than any new plauſible reaſon which may be aſſigned. But of this there is no footſtep in any antient or modern book. If it never was done, the old known reaſon will beſt ſerve our turn, that it was becauſe the money was paid into the receipt, and then no court had power to intermeddle with it.

VIII. *Eighthly*, This does ſeem to be an extraordinary and anomalous method of proceeding, and ſuch as has nothing like it in any other court, either when the ſubject ſues the king, or any other ſubject.

This method of proceeding takes from the king all poſſibility of making a defence: for the attorney-general does not come in till the barons have commanded the letters patent to be enrolled; after which the attorney-general could not plead *non conceſſit*, as he might have done before; or if he could have pleaded that plea, no *venue* is laid, and conſequently no trial could be had on ſuch iſſue. And a proper defence being thus taken away, or, which is all one, the trial of it rendered impracticable, no courſe of any court can make ſuch a proceeding good.

It was confeſſed, that the legitimation of a caſe is to be ſuſpected unleſs there be another like it.

But it was ſaid, that in other courts caſes might be found, which might properly be reſembled to the proceeding in this caſe; and the caſe in *Co. Ent.* 93. was inſtanced. I will put that caſe as it ſtands upon the record.

A claim is put in by the lord *Hunſdon*, to a ſum of 18 *l.* 11 *s.* 8 *d.* which is charged upon the accounts of the ſeveral ſheriffs of *Kent* and *Dorſet* for the laſt year, for iſſues out of the *Common Pleas* and *King's Bench*; and for fines and amerciaments before the juſtices of aſſize; and for iſſues and amerciaments before the barons of the *Exchequer*, *&c.* (the particulars are expreſſed in the claim;) which were ſeverally ſet upon his tenants, or reſiants within his manor and hundred of *Sevenoakes*, and *Coddeſheath*: all which he claims to belong to him, the perſons, upon whom they were ſeverally ſet, being tenants or reſiants within his manor and hundred, as the ſaid ſheriff of *Kent* had teſtified upon his account.

And he ſets out letters patent of *Ed.* 4. granting to the archbiſhop of *Canterbury*, and his ſucceſſors, the return of writs, and all fines and amerciaments of tenants and reſiants within the manor, *&c.* and ſo proceeds to ſhew a title in the archbiſhop to the fines, *&c.* with which the ſheriff was charged: and then ſhews the inrollment of theſe letters patent in the *Exchequer*, in the third year of *Ed.* 4; and that *Cranmer* was ſeized, in right of his archbiſhoprick, of the ſaid manor, hundred, and liberties, *&c.*

Then he ſets forth the act for erecting the court of *Augmentations*, whereby all manors, *&c.* which *H.* 8. ſhould purchaſe, were put under the government of that court: after which act, *Cranmer* by deed inrolled conveyed the manor and liberties to *H.* 8. and his heirs; which grant was confirmed by the prior and covent of *Canterbury*. And then he ſets forth the act of 32 *H.* 8. *c.* 20. for reviving and continuing liberties and privileges in the hands of the king; by virtue whereof, *&c.* *H.* 8. was ſeized, and died ſeized: and ſo conveys a title to *Ed.* 6. and queen *Mary*: and that upon her death queen *Elizabeth* became ſeized; and that ſhe granted the manor, hundred, and liberties, to him and his heirs males; and that he entered and was ſeized. He then proceeds to plead an allowance in the *Exchequer* of theſe fines and amerciaments to the archbiſhop of *Canterbury*, in the time of *Ed.* 4: and ſo makes his claim; which the attorney-general confeſſes.

And thereupon, on view of ſeveral records, and for that the ſheriff of *Kent*, upon oath, did teſtifie the matter of fact; that the ſeveral perſons, on whom the fines and amerciaments were ſet, were tenants and reſiants in the manor and hundred of the lord *Hunſdon*, the barons adjudge, that the ſheriff of *Kent* ſhould be diſcharged of 10*l.* 6*s.* 4*d.* with which he ſtood charged upon his account; and that the ſame be allowed to the lord *Hunſdon*; and thereupon the ſheriff had his *quietus*.

Upon this caſe I obſerve.

1*ſt*, That it has no relation to any money in the receipt of the *Exchequer*.

2*dly*, This is a proceeding in diſcharge of the ſheriff upon his account: the queſtion being only, if the ſheriff ſhould be charged with ſo much as payable to the king, contrary to what he had teſtified upon his account on oath. So that this queſtion was the proper buſineſs of the barons to determine.

3*dly*, This claim of the lord *Hunſdon*'s was by way of defence to a demand on the king's part, and not by way of ſuit of the ſubject to recover from the king: and this demand, on the king's part, is ſo far from being founded on the record, that it is contrary to what the ſheriff had ſworn upon his account.

4*thly*, This was not a claim which came at that time originally before the court; but was founded upon antient allowances, before made in the court of *Exchequer*.

5*thly*, Here was no poſitive record for the king; it being only a general charge upon the ſheriff, and he having diſcharged himſelf by oath.

6*thly*, This is a caſe directly within the ſtatute 5 *R.* 2. which impowers the barons to allow the matter pleaded by way of diſcharge upon account.

By all which it appears, that there is no manner of reſemblance in that claim of my lord *Hunſdon*, to the caſes before the court; where the ſubject comes originally as a plaintiff, and makes a demand of money out of the receipt of the *Exchequer*.

Another caſe, cited by my lord chief juſtice, as a proceeding that might be reſembled to the caſes now before the court, was that of the lady *Broughton*; which is entered *Trin.* 24 *Car.* 2. *Rot.* 38. *B. R.*

There an information was exhibited againſt the lady *Broughton*, for divers miſdemeanours committed by her, as keeper of the *Gatehouſe* priſon at *Weſtminſter*. Upon not guilty pleaded, a verdict was found againſt her; and judgment was given, that ſhe ſhould be fined 100 marks, *Et quod officium cuſtodis priſonæ prædict' capiatur in manus domini regis, quouſque curiæ hic conſtiterit cui vel quibus officium illud de jure ſpectat, vel quouſque curia hic ulterius ordinaverit, ſalvo jure cujuſcunque, &c.*

Whereupon the dean and chapter of *Weſtminſter* come in, and ſet forth their title to be a corporation; and that king *James* I. granted to them and their ſucceſſors, *habere priſonam & arreſtacon' & impriſonament' omnium hominum arreſtat' infra civitat' & libertat'* Weſtm' *adeo libere quiete & integre ac in tam amplis modo & forma prout ultimus abbas, &c. in præmiſſis habuit*, to hold to them and their ſucceſſors to their uſe for ever, *&c.* by virtue whereof they were ſeized *de libertatibus habendi priſon' & arreſtacon' & impriſonamentum omnium hominum infra' civitat' & libertat'* Weſtm', *ut de feodo & jure, in jure eccleſiæ, &c.*

And then they ſet forth the grant by them to ſir *Edward Broughton* and *Mary* his wife, of the office *cuſtod' priſone ſue prædict', ſimul cum omnibus feodis, &c. habend'* to them, their executors and aſſigns, for forty years; by virtue of which they were poſſeſſed, *&c.* and that ſir *Edward* died: and that *Mary*, as ſurvivor, was poſſeſſed; and for divers offences, by her committed in the execution of the ſaid office, (whereof ſhe was convicted,) forfeited the ſaid office, *prout* the record.

Et ea de cauſa prædict' dec' & capitul' petunt & calumniant libertat' habendi & diſponendi officium prædict', &c. Et petunt allocationem libertat' prædict', ſecund' conceſſionem ſic ut prefertur factam; and make the proper averments. The attorney-general confeſſes their claim, and thereupon they have judgment.

I acknowledge that I am much to ſeek as to any thing appearing in this record, which is in the leaſt to be reſembled to the caſes before us.

Judgment was given againſt the keeper of a priſon, of forfeiture of the office for a miſdemeanour: by that judgment the office was vacant; but it did not appear to the court in whom the right was of diſpoſing, or exerciſing the office. Upon ſuch an avoidance, it was neceſſary for the ſake of publick juſtice, and to prevent the eſcape of the priſoners, that the office ſhould be taken into the king's hands, till it might appear to the court in whom the right was; but it was only *quouſque*, and with a *ſalvo jure*. So that no title to the office is found, or ſo much as alledged for the king: and when the dean and chapter, in purſuance of the very direction of the judgment, come in, and ſet out their title, the attorney-general confeſſes it, and they are put into poſſeſſion.

I do not ſee but, notwithſtanding either of theſe two inſtances, the caſes before us ſtand by themſelves; and that the argument againſt theſe kind of proceedings does ſtill remain in force, becauſe they are unuſual, and of an unprecedented nature, and ſuch as the counſel can ſcarce find a name for.

In their arguments upon theſe caſes ſome of the counſel ſaid, that the proceeding was in the nature of a *monſtrance de droit.*

Others, with more circumlocution, ſtiled it, *an application to the court of* Exchequer, *ſetting forth a right to part of a revenue in charge before them, which the officers under their power refuſe to pay.*

Others ſaid it was neither a *petition*, nor a *monſtrance de droit*; for thoſe were only proper when the ſuit is in diſaffirmance of the king's title, but here the ſubject claims from the king, and complains only of the officer; but they gave it no name.

My lord chief juſtice was pleaſed to ſay that this ſuit was a *monſtrance de droit*; and, I think, I may affirm that to be the firſt time it had a certain name. *Plowden* calls ſir *H. Nevil*'s caſe, *a report of a judgment given by the barons, upon the exhibiting to the court of* Exchequer, *by ſir* H. Nevil, *a deed of grant of the office of keeper.*

My lord chief juſtice ſaid, that a *monſtrance de droit* was a common law remedy. He owned, that though ſeveral ſtatutes had enlarged the relief, which the ſubject might have in many caſes where there was occaſion to interplead with the crown; yet the caſes in queſtion did not come within the relief of any of thoſe ſtatutes, but remained the ſame as at common law. But he ſaid, this ſuit was a *monſtrance de droit* maintainable at common law, and was the ſubject's proper remedy when his title appeared upon record. And that the party might in this caſe maintain his *monſtrance de droit*, and was not put to his *petition of right* to admit himſelf out of poſſeſſion.

1*ſt*, Becauſe the right he claimed is not grounded on *a matter of fact*, but by *matter of record*; *Williamſon* claiming by a deed inrolled, and that inrollment directed by the letters patent, which is a *matter of record.*

2*dly*, Becauſe the party does not go about to deſtroy the king's title, but his claim ſubſiſts upon the king's title to the exciſe.

3*dly*, Becauſe his annuity is not turned to a right, nor deveſted; and therefore it was not neceſſary he ſhould go by way of *petition.*

I will not, at this time, enter into the particular conſideration of thoſe reaſons. Though I cannot but ſay, in the *firſt* place, it is far from being clear to me, when letters patent direct, that the aſſignment of one ſubject to another ſhould be inrolled within thirty days before the auditor of the *Receipt*, or clerk of the *Pells*, for a particular purpoſe, (*viz.* that it may appear what aſſignments have been granted,) that ſuch an inrollment does make a record; much leſs ſuch a record as is equal to that record which intitles the king. And if it be not a record of as high a nature, the ſubject is put to his *petition*, and in no caſe can have a *monſtrance de droit*; as is reſolved in *Piers Partifield*'s caſe, 29 *Aſſ.* 31; and is agreed, and declared to be law in the *commonalty of* Sadlers *caſe.* 4 *Co.* 55. *b.* and 56. *a.*

In the *ſecond* place, I cannot underſtand, but that a perſon, who ſets up a title to the inheritance of a part of the *Exciſe*, and ſeeks to recover it from the king, does go about to defeat the king's title to that part of the revenue

Nor will I, in the *third* place, enter into the debate, whether, as this caſe is, the annuity be deveſted or turned to a right. Though I cannot but obſerve, that a writ of annuity, (and this ſuit is in the nature of ſuch a writ,) is the higheſt writ which ſuch a perſon can purſue; and the judgment given upon that writ is for the whole inheritance, for the time to come, as well as for the arrears: and therefore it might ſeem, that he who brings it doth admit himſelf to be deveſted of the whole.

But I will very plainly own, that after conſideration of this argument, with the beſt application I could uſe, ſeveral doubts remain with me as to the force of it.

As, 1*ſt*, Whether a *monſtrance de droit*, in the ſenſe it is now taken, and commonly underſtood, and as it ſeems to be applied to theſe caſes, did lie at the common law.

2*dly*, If that were to be admitted, becauſe I would not diſpute about words or names, yet I am not ſatisfied that this ſuit can properly be called a *monſtrance de droit.*

3*dly*, Let this ſuit have what name it will, yet I think it is not the proper common law remedy, to which the ſubject was entitled in a caſe of this nature; but that the party was put to his *petition of right.*

I. The *firſt* thing I ſhall do, is to ſhew why it ſeems doubtful to me, whether ſuch a ſuit as a *monſtrance de droit*, as it is now underſtood, did lie at the common law.

I will not be thought to mean, that the ſubject had not, in ſeveral caſes, a proper way of defending himſelf at common law againſt the king, and by proper application to the courts to obtain an *ouſter le maine.* But I do ſay, wherever the king had a direct title of freehold, or inheritance, appearing for him *by matter of record*; (whether that *record* was judicial, or miniſterial; or was a conveyance of *record*; or was a matter of fact found by *office of record*;) the ſubject at common law was put to his *petition of right*, and could not interplead with the king, either by traverſing the king's title, or avoiding it by ſetting up any title of his own: and in this I ſay no more than what was agreed in the *commonalty of* Sadler's *caſe.* 4 *Co.* 55. *a.*

'Tis very true, if the *office* did not entitle the king to the 4 *Co.* 56. *a. b.* poſſeſſion, but only to the bringing of a *ſcire facias*; (as if a *ceſſavit per biennium*, or a *fine by colluſion*, or *the committing of waſte*, was found againſt the king's tenant by inquiſition;) upon a *ſcire facias* brought, the party at common law might come in and defend the poſſeſſion, by ſhewing his title, and denying the matter found againſt him. For it was what the writ itſelf expreſly required; and it would have been very abſurd to ſay he ſhould not be admitted to do that which the very writ required him to do: and by the *ſcire facias* he was made privy, and had a day to plead. *Kelw.* 155. *b.* 158. *a. b.*

And therefore ſuch a *traverſe*, or, if that name be better liked, ſuch a *monſtrance de droit*, lay at common law.

In like manner, where the *office* contained the whole ſpecial 4 *Co.* 55. *a.* matter; ſo that tho' there might be ſuch matter found, as, if it ſtood alone, would make a title for the king; yet, if there was alſo found, in the ſame *office*, ſufficient upon the whole to ſhew a good title in the ſubject, the ſubject might inſiſt upon this matter, and might pray an *amoveas manum:* becauſe in truth the very record, upon which the king ſeized, made a title for the party.

As ſuppoſe it to be found, that *A.* did diſſeize me of lands 4 *Co.* 55. *a.* holden of the king, and that *A.* aliened in mortmain, or died without heir; in this caſe, I may pray an *ouſter le main* upon the very record. So, if it be found that the king's tenant, at the time of his death, held an acre of land of me by leaſe for his life. *Kelw.* 156. *b.* 157. *a.* 158. *a.*

In like manner, if the title found for the king appears, by the record, to be determinable upon performance of a condition, and that condition appears upon the record to be performed, the party might take advantage of it. 4 *Co.* 55. *a. b.*

But as the common law ſtood, wherever a title for the king only was found *by matter of record*, tho' it was falſe, the party could not traverſe it.

So where a title was found for the king which was true, but it was diſcloſed in the record, that the ſubject had a good right, which would avoid the title found for the king; yet in that caſe the ſubject could not have been admitted to ſhew it, but was ſo far concluded as to be put to his *petition* of right. 4 *Co* 56. *a.*

Lib. 1. *c.* 8. & *lib.* 4. *c.* 10.

I need not mention *Bracton*'s words for this purpoſe.

Stamford's opinion is expreſly, that a *monſtrance de droit* was given by the ſtatute 36 *Ed.* 3. and did not lie at common law. *Prer. Reg. cap.* 21. *fol.* 71.

And in the caſe *of the corporation of ſadlers*, which has been mentioned before, as it is reported by my lord chief juſtice *Anderſon*, 1 *And.* 180. 181. *num.* 216. it is expreſly affirmed, *that the traverſe and monſtrance de droit are both given by that ſtatute.* Nor do I ſee, that any thing to the contrary of what I have ſaid is affirmed in the report of this caſe, by my lord chief juſtice *Coke.* Unleſs it be, that he gives the name of a *monſtrance de droit* to thoſe proceedings, which were always admitted to have been at the common law; that is, where the ſpecial matter was ſo found, as that, *upon the ſame record,* it did appear, that the right was in the party, and not in the king: whereas, in proper ſpeaking, it is not the ſubject there who comes in and ſhews his right, but the king's own record ſhews it.

But I think it very plain, that the ſtatute 36 *Ed.* 3. *cap.* 13. which gives a *traverſe* in caſe of *offices* found, does alſo give the *monſtrance de droit*; which my lord chief juſtice *Coke* himſelf, *in the commonalty of* Sadler's *caſe*, does agree was not given by the ſtatute 34 *Ed.* 3. *cap.* 14. For tho' that ſtatute gave the ſubject a *traverſe* in ſome caſes, where the *office* was found by virtue of a writ, or a commiſſion; yet it was defective, even in thoſe caſes: for upon the *traverſe* taken, tho' the iſſue was found for the ſubject, yet no judgment could be given without a new commiſſion *de procedendo ad judicium.* 4 *Co.* 56, 57.

The words of the ſtat. 36 *Ed.* 3. are, *that if any one will put in a claim to lands ſeized by office, the eſcheator is to ſend the inqueſt into* Chancery, *and a writ is to be delivered to him to certifie the cauſe of the ſeizin there.* And there the party *ſoit oye ſans delaye de* traverſer l'office, *ou autrement* monſtrer ſon droit, & *illonques maunde devant le roy, a faire final diſcuſſion ſans autre maundement.*

Theſe words, as I take it, gave the name of *monſtrance de droit* to that ſort of proceeding; and I think I may affirm, with *Stamford*, that no book before this ſtatute did treat any thing of a *monſtrance de droit. Stamf. c.* 21. *prer. regis.*

That it was this ſtatute which gave the ſubject a right of interpleading with the king, where an abſolute title was found for the king by office; and that the ſubject is ſtill put to his petition in all caſes out of the remedy of that ſtatute, (as in all caſes where the king is entitled by a judicial record;) is what appears plainly by the lord *Hungerford*'s caſe, which is 4 *Ed.* 4. 21. 22. and alſo by 9 *Ed.* 4. 52. and 13 *Ed.* 4. 8. and by many other caſes. I need not be at the trouble of citing them all.

II. But in the *ſecond* place, ſuppoſe it ſhould be admitted, that a *monſtrance de droit* did lie at common law, yet ſtill it remains a doubt to me, how the proceeding in this caſe can be called by that name.

In caſes where an *office* is found by which the king is entitled to the poſſeſſion, by the ſtat. 36 *Ed.* 3. (and take it for granted at preſent, in ſome caſes at common law,) the ſubject may come in and interplead with the king; either by denying the title found for the king, or by ſhewing his own right, whereby he does avoid the title found for the king.

This is that kind of proceeding which is called a *monſtrance de droit.* And in this ſort of proceeding, the ſubject is in the nature of a defendant, and comes in and pleads to a title found for the king: and the judgment is, *quod manus domini regis amoveantur.* This appears 1 *Co.* 157. *Digg*'s caſe; 4 *Co. commonalty of* Sadler'*s caſe*; and by the caſes in *Co. Entries.* So is the caſe of *Coningſby* and *Malham*, in *Kelway*'s Reports, 154. In which caſe it is ſaid, *that the* amoveas manus *is the end of every ſuit, where a man comes in to interplead with the king*; *for without that judgment the land will ſtill remain in the king's hands. Kelw.* 158. *a.*

And therefore, where that judgment cannot be given, the party ſhall not be admitted to traverſe a falſe *office*, or to interplead with the king, tho' the caſe be otherwiſe ſuch as comes within the remedy of the ſtatute of 36 *Ed.* 3.

As, where a man has a remainder, or reverſion, expectant upon an eſtate of freehold, without any rent, or profit, and a falſe *office* is found of the dying ſeized of ſuch a remainder, or reverſion; he ſhall not be admitted to traverſe this falſe *office*, becauſe the judgment cannot be given, *quod manus domini regis amoveantur*: as was adjudged in the caſe of the counteſs of *Rutland.* 2 *Inſt.* 688.

But in theſe caſes before us, neither does the party aſk any ſuch judgment; nor are the judgments, which are brought before the court by theſe writs of error, any thing like it.

If this be a *monſtrance de droit*, the judgment ought to be ſuch as the law hath ordained in caſes of that nature: but here the ſuit is plainly in the nature of a writ of annuity; the party concludes his demand in the ſame manner as in a declaration for an annuity, and the judgment is given accordingly.

III. The *third* thing I will conſider is, ſuppoſing it were taken for granted, that a *monſtrance de droit* did lie at common law; and that this ſuit of *Williamſon*'s is ſuch a *monſtrance de droit*, whether yet this *monſtrance de droit* be the proper remedy maintainable at common law in a caſe of this nature? For, as *Fineux* ſays, in the caſe of *Coningſby* and *Malham*, *Kel.* 157. *b. tho' the parties have ever ſo good a right, yet they muſt come to the poſſeſſion of what they have a right to by the ordinary method of law*; *for*, ſays he, *if a man owes me money, I cannot take it out of his purſe, nor can I recover it by an improper action.*

Let us ſee then what this ſuit is for; and what was the courſe taken at common law to recover a thing of this nature.

The ſuit is for the arrears of an annuity, granted to ſir *Robert Vyner* and his heirs, by the king's predeceſſors, out of a branch of the hereditary revenue of the crown, and by him aſſigned to *Williamſon*; as alſo for the growing payments, that they may be anſwered from time to time, as they become due.

Now, as far as I can find, by the common law, in all caſes where arrears of an annuity, or annual rent or ſum, were demanded by the ſubject from the crown; (whether it was originally granted by the crown out of any part of the revenue; or was iſſuing out of lands which afterwards came to the crown;) the only remedy, which the ſubject had for recovering thereof, was by *petition* to the king.

The authorities are very expreſs and full in this matter.

Suppoſe a man hath a rent-charge, or a rent-ſervice, or other rent, iſſuing out of land by preſcription, or grant; and this land comes to the king by grant, or forfeiture: in all ſuch caſes the owner of the rent is put to his *petition* to the king, and hath no other remedy whatſoever.

In like manner, if a man be ſeized of land, and acknowledges a ſtatute, or recognizance, and before execution taken, the eſtate comes to the king by attainder: or the ter-tenant grants to the king by deed inrolled: in either caſe the conuzee is put to his *petition*, and has no other remedy; unleſs the whole matter be ſpecially found in the *office.* 4 *Ed.* 4. 23. *Stamford de prerog. regis* 75. *c.* 22. *Kelway* 155. *b.*

A man holds lands of the king *in chief*; and other lands, by knights ſervice and rent, of other lords; and dies, leaving his heir within age: the king ſeizes the body and lands held in chief; and alſo the other lands, which the anceſtor held of other lords. The heir ſhall pay his relief to the other lords when he comes to age: and as to the rent during the nonage of the heir, the lords ſhall ſue to the king by *petition* to have the rent of the lands which are held of them by the heir, who is in ward to the king; and ſhall have it by this means. So is 13 *H.* 7. 15. *pl.* 11. 24 *Ed.* 3. 24. *pl.* 5.

And that the law is ſo, is affirmed in all the abridgments of the caſe; and particularly *Bro.* Title *Pet.* 43. makes a ſpecial reference to the ſtatute 2 & 3 *Ed.* 6. *c.* 8. of *offices.*

Fitz. relief 7. traverſe 43.

And that the law continued ſo till the making of that ſtatute, does ſufficiently appear by the ſtatute itſelf. For in the *ſeventh* branch of that act, it is expreſly taken notice of, *that*, in the caſe abovementioned, *the meſn lords would ſpare the rents due to them for the lands holden of them during the king's poſſeſſion*; and *after the heir had ſued his livery, would diſtrain upon him for the arrearages, where they ſhould have ſued by petition to the king's majeſty, to have obtained the ſame out of the king's hands.* And that ſtatute enacts a new relief for the meſn lords; *that they ſhould receive the rents, during the wardſhip, from the king's officers appointed to receive the profits of the ward's lands: and that ſuch officers payment, and the acquittance of the meſn lord, ſhould be a good diſcharge to the officers.*

From hence it is plain, that, before this act, there was no remedy for the meſn lords, but by *petition.* And it may be obſerved, that the remedy given is by ſending them to the receivers in the country, and not to the receipt of the *Exchequer.* And this clauſe does explain the general words of the preamble of that ſtatute: which takes notice, *that perſons having any rent, common, fee, or other profit apprender, out of lands, or tenements, ſpecified in ſuch offices, or inquiſitions, were without remedy to obtain or have the ſame, by any traverſe, or other ſpeedy mean, without great and exceſſive charges, during the king's intereſt therein.*

And ſince that ſtatute, in the caſe of *Wicks* and *Dennis*, 31 & 32 *El.* 1 *Leon.* 190. it was holden by the whole court, that during the queen's poſſeſſion of the land, the rent-charge iſſuing out of it is only recoverable by *petition*: altho' the demand of the rent was agreed to be good; becauſe in his *petition* the party muſt ſhew that he did demand the rent.

And as the law is plainly ſo, where a perſon has a title to a rent, by grant of a ſubject, out of lands which come to the poſſeſſion of the king; ſo the caſe is to all purpoſes the ſame, where he has a title to a rent, or yearly ſum, by letters patent from the crown.

13 *Ed.* 4. 5. *pl.* 15. The king grants a rent out of his manor: *the manor is not charged, but the king by petition.* Theſe are the words of the book.

And as that book is an expreſs authority that this was the law, ſo was the practice accordingly.

In 18 *Ed.* 1. *Ryley*'s *Placita Parliamentaria* 52. the abbeſs *de Fonte Eboraldi* ſues to the king by *petition* for the arrears of an annuity of 10*l. per ann.* granted by *H.* 3. to the abbeſs of that place, and her ſucceſſors.

In 35 *Ed.* 1. *Ryley* 329. is the *petition* of *John Hernigod* for the arrears of a rent of 7*s.* 8*d.*

So alſo was *Everle*'s caſe, and the abbot and covent of *Warden*'s caſe, before-mentioned.

In like manner, it appears by the ſame book, that the ſame method was to be taken for recovering a rent, &*c.* granted by a ſubject out of lands which afterwards came to the crown.

33 *Ed.* 1. *Ryley* 256. 257. *Elſefend*'s caſe; & 245. the abbot and covent of *Oſeney*'s caſe. So, where *Peche*, the tenant of the biſhop of *Ely*, who held of the biſhop, as part of his barony, four knights fees, granted theſe lands to the king, the biſhop was put to his *petition* to recover his ſervices. 33 *Ed.* 1. *Ryley* 249.

Upon the exile of the *Jews*, in the time of *Ed.* 1. divers lands came to the king's hands by way of eſcheat: the chief lords, of whom thoſe lands were holden, had no remedy to recover their ſervices in arrear, but by *petition.* 21 *Ed.* 1. *Ryley* 129.

By all theſe authorities, and by many others which I could cite, both ancient and modern, it is plain, that if the ſubject was to recover a rent, or annuity, or other charge, from the crown; whether it was a rent, or annuity, originally granted by the king; or iſſuing out of lands, which by ſubſequent title came to be in the king's hands; in all caſes the remedy to come at it was by *petition* to the perſon of the king: and no other method can be ſhewn to have been practiſed at common law.

Indeed I take it to be generally true, that in all caſes where the ſubject is in the nature of a *plaintiff*, to recover any thing from the king, his only remedy, at common law, is to ſue by *petition* to the perſon of the king. I ſay, where the ſubject comes as a *plaintiff.* For, as I ſaid before, when, upon a title found for the king by *office*, the ſubject comes in to traverſe the king's title, or to ſhew his own right, he comes in the nature of *a defendant*; and is admitted to interplead in the caſe with the king in defence of his title, which otherwiſe would be defeated by finding the *office.* And to ſhew that this was ſo, I would take notice of ſeveral inſtances.

That, in caſes of debts owing by the crown, the ſubject's remedy was by *petition*, appears by *Ayneſham*'s caſe, *Ryley* 251. which is a *petition* for 19*l.* due for work done at *Carnarvan* caſtle.

So *Ryley* 251. the executors of *John Eſtrateleng* petition for 132*l.* due to their teſtator for wages. The anſwer is remarkable; for there is a latitude taken, which will very ill agree with the notion that is taken up in this caſe: *Habeant bre' de liberate in canc' theſ. & camerar' de* 32*l. in partem ſolutionis.*

So the caſe of *Yerward le Galeys* for 56*l.* *Ryley* 414.

In like manner, in the ſame book 253. 33 *Ed.* 1. ſeveral parties ſue by *petition* for money and goods taken for the king's uſe; and alſo for wages due to them; and for debts owing to them by the king. The anſwer is, *Rex ordinavit per concilium theſaurarii & baronum de ſcaccario, quod ſatisfiet iis quam citius fieri poterit; ita quod contentos ſe tenebunt.* And this is an anſwer given to a *petition* preſented to the king in parliament; and therefore we have reaſon to conclude it to be warranted by law. They muſt be content, and they ſhall be paid, *quam citius fieri poterit.*

The parties, in theſe caſes, firſt go to the king by *petition*: it is by him they are ſent to the *Exchequer*; and it is by a writ under the great ſeal, that the *Exchequer* is impowered to act. Nor can any ſuch writ be found, (unleſs in a very few inſtances, where it is mere matter of account,) in which the treaſurer is not joined with the barons.

So far was it from being taken to be law at that time, that the barons had any original power of paying the king's debts; or of commanding annuities, granted by the king or his progenitors, to be paid, when the perrſons applied to them for ſuch payment.

But perhaps it may be objected, that it is not to be inferred, becauſe *petitions* were brought in theſe caſes, that therefore it was of neceſſity that the ſubject ſhould purſue that courſe, and could take no other way. It might be reaſonable to require from thoſe who object thus, that they ſhould produce ſome precedents at leaſt, of another remedy taken.

But I think there is a good anſwer to be given to this objection. All theſe *petitions* which I have mentioned, are after the ſtat. 8 *Ed.* 1. *Ryley* 442. where notice is taken, *that the buſineſs of parliament was interrupted by a multitude of petitions, which might be redreſſed by the chancellor, and juſtices.* Wherefore it is thereby enacted, *that petitions which touch the ſeal ſhould come firſt to the chancellor; thoſe which touch the Exchequer, to the Exchequer; and thoſe which touch the juſtices, or the law of the land, ſhould come to the juſtices: and if the buſineſs be ſo great, or* ſi de grace, *that the chancellor, or others, cannot do them without the king, then the petitions ſhall be brought before the king to know his pleaſure; ſo that no petitions come before the king and his council, but by the hands of the chancellor, and the other chief miniſters; that the king and his council may attend the great affairs of the king's realm, and his foreign dominions.*

This law being made, there is reaſon to conclude that all *petitions* brought before the king in parliament after this time, and anſwered there, were brought according to the method of this law; and were of the nature of ſuch *petitions* as ought to be brought to the perſon of the king.

And that *petitions* did lie for a chattel, as well as for a freehold, does appear 37 *Aſſ. pl.* 11. *Bro. Pet.* 17. If tenant by ſtatute merchant be ouſted, he may have a *petition*, and ſhall be reſtored. *Vide* 9 *H.* 4. 4. *Bro. Pet.* 9.

9 *H.* 6. 21. *Bro. Pet.* 2. If the ſubject be ouſted of his term, he ſhall have his *petition.*

7 *H.* 7. 11. Of a chattel real, a man ſhall have his *petition of right*, as of his freehold.

34 *H.* 6. 51. *Bro. Pet.* 3. A man ſhall have a *petition of right* for goods and chattels; and the king indorſes it in the uſual form.

It is ſaid indeed, 1 *H.* 7. 3. *Bro. Pet.* 19. that a *petition* will not lie of a chattel.

And, admitting there was any doubt as to that point, in the preſent ſuits we are in the caſe of a freehold.

I will now enter into the conſideration of the two caſes, which have been principally inſiſted upon, as warranting the proceedings in the ſuits which are now depending. I mean the caſes of ſir *H. Nevil* and ſir *T. Wroth*: both of them reported by *Plowden*; and both adjudged in the reign of queen *Elizabeth.*

Indeed the pleadings in the caſes before us have been formed upon theſe precedents.

Plo. C. m. 377. Sir *H. Nevil* exhibits to the barons a writing of the late archbiſhop of *Canterbury*, dated the 15th of *Nov.* 22 *H.* 8. purporting to be a grant to him, and one ſir *Edward Nevil*, (lately attainted for treaſon), of the office of keeper of *Aldington* park, and of the rent of 3*l.* 10*d.* for the exerciſe of the office, to be received out of the manor of *Aldington*, *habendum* for their lives and the life of the ſurvivor; which grant was confirmed by the prior and covent; and prays it may be inrolled.

The barons receive the writing, and cauſe it to be read and inrolled. And thereupon ſir *H. Nevil* alledges, that he is three years in arrear, and that during that time the manor has been, and does remain in the king's hands; and prays that the writing may be allowed, and the arrears paid him, and the growing rent during his life.

The attorney-general demurs. And after eight or nine years depending, judgment is given, *that the writing ſhould be allowed, and the arrears paid at the receipt of the* Exchequer, *and alſo the growing rent.*

Then ſir *Henry* prays a writ to the treaſurer and chamberlains of the receipt to execute the judgment; which is granted.

It has been obſerved, that the queſtions made in this caſe were only,

1. If the office was forfeited by the attainder of ſir *Edward*?

2. Whether the annuity was not gone, tho' the office was not forfeited?

Not one word is ſaid touching the nature and manner of the proceedings throughout the whole debate of the caſe, tho' it laſted ſo many years.

'Tis true, *Plowden* adds a remark of his own, *that thereby might be ſeen the order and form, how one, who has a rent out of lands in the king's hands, may come to it by petition to the court of* Exchequer, *without petition to the perſon of the king: and how he ſhall have the judgment executed: For it is not the order to command by word of mouth that the payment be made; but a writ in form aforeſaid ſhall be awarded by the barons: which is a judicial writ under the ſeal of the* Exchequer, *and is a ſufficient warrant to the treaſurer and chamberlains to pay the arrears, and growing rent.*

This obſervation of *Plowden's* hath been variouſly interpreted in ſpeaking to theſe caſes, according as the perſons concluded differently.

It may be ſaid, his obſervation is an argument that he approved of the method, and looked upon it as law.

But it may be alſo inferred,

1. That it is an obſervation which he founded only on that caſe; for he ſays *from* this record *you may ſee, good reader.*

2. That it was new to him; otherwiſe he had not added ſuch a remark to his report.

3. That he looked on the other way by *petition*, as the known method in caſes of that nature.

4. That this was purely a reflection of his own. For he is ſo exact a reporter, that he ſets down particularly when the point is debated in court, and when he has it in private from one of the judges; as appears in the caſe of ſir *Thomas Wroth*, *fol.* 455. *b.*

5. He only ſays this writ is *a ſufficient warrant* to the treaſurer and chamberlains of the receipt to pay the money, not that it is compulſory to enforce the payment.

The other caſe of ſir *Thomas Wroth* was this.

Plowd. Com. 452. He exhibits to the barons letters patent, dated the 13th of *October*, 38 *H.* 8. whereby the king appointed him gentleman uſher of the privy chamber to prince *Edward*, and granted to him, for the exerciſe of the office, an annuity of 20 *l. per annum* during life, to be received by the hands of the treaſurer of the court of *Augmentations*, out of ſuch of the treaſure of the ſaid revenues as ſhould be in his hands. And whereas he had ſerved the prince from *Lady-Day* 36 *H.* 8. to that time, and had received no allowance, the king thereby grants for his attendance for the time paſt, as much money as the ſaid annuity of 20 *l. per ann.* from *Lady-Day* 36 *H.* 8. to that time amounted to, to be received as aforeſaid. And he prays the letters patent may be inrolled: and the ſame are received by the barons, and ordered to be read and inrolled.

Then he alledges that king *H.* 8. died the 28th of *January* 38 *regni ſui*; and that he exerciſed the office during the life of king *Edward*. And then ſets forth the clauſe in the act of 1 *Mar.* for the alteration, union, tranſpoſing, or determination of the court of *Augmentations*, &c. whereby it was provided, that *that act ſhould not extend to extinguiſh or take away any annuity, which any perſon had title to, or ought to have, by letters patent, or other writing ſufficient, under the ſeal of the court of* Augmentations, *before the 7th of* July *then laſt: but that the ſame ſhould be paid out of the treaſure of the queen, in the court to which the court of* Augmentations *ſhould be annexed; or in any new court which ſhould be erected inſtead of the court of* Augmentations; or, *in default thereof, in any court where there ſhould be ſufficient of the queen's treaſure.*

He ſays the annuity was ſo many years in arrear; and prays as in ſir *H. Nevil*'s caſe.

And there is a demurrer; and judgment *for allowing the letters patent, and for paying the arrears, and growing payments*; and a writ to the treaſurer and chamberlains of the receipt accordingly.

There were five points debated, and determined in this caſe.

1. If there did not want an averment of the ſervice done to the prince, in order to entitle himſelf to the ſum granted for his attendance for the time paſt?

2 If the annuity was determinable by the nonfeazance of the ſervice to the prince?

3. If the ſervice might be done to the prince, when king?

4. If the annuity was payable during the life of ſir *Thomas Wroth*?

5. If this grant did bind the ſucceſſor, it not being granted by king *H.* 8. *for him, his heirs and ſucceſſors*? And this ſeems to be the great point of the caſe; the judgment being expreſſed to be given upon view of ſeveral judgments, where, without thoſe words, ſuch letters patent had been allowed.

Plowden ſets down the effect of the writ of execution; and the writ itſelf is to be ſeen at large, *Co'ia Scac. Paſc.* 4 *Eliz. Rot.* 52.

He ſays, *afterwards payment was made of the arrears according to the* effect *of the writ.* I obſerve, it is not ſaid by *force* of the writ.

The truth is, upon that writ nothing was paid, ſir *Thomas Wroth* dying not long after. But the 5th of *November*, 15 *Eliz. Oſborn*, *Morris*, *Wroth* and *Clerk*, his executors, produced the former writ in the court, and ſurmiſed that ſir *Thomas Wroth* was dead, having made his will, and them executors; and that ſir *Thomas Wroth* had not received any part of the arrears: and ſo prayed another writ, which was granted; and afterwards the arrears were paid.

The ſame obſervation lies upon this caſe as on the other, that in the whole debate, which laſted ſo long, nothing was ſaid as to the nature and manner of the ſuit. But by the points made in the caſe, and by the judgment itſelf, and by what *Plowden* tells us that *Sanders* chief baron added to the report, it is plain the only queſtion was upon the matter in law whether the annuity was determined or not.

All the judges, who argued before my lord chief juſtice *Treby*, ſeemed to lay the great ſtreſs of their arguments upon theſe caſes.

He applied himſelf to ſhew, that the proceedings in theſe two caſes are founded upon particular reaſons, and not upon the common law, or the courſe of the *Exchequer*. And for that cauſe it was, that they had never been cited in any law book as precedents, warranting any ſuch juriſdiction in the court of *Exchequer*, as was exerciſed in thoſe caſes.

He obſerved, that both theſe caſes were for annuities payable in the court of *Augmentations*. Sir *Thomas Wroth*'s caſe being for an annuity granted under the ſeal of that court; and *Nevil*'s annuity being alſo payable there. For all lands purchaſed, or to be purchaſed by king *Henry* the 8th, were by the ſtat. 27 *H.* 8. *c.* 27. put under the juriſdiction of that court; and the manor of *Aldington* was purchaſed afterwards by him, of the archbiſhop of *Canterbury*, in the 32d year of his reign; the deed of bargain and ſale being dated the 11th of *Feb.* in that year, and inrolled in the court of *Augmentations:* conſequently that manor was under the ſurvey of that court. And in the covenant againſt incumbrances, which was in that deed of bargain and ſale, there was an exception of this fee payable to ſir *H. Nevil.*

He obſerved further, that by the act made the *firſt* of queen *Mary*, *cap.* 10. and that queen's letters patent thereupon, this court was united to the court of *Exchequer:* and that by a clauſe in that act, all the annuities payable in the court of *Augmentations* were ſaved; *and all ſuch unitings and annexations*, &c. *and all orders made by the queen touching the revenues of ſuch court, and expreſſed in ſuch letters patent, are enacted to be of the ſame force, as if declared by parliament.*

That after the union, in theſe caſes the *Exchequer* acted according to the power given by that ſtatute, and the letters patent.

That the court of *Augmentations* proceeded in a ſummary way; and that many decrees of the ſame nature with theſe were to be found in the records of that court.

And he took notice, that it was remembered by a very learned judge, who argued the ſame way with him in the court of *Exchequer*, that my lord chief juſtice *Hale* had formerly declared, that theſe caſes of *Nevil* and *Wroth* did depend on particular reaſons; and were not to be urged ſo precedents of the juriſdiction of the *Exchequer.*

My lord chief juſtice of the *King's Bench*, in his argument, did very particularly apply himſelf to take off the force of this objection.

The firſt thing I obſerved him to urge, as an argument that theſe caſes were adjudged by the proper juriſdiction of the court of *Exchequer*, and not by any power derived to it by the union of the court of *Augmentations*, was drawn from *Nevil*'s caſe; in the pleadings of which no mention is made of the court of *Augmentations*, or of any ſtatute relating to it.

He did admit, that the manor of *Aldington*, which was charged with the rent, was purchaſed by king *Henry* the 8*th*, and ſo under the ſurvey of the court of *Augmentations*; but that being made no part of the caſe, he ſaid that caſe was no otherwiſe to be regarded than as an ordinary proceeding in the court of *Exchequer*, by a grantee of a rent iſſuing out of lands which came afterwards to the crown.

I ſhall not here repeat what I have already ſhewn, that a grantee of a rent iſſuing out of lands, which come to the crown ſubſequent to his grant, could not proceed in this manner to recover it.

But I will obſerve as to this caſe of *Nevil*; *Firſt*, that it is not denied, but if the court of *Augmentations* had ſubſiſted, it had been under the ſurvey of that court, and the court of *Exchequer* could have had no juriſdiction over it; ſo that it came not into the governance of the *Exchequer*, till the diſſolution of that court.

2*dly*, That the court of *Augmentations* had a power of ordering payments of ſuch fees, or annuities, will appear plainly, I think, by what I ſhall ſhew preſently.

3*dly*, It appears that this fee, or annuity, had been paid not only during the reigns of *Henry* the 8*th*, and *Edward* the 6*th*, when the court of *Augmentations* ſubſiſted; but alſo during the whole reign of queen *Mary*, which was for ſeveral years after the diſſolution of that court. The arrears ſued for being only for three years, from *Michaelmas*, 5 & 6 *Philip & Mary*, (which was the *Michaelmas* before the death of queen *Mary*, who died the 17th of *November* 1559,) to *Michaelmas* the *third* of queen *Elizabeth.*

So that this grant had been allowed before in the court of *Exchequer*, and payments had been made upon it there for ſeveral years: and therefore there was no occaſion to take any notice of the court of *Augmentations* on the one ſide; or, of the other ſide, to object that it was not ſet out. But the matter of law only came under the conſideration of the court, whether, by the attainder of one of the grantees, the annuity and the office were determined. Which objection to the payment of the annuity, as it is probable, had been but lately obſerved, although ſir *Ed. Nevil* had been attainted 30 *H.* 8. for a fact alledged to be committed the 12th of *July*, 29 *H.* 8.

But my lord chief juſtice of the *King's Bench* did principally inſiſt upon two other points, in anſwer to what was ſaid by my lord chief juſtice of the *Common Pleas* as to this matter.

1. That the court of *Augmentations* was never united to the court of *Exchequer.*

2. That the court of *Augmentations* had no ſuch ſpecial power given to it, either by act of parliament, or letters patent, for relief of grantees of rents; and conſequently, though there had been an union of that court to the court of *Exchequer*, yet the court of *Exchequer* could not derive any power of acting in ſuch a manner from that union.

To prove the *firſt* of theſe poſitions, *Dyer* 216. *a.* and *Coke*'s 4th *Inſt.* 122. were cited. Where it is ſaid to be reſolved by all the judges, 4 *Eliz.* that the union was but in ſhew, and was really void. For queen *Mary*, by her letters patent of the 23d of *January* in the *firſt* year of her reign, having diſſolved the court of *Augmentations*, and by other letters patent, dated the next day, uniting the ſame to the court of *Exchequer*, the ſecond letters patent came too late, and were utterly void. And therefore it was argued, there could be no acceſſion of power to the court of *Exchequer*, by a union that was abſolutely void: but by the diſſolution of the court of *Augmentations*, the revenues of that court fell naturally under the government of the *Exchequer*; and ſir *T. Wroth*, and ſir *H. Nevil* came to the court of *Exchequer*, as to an original court of *Revenue.*

But notwithſtanding theſe books, and the weight ſuch a reſolution may ſeem to have, I think I ſhall be able to make it out clearly, that the authority, given by the act of parliament *primo Mariæ*, was well executed by her two ſeveral letters patent of the 23d and 24th of *January*; and that the court of *Augmentations* was thereby effectually united to the *Exchequer.*

For, *firſt*, The act of parliament did empower the queen to *alter, change, unite, tranſpoſe, diſſolve, or determine the court of* Augmentations *and revenues of the king's crown*, and the other courts therein mentioned; *and to reduce the ſame, or any of them, into one, two, or more courts; or unite, or annex the ſaid courts, or any two, or more of them together; or to any other of her courts of* Record; *or to erect out of the ſame any other new court.*

Secondly, The queen did intend to execute her power, by uniting that court to the *Exchequer.* That appears moſt plainly by both the letters patent, which recite the act, and declare that the queen did intend to put the act in execution. And the letters patent of the 24th do recite, *that it was with that intent*, *viz.* of putting the act in execution, *that ſhe had, by letters patent of the day before, diſſolved the ſaid court:* and ſhe did thereby *unite, tranſpoſe and annex the ſaid court diſſolved to the court of* Exchequer; and did thereby *appoint all the lands and hereditaments, which at the time of the diſſolution of the ſaid court, were in the order or ſurvey thereof to be in the order or ſurvey of the court of* Exchequer, *according to the articles and ordinances in the ſchedule annexed to thoſe letters patent.*

Thirdly, Every thing ought to be expounded favourably, that the queen's intention might take effect; eſpecially, when ſhe acts in purſuance of an act of parliament, and *for the more ſpeedy and ſure anſwering of her revenue*, as the intent of the act is declared to be.

Fourthly, The letters patent, though bearing ſeveral dates, may, and ought to be expounded as one and the ſame act, as in many other caſes; eſpecially when done in execution of an act of parliament.

Fifthly, As to the *quaſi abſurdum & impoſſibile*, in *Dyer*; we are not now diſcourſing upon a ſubject of philoſophy, nor ſpeaking of the natural exiſtence of things. There indeed, it would be abſurd to ſay, that what was diſſolved and annihilated one day, ſhould yet have ſuch an exiſtence as to be united to any thing the day following: but we are ſpeaking upon a legal ſubject, touching the conſtruction of a law, where fictions, and relations, and concluſions have place.

That which one act of parliament ſays ſhall be diſſolved to-day, another act may ſay ſhall be to all intents revived and united to-morrow; and all men are concluded to ſay, that the union is not real to all intents of law. And as this may be done by ſeveral acts, ſo the ſame act may ſay, that a court ſhall be diſſolved, and that the ſaid court ſo diſſolved, ſhall be united; or, in other words, may ſay that the queen by her letters patent may diſſolve a court to-day, and by letters patent of the next day may unite the ſame court to another: and when that is done, notwithſtanding the ſeeming abſurdity, it will be as really united to all intents as if it had never been diſſolved. Now that in effect is ſaid here. The act ſays, *the queen may alter, change, diſſolve or determine the court*; *and may reduce the courts to one or more, or unite and annex the ſame to any other court.* Here the queen literally purſued both parts: *ſhe did diſſolve it*; and *ſhe united and annexed it.*

The act further ſays, *ſuch alterations, diſſolvings, and annexings, declared and ſet forth in ſuch letters patent ſhall be of the ſame force to all intents, as though the ſame were ſet forth and declared by authority of parliament:* and if this had been done by act of parliament, nobody could have ſaid but that it had been well united.

Sixthly, All the parts and buſineſs of the court of *Augmentations* were actually diſtributed and ſettled in the reſpective offices of the *Exchequer*, according to the order of the ſchedule annexed to the letters patent of union, and have been continued to this day under theſe orders. And would it not be ſtrange, that the letters patent of the 24th ſhould be taken to be wholly void, but the ſchedule annexed to them ſhould be good and effectual, and take place, and be put in execution to all purpoſes?

Seventhly, It is expreſly and fully declared by act of parliament, that the court of *Augmentations* was united to the court of *Exchequer.* I mean the ſtat. 1 *Eliz. cap.* 4. § 15. *for reſtitution of the firſt-fruits to the crown.*

That ſtat. takes notice that queen *Mary*, by the act *primo Mariæ*, *cap.* 10. was empowered *to alter or determine the courts of* Firſt-fruits, Augmentations, *and other courts therein expreſſed, or to unite the ſaid courts or any of them together, or to any other courts of* Record, *as ſhou'd be thought moſt convenient for the anſwering of her revenues: by authority of which act the late queen by four letters patent, whereof two bear date the* 23*d of* January, *in the firſt year of her reign, and the other two the* 24*th day of the ſame* January, *did not only diſſolve, determine, and extinguiſh the ſaid court, commonly called, the court of* Augmentations *and revenues of the crown, and the courts of* Firſt-fruits *and* Tenths, *and the juriſdiction and authority thereof; but alſo did unite, tranſpoſe and annex the ſaid courts* ſo diſſolved, *to the ſaid court of* Exchequer, *there to be and continue as a member and parcel of the ſaid court; and did appoint the revenues then anſwerable in the ſaid courts, to the order, rule, ſurvey, and governance of the court of* Exchequer, *there to be anſwered and accounted for ever, in ſuch order and form, as in the ſaid letters patent, and two ſchedules thereto annexed, is mentioned and declared.*

Had the act reſted there, unqueſtionably it had done enough to make good what I hold: but the act goes on further and ſays; *by reaſon of which premiſes, the ſaid perpetual revenues of* Firſt-fruits *and* Tenths, (which was the ſubject matter of that act,) *and the revenues relating thereto, were ordered and accounted for in the court of* Exehequer.

Then the act proceeds to recite the act 2 & 3 *Phil. & Mary*, *for taking away the* Firſt-fruits *and* Tenths from the crown, and repeals that act: and enacts, *that the ſame ſhall be revived and united to the crown in the ſame eſtate, degree and condition, and in as ample manner as the ſame were in queen* Mary *before the act of repeal: and that the ſaid revenue ſhould be in the order, ſurvey, rule, and governance of the ſaid court of* Exchequer, *in every degree, ſort, and condition, as they were, at and before the ſaid* 8*th day of* Auguſt, *in the* 2 & 3 *of* Phil. & Mary; from which day that act took effect.

Now whether we are to depend upon the authority of an act of parliament, which does expreſly declare, that by the force of the act *primo Mariæ*, and by virtue of the letters patent of the 23d and 24th days of *January* in the ſame year, the court of *Augmentations* was united, tranſpoſed and annexed to the court of *Exchequer*; or whether we are to believe the judges in *Dyer*, who ſay that it was not united, does ſeem no difficult queſtion to decide.

Theſe two things muſt be obſerved.

1*ſt*, That by this act the *Firſt-fruits and Tenths* are put under the ſurvey and governance of the *Exchequer*, only as they were at the time of the act 2 & 3 *Phil.* & *Mary*; and by the ſame act it is declared, in what manner they were then annexed, and put under that governance; that is, according to the letters patent *primo Mariæ:* ſo that they are annexed to the court of *Exchequer*, in the form, and by virtue of thoſe letters patent, or not at all. And the annexation of the court of *Augmentations* being exactly in the ſame manner as that of the *Firſt-fruits*, if the one was good, the other muſt be ſo.

2dly, That if there was not ſuch an union, it may be queſtionable, if the *Exchequer* at this day has any juriſdiction as to the revenues which were under the ſurvey of the court of *Augmentations*; there being a clauſe in the act 27 *H.* 8. *cap.* 27. that, *all proceſs out of the* Exchequer, *to or againſt any perſons, for any rents, iſſues or profits, relating to any the lands, which by that act were limited, to be under the ſurvey of the court of* Augmentations, *ſhould be clearly void, and of none effect.*

If any thing more was neceſſary to be added after ſuch an authority, it is plain, that it was the received opinion of the whole kingdom, and of the court of *Exchequer* itſelf, that the court of *Augmentations* was united to that court. This will abundantly appear by the caſe of the executors of ſir *Walter Mildmay*, chancellor of the *Exchequer*, reported in the earl of *Devon*'s caſe, 11 *Co.* 91. which caſe ariſes upon a warrant of the lord treaſurer, and under-treaſurer, for allowing to ſir *Walter Mildmay* 140*l.* yearly, in conſideration of the increaſe of his buſineſs, by reaſon of the annexation of the court of *Augmentations* and *Firſt-fruits* to the court of *Exchequer*.

I will yet add one more authority to prove this; and it is in the office of the king's remembrancer, *Mich.* 1 & 2 *Phil.* & *Mar. Rot.* 175. and was the caſe of a lord chief juſtice of the *King's-Bench*.

There it is found in the accounts of the late treaſurer of the court of *Augmentations*, that there had been granted to ſir *Thomas Bromley*, chief juſtice of the king and queen's bench, an annual fee of 6*l.* 13*s.* 4*d.* quarterly, out of the treaſure in the hands of the treaſurer of that court, for divers cauſes therein mentioned; which fee had been paid to *Michaelmas primo Mariæ*. And thereupon ſir *Thomas Bromley* comes *in propria perſona ſua, & pro eo quod dicta domina regina nunc annexavit & univit dictam nuper curiam* Augmentationum *& revencionum corone regie huic curie ſcaccarii ſui, (prout in memorandis hujus ſcaccarii de anno primo regni ſui, viz. inter record' de termino ſci' hill' rotl' &c. ex parte hujus remem', plenius liquet de recordo,) petit quod ipſe tam de dicto annuali feodo* 6l. 13s. 4d. *&c. durante vita ſua, quam de* 10l. *ſibi de arrearagiis ejuſdem feodi a feſto annunciacon' B.* Mariæ *virginis anno* 7. Ed. 6. *debit' & ad hoc minime ſolut', ad recept' hujus ſcaccarii de theſauro dominorum regis & reginæ ibidem de tempore in tempus remanere contingen' ſatisfiat. Super quo, pro eo quod ſcrutatis rotulis & mem' dict' cur'* Augm' *&c. in hoc ſcaccario modo remanen'*, it did appear that the ſaid fee was granted, and that it had been anſwered and paid at the court of *Augmentations*, and that he was not ſatisfied his arrears, as he had alledged in his petition: *conſiderat' eſt per barones quod eidem* Thome Bromley *de dicto feodo de* 6l. 13s. 4d. *per annum ad dictos quatuor anni terminos durante vita ſua una cum arrearagiis præd' ſibi debit' ad recept' hujus ſcaccarii de theſauro, &c. ibidem de tempore in tempus remanere contingen' ſatisfiat, &c.*

Here is a judgment founded upon this very point of the union and annexation of theſe courts.

I have mentioned this caſe, becauſe it ſeems to me a very full authority; at leaſt the lord chief juſtice *Bromley* thought ſo. But the ſame thing does appear by the whole tenor of the proceedings of the court of *Exchequer*, in relation to caſes which were before of the juriſdiction of the court of *Augmentations*; wherein, the ſummary way, practiſed in that court, was taken up, and a great variation made from the antient manner of proceedings in the *Exchequer*; which amounts to a plain proof of this matter, that the court of *Augmentations* was really united to the court of *Exchequer*.

I proceed now to the ſecond thing inſiſted on by my lord chief juſtice. That, admitting it to be true that the court of *Augmentations* was united to the court of *Exchequer*, and ſo the powers of that court transferred to the *Exchequer*, yet it would have no conſequence to make good the point for which it was urged; *viz.* that in theſe two caſes of *Nevil* and *Wroth*, the court of *Exchequer* acted as the court of *Augmentations*, and by a power ſuppoſed to be veſted in the *Exchequer* by that union: becauſe the court of *Augmentations* itſelf had no eſpecial powers given to it, either by act of parliament, or by letters patent, to determine of, and give relief to grantees of annuities and rents, in the manner it is done in *Nevil*'s and *Wroth*'s caſes; but that all which was done in the erecting of that court was to make it a court of *Record*, and a court of *Revenue* to ſuch and ſuch lands: the conſequence of which was, that it had all the powers incident to a court of *Revenue*, and as ſuch could give relief in theſe caſes; becauſe in the like caſes the court of *Exchequer* could, and always had given relief.

And to make this out, ſeveral caſes of the like nature, decreed in the court of *Augmentations*, wherein relief had been given to grantees of fees and annuities, (which were found in a book of that office,) were cited as ſo many authorities for this opinion. And that, in like manner, relief was given in the court of *Wards*, and in the court of *Surveyors*, to grantees who came thither for their annuities; which were new erected courts of *Revenue*, and therefore, if thoſe ſeveral new erected courts acted in that matter without a ſpecial authority, it was argued, that it might be concluded to be by a right incident to them as courts of *Revenue*, and in imitation of what the court of *Exchequer*, which was the old court of *Revenue*, could do before by the common law.

This is an ingenious turn of an argument, which was drawn by my lord chief juſtice *Treby* to a contrary purpoſe, from the practice of thoſe new erected courts, if it will hold; but I think it will not.

For if it cannot be ſhewn that antiently, or at any time before the union of the courts of *Augmentations* and *Firſt-fruits* to the court of *Exchequer*, the barons of the *Exchequer* did give relief to perſons who had grants of annuities out of the *Revenue*, or out of lands in the hands of the king, upon application made to them immediately, in the manner we are now ſpeaking; unleſs, in caſes where the party applied to the king by *petition*, and the treaſurer and barons were authoriſed by the great or privy ſeal, or by ſpecial indorſement upon the *petition:* and on the other ſide, if it muſt be confeſſed, that as ſoon as ever theſe new courts were erected, they did conſtantly exerciſe this power: and if it alſo cannot be denied, but that as ſoon as the courts of *Augmentations* and *Firſt-fruits* were united to the court of *Exchequer*, and not before, the court of *Exchequer* began to proceed in the ſame manner as thoſe courts did, as to caſes which were before under the ſurvey of thoſe courts: the proper inference muſt be, not that thoſe courts, in the exerciſing theſe powers, did purſue the courſe of the *Exchequer*; but on the contrary, that the court of *Exchequer*, in taking up a new courſe after the union, did act according to the manner of the courts of *Augmentations* and *Firſt-fruits*.

To examine this matter a little further, three things are properly to be conſider'd.

1ſt, If the barons, as ſuch, did at any time exerciſe this power of giving judgment for the grantees of rents iſſuing out of lands in the king's hands, or of annuities granted out of the revenues of the crown, to be paid by the treaſurer and chamberlains at the receipt of the *Exchequer*, upon application to them.

I ſpeak of what the barons have done in the court of *Pleas*; for in the *Exchequer Chamber*, upon matters of equity, and other grounds upon which the chancellor and barons are impowered to proceed, ſome relief may be given in caſes of annuities, and rents.

2dly, If a power was veſted in the court of *Augmentations*, to give relief in ſuch caſes.

3dly, If by the union that power was ſufficiently transferred to the court of *Exchequer*.

As to the *firſt* of theſe points, I have ſpoken in great meaſure already, by ſhewing,

1ſt, The method taken heretofore by ſuitors, who applied by *petition* to the perſon of the king.

2dly, By the authorities I cited to ſhew, that in ſuch caſes the party had no relief but by *petition*.

3dly, By ſhewing that amongſt the records of the *Exchequer*, upon all the ſearch I could make, I have not found any thing of this kind before the time of the union.

I have been more particular in my ſearch during the reigns of *H.* 8. and *Edw.* 6. And in the king's remembrancer's office I find, during thoſe reigns, and ſo afterwards during the reigns of queen *Mary* and queen *Elizabeth*, writs of *liberate* to the treaſurer, and alſo to inferiour officers, and writs *de allocatione facienda* to the treaſurer and barons, paſſing the great ſeal in the ſame manner as anciently, for annuities made payable at the receipt of the *Exchequer*, without any alteration from the old courſe; and likewiſe writs of privy ſeal for making allowances upon accounts in the ſame manner as formerly: ſo that, as to matters properly of the juriſdiction of the court of *Exchequer*, the proceedings are the ſame.

I ſhall proceed therefore to the *ſecond* point, to ſhew that by act of parliament, and letters patent, the court of *Augmentations and revenues of the crown* was fully inveſted with this power to give relief in ſuch caſes as thoſe of *Wroth* and *Nevil*.

In order to this I will premiſe, that *Henry* the eighth, affecting power as much as any of our kings, and having great deſigns, did early in his reign endeavour to get ſome parts of the revenue of his crown more immediately under his private and perſonal direction, than the old regular conſtitution of the *Exchequer* would allow of.

To that end, in his *fourteenth* year, he procured an act of parliament, for putting divers lands under the ſurvey of perſons, commiſſioned by him, and ſtiled his general ſurveyors.

In his *twenty-ſixth* year, when the *Firſt-fruits* and *Tenths* were given him in parliament, he prevailed to have them anſwered in a new method, and not in the *Exchequer*.

The compoſitions for the *Firſt-fruits* might be made with the lord chancellor; and the money, or ſecurities were, in that caſe, to remain in the hanaper: or the compoſitions might be made with commiſſioners under the great ſeal; and then the ſecurities taken, and the monies paid, were to be paid and remain with the treaſurer of the king's chamber.

The value of eccleſiaſtical revenues were to be enquired of by commiſſions under the great ſeal, and a certificate was to be returned thereof, and on ſuch certificate the tenths were to be aſſeſſed by the treaſurer, chancellor, chamberlains, and barons of the *Exchequer*; but the money was to be paid to the treaſurer of the chamber, or as the king ſhould appoint, and his acquittances were made full diſcharges.

The treaſurer of the chamber is accountable only to the king, and not in the *Exchequer*. 4 *Inſt.* 113.

This act, and the act in the next year for diſſolving the leſſer monaſteries, having made a great change; and the king finding himſelf obliged to reward thoſe who aſſiſted his deſigns, as well as to provide for the ſubſiſtence of the abbots, priors and monks, who were turned out of their houſes; and that theſe matters would be very troubleſome, if the old common law method was to be purſued; did procure by the act 27 *H.* 8. *cap.* 27. the court of *Augmentations* to be erected, and made a court of *Record*. And there were appointed for it two ſeals, and a chancellor to have the keeping of them, who is the chief officer; and a treaſurer, attorney, and ſolicitor, and ten auditors, and ſeventeen receivers.

The duties of theſe officers are deſcribed in the oaths appointed for them.

And it is plain by the whole frame of the act, that nothing was farther from the intention of the law-makers, than to form this court upon the model of the *Exchequer*; on the contrary, it is made a court of *Equity*.

The oath of the chancellor is, in effect, the ſame with that of the chancellor of *England*. The oath of the treaſurer is, in effect, the ſame with that of the treaſurer of *England*. And the attorney and ſolicitor are ſworn to be ready, at the calling of the chancellor, to hear and determine cauſes depending before the chancellor.

The clerk is made regiſter for all decrees and orders made by the chancellor and council.

The chancellor is impowered to take recognizances, which are to have the effect of recognizances taken in *Chancery*; and ſuch proceſs as in *Chancery* is to go upon them.

And upon iſſues joined in the court, the record is to be delivered by the hands of the chancellor to the juſtices of the *King's Bench*, as upon iſſues joined in *Chancery*.

The proceſs of the court is to be after the manner of the court of the duchy of *Lancaſter*: and the fees of the officers, *&c.* are to be ſuch as in the duchy court. And all proceſs out of the *Exchequer*, as to any lands put under the juriſdiction of this court, is enacted to be void.

I think then, as to the firſt matter upon this act, nothing can be more clear, than that it was not intended, that this court ſhould be another ſuch court of revenue as the *Exchequer* was.

For, 1*ſt*, the very inſtitution of it had been uſeleſs and abſurd; for the *Exchequer* could have done the buſineſs as well.

2*dly*, It is in part conformed to the court of *Chancery*, but principally to the court of the Duchy; both which are courts of *Equity*.

3*dly*, It was plainly intended to be a court of *Equity* in its inſtitution, and to proceed by way of decrees, and act according to diſcretion: and therefore not to be like the court of *Exchequer*, which is a court of *Law*: I mean the court of *Pleas*, held before the barons; for the court of *Equity* in the *Exchequer* is quite of another conſideration, and the preſent caſes have no relation to it.

This ſtatute, for erecting the court of *Augmentations*, proceeds to appoint the treaſurer to account before the chancellor, and two of the auditors.

The treaſurer is to be allowed *all ſuch ſums as he ſhall pay to patentees of any offices, fees, or annuities to be granted under the ſeal of that court*: or *to any other perſons, by virtue of the king's warrant, or by bill ſigned*: or *as he ſhall be commanded to pay by any bill ſigned with the hands of the chancellor, attorney and ſolicitor, or any two of them, upon ſuch conſideration as ſhall be thought convenient by their diſcretions.*

See then how far this court is empowered to give relief to grantees of fees and annuities.

1*ſt*, The treaſurer is put under the direction of the chancellor, attorney and ſolicitor, or any two of them; and to account before the chancellor.

2*dly*, He is to be allowed *ſuch ſums as he ſhall pay to patentees for offices, fees and annuities granted under the ſeal of the court*; which is directly the caſe of ſir *Tho. Wroth.*

3*dly*, He is to pay ſuch ſums *as he ſhall be commanded to pay by any bill ſigned and ſubſcribed with the hands of the chancellor, attorney and ſolicitor, or any two of them, upon ſuch conſideration as ſhall be thought convenient by their diſcretions.*

By the act 37 *H.* 8. *cap.* 4. and 1 *Ed.* 6. *cap.* 14. the *Chantry lands* are put under the ſurvey of the court of *Augmentations*, or ſuch other court as the king pleaſed.

My lord chief juſtice *Treby* did obſerve, that the decrees themſelves of this court were ſigned on the record by the chancellor, attorney and ſolicitor, or two of them; which not being practiſed in any other court, might be very well taken up in purſuance of this clauſe, that ſo they might, within the letter of the act, be warrants to the treaſurer for payment.

I have a full authority, which will give ſtrength to this obſervation of his, that thoſe decrees were looked upon as *bills ſigned* within the meaning of the act; which I find, amongſt the decrees of the court of *Augmentations*, 4 *Ed.* 6. made in the behalf of the poor of St. *John's*, *Walbrooke*, upon a petition of the parſon and church-wardens, reciting a petition to the chancellor of the court of *Augmentations* in the ſame year, and an order thereupon, for the payment of ſome money which the king had given and appointed for the relief of poor people: and it is decreed thereupon, that the parſon and church-wardens ſhall have the ſum demanded, to be paid by the hands of the treaſurer of this court; *and* this bill ſigned *by the hand of the chancellor*, &c. *ſhall be to the treaſurer of the ſaid court a ſufficient warrant.*

Now without going further, I think we may reaſonably conclude ſir *H. Nevil*'s caſe to have come within this clauſe. For the manor of *Aldington* came into the king's hands, 31 *H.* 8: and ſir *H. Nevil*'s annuity having been anſwered till *Michaelmas* before the death of queen *Mary*, there is little doubt to be made, but that he had a decree in the court of *Augmentations* for it; which was the warrant for payment thereof, and which continued ſo before and after the union of that court to the *Exchequer*, till the objection upon the attainder of ſir *Ed. Nevil* was made, and taken off.

As a farther confirmation of what I ſaid, relating to the deſign which king *Henry* the eighth had, of making himſelf more abſolute maſter of his revenue, by excluding it from the regular juriſdiction of the *Exchequer*; in the *thirty-ſecond* year of his reign, *c.* 45. the court of *Firſt-fruits and Tenths* is erected, according to the model and ſcheme of the court of *Augmentations*: and in the ſame year the court of *Wards* is ſet up; being formed much after the ſame manner, and the whole revenue to be anſwered to the *treaſurer of the chamber.*

In the *thirty third* year of *H.* 8. *cap.* 39. an act, taking notice of the former act, made in the *fourteenth* year of his reign, about general ſurveyors, forms another court of *General Surveyors of the King's Lands*, much after the manner of the court of *Augmentations*, only with ſome larger powers.

The ſame act does alſo enlarge the power of the court of *Augmentations*, by enacting, *that all payments made by the treaſurer of the ſaid court by decree or commandment of the chancellor, by aſſent of the council, for buying lands, or for recompence or ſatisfaction of debts and expences, not exceeding* 200 *l. to one perſon, ſhall be good againſt the king. And if perſons pretend title to lands ſold, or exchanged by the king, upon which a rent is reſerved payable in the court of* Augmentations; *or demand any rent out of ſuch lands: or if the king ſhall claim right to lands by him ſold, or exchanged, upon which a rent is reſerved payable in the court of* Augmentations; *or to any charge upon lands appointed to the court of* Augmentations: *the chancellor and council of the court of* Augmentations *ſhall have power to examine ſuch demands, and by their diſcretions to hear and determine the ſame; and to decree recompences, &c. out of the king's treaſure*, where equity ſhall appear, in the caſes mentioned in that ſtatute.

Afterwards, by letters patent, in 38 *H.* 8. reciting the erection of the ſeveral courts of *Augmentations* and *General Survey*, and that the rules for governing of them were not ſufficiently certain, the king does thereby determine and diſſolve thoſe courts; and erects a new court, to be called the court of *Augmentations and Revenues of the King's Crown*: and directs that all revenues under the ſurvey of the former courts, ſhould be put under the government of this new court: and appoints the officers, and their buſineſs; and in particular, the chancellor, and general ſurveyors to take the accounts of the treaſurer, and other officers; and to make allowances for all payments of annuities, fees, *&c.* and to give diſcharges: and that the treaſurer ſhall pay all monies, fees, or annuities, directed by the king's letters patent; or mentioned in any warrant directed by the king; or in any warrant, or decree, or order to be made by the court, or heretofore made in the court of *Augmentations*, or *General Survey*; or granted by any letters patent ſealed with the ſeal of either of the ſaid former courts. But penſions to religious perſons, or fees, or annuities chargeable upon monaſteries, were to be paid by the receivers of the counties.

And theſe letters patent are confirmed by act of parliament. 7 *Ed.* 6. *cap.* 2.

I have been ſomewhat long in ſhewing the powers veſted in the court of *Revenues and Augmentations of the Crown*, by the ſeveral acts of parliament, and letters patent: but I thought it material to ſhew, that a power was clearly veſted in the chancellor and council of that court, (and that to be exerciſed in a ſummary way, *according to their diſcretions*,) to relieve perſons who came before them for fees and annuities; and to require the treaſurer of that court to make payment, and to diſcharge the treaſurer by their *bill ſigned*. Which was the thing to be proved.

I will not ſpend time to ſhew that they did conſtantly exerciſe this power, during the continuance of that court.

I have peruſed a vellum book of decrees of the court of *Augmentations*, in the time of *H* 8. which contains the firſt proceedings after the erection of the court; and alſo a book of decrees of that court, during the firſt four years of *Ed.* 6. which was cited by my lord chief juſtice; and alſo many decrees in the ſame reign entered upon parchment rolls, all remaining in the court of *Augmentations*: by which it does appear, that court acted merely as a court of *Equity*.

The bills, (of which there is one entered at large, with the proceedings upon it, and the minutes of the decree, and, after that, the decree itſelf drawn up,) are in *Engliſh*, in the form of a petition, and the caſe comes to hearing in a ſummary way, and the decree is made; and if it be for payment of money, it is decreed to be paid by the treaſurer of the court, and *this decree* is always mentioned to be his ſufficient warrant and diſcharge; and the decree is ſigned by the chancellor, and a *quorum* of the council.

Theſe proceedings ſure are not in imitation of the court of *Exchequer* before the barons.

Amongſt theſe proceedings there are hundreds of decrees for annuities, penſions, rents, fees, *&c.* So that this court was in full poſſeſſion of this authority at the time of the uniting it to the court of *Exchequer*.

Thirdly, The only thing which remains, is to ſhew that, by the union, this power was ſufficiently transferred to the *Exchequer*.

The ſame power, which the act 1 *Mariæ*, *cap.* 10. did give to queen *Mary*, for diſſolving the court of *Augmentations*, and uniting it to any other court, was by the act 7 *Ed.* 6. *cap.* 2. given to him, in almoſt the ſame words; except only that there is a new proviſo, for the further ſaving of annuities payable out of the court of *Augmentations*, added in the ſtatute of queen *Mary*.

I ſuppoſe it will be granted, that the words of that ſtatute are ſufficient to ſave the fees and annuities, payable in the court of *Augmentations*, from being loſt by the diſſolving, or annexing of that court.

Then the letters patent of queen *Mary*, which do *unite*, *tranſpoſe*, *and annex that court to the Exchequer*, *there to be and continue as a member*, *and parcel of that court*, do ſeem ſufficient to carry over the buſineſs and power of that court to the court of *Exchequer*, under ſuch orders and form as is expreſſed in the ſchedule annexed thereto.

By the 15th article of that ſchedule, ſheriffs and other accountants are to pay all annuities, fees, penſions and corodies, according to grants allowed and inrolled; unleſs they ſhall have ſpecial commandment to the contrary by the court. And as for payments of that kind to be made at the *receipt*, beſides that the act itſelf gave an authority, there was a general *dormant* privy ſeal lodged with the treaſurer and chamberlains.

And as the powers of the court of *Augmentations* were ſufficiently veſted in the court of *Exchequer*, by the act of parliament and the letters patent; ſo were the ſame, from the time of the union, exerciſed accordingly.

On the *twenty-ſixth* of *January*, 1 *Mariæ*, the lord chancellor, in open court, delivers the letters patent for diſſolving and uniting the court of *Augmentations*; which were received by the lord treaſurer, chancellor, and under treaſurer, and barons, and were inrolled 1 *Mariæ Rot.* 80. in the office of the king's remembrancer.

And the next *Eaſter* term the grantees of rents come in great numbers, and exhibit their letters patent under the ſeal of the court of *Augmentations*, and pray that a ſearch may be made for the decrees of that court, whereby they are intitled; and it is done: and thereupon, without more formality, the barons order that the arrears, and growing payments of the annuities ſhould be paid at *the receipt of the Exchequer*. The entry is *Quod ſatisfiat.*

Paſch. 1 *Mar. Rot.* 92. *Pope's* caſe, and very many others. *Trin.* 1 *Mar. Rot.* 27.

And all the proceedings are ſummary; ſometimes upon the oath of the party, that he was not paid in the ſame manner as in the court of *Augmentations*. For this, ſee *Glaſcie*'s caſe, 1 *Mar. Rot.* 29; *Pantwentworth*'s caſe, 1 *&* 2 *Phil. & Mar. Rot.* 158; *Mich.* 1 *&* 2 *Phil. & Mar. Rot.* 175. Sir *Thomas Bromley*'s caſe; *Rot.* 210. *Thompſon*'s caſe.

And very great numbers of theſe caſes are entered in the rolls of the king's remembrancer's office in the time of queen *Elizabeth*: *Paſch.* 2 *Eliz. Rot.* 145. *Baſhe*'s caſe; *Mich.* 2 *Eliz. Rot.* 196. *Badcock*'s caſe;

Hill. 3 *Eliz. Rot.* 148. and downwards for ſome time; tho' by degrees the number did leſſen, as the grantees died.

I ſhall ſpend no more time in ſhewing, that theſe decrees, or orders of the barons, of which ſo many are to be found after the union of court of *Augmentations*, were founded upon the power transferred by the union to the court of *Exchequer*.

I will only add, that as the caſe ſtood upon the act 1 *Mariæ*, admitting the court of *Augmentations* had been utterly diſſolved, and the revenues, which were under the ſurvey of that court, had fallen under the government of the *Exchequer* as the original court of *Revenue*; yet, nevertheleſs, the barons were ſufficiently authorized to order the payment of annuities, which were payable in the court of *Augmentations*, by the clauſe in the ſtatute 1 *Mariæ*, which ſays, *that ſuch fees and annuities ſhall not be extinct, but in default of ſuch annexation, &c. ſhall be paid out of the queen's treaſure, in any of the queen's courts where ſufficient revenue ſhall be to anſwer the ſame, by the hands of the officers of the ſame court, in ſuch manner as the ſame might have been done, or been paid, in any other court or place, if this act had not been made.*

The conſequence of which would have been, that as the annuities were payable before by the treaſurer of the court of *Augmentations*, by the order of that court; ſo, by the ſpecial authority given by this act, the court of *Exchequer* might direct the ſame to be paid by the treaſurer of the *Exchequer*; and ſuch direction, in thoſe particular caſes, would be a good warrant in point of law. And yet, no argument would be deducible from thence to maintain the judgments now before us, which relate to grants which never were under the ſurvey of the court of *Augmentations*.

But beſides what might be inferred from this ſtatute, the treaſurer and chamberlains of the *Exchequer* had a full and ample authority, under the privy ſeal, for payment of the annuity to ſir *Thomas Wroth*. The privy ſeal bore date the 19th of *March*, 2 *Eliz.* and indeed, it is the ſame privy ſeal, which is mentioned in the report of ſir *Walter Mildmay*'s caſe, cited in the earl of *Devonſhire*'s caſe. 11 *Co.* 91. *a.*

I have not been able to recover a copy of that privy ſeal; and the entries of the *Pell* of that year are loſt, or burnt, as moſt of them are. But it is recited in a privy ſeal, bearing date the 27th of *April* 1 *Jac.* 1. to contain, among many other things, a general authority to the treaſurer, chamberlains, and under-treaſurer for the time being, to make payment of all annuities, fees, wages, diets and rewards, and the arrearages of the ſame, as ſhould be due to any perſons whatſoever by any aſſignment, act of parliament, letters patent, or otherwiſe howſoever: and, by the ſame privy ſeal, king *James* does command payments to be made according to the tenor and effect of the ſaid privy ſeal of the 19th of *March*, 2 *Eliz.*

So that tho' the original privy ſeal is not to be found, yet it is ſufficiently recited in this privy ſeal of king *James*; and mention is made of it in the entries of the *Pell* in many hundred places. And the privy ſeal of the 10th of *June*, 1 *Jac.* 1. does again take notice of the ſame; and does give the like large and general power for payment of annuities, fees, *&c.*

And therefore, it was not at all ſtrange that the arrears of ſir *Thomas Wroth*'s annuity were paid, when the writ of the *Exchequer* had certified the treaſurer and chamberlains that it had a continuance, and what was the ſum to which the arrears did amount: but it was paid by force of the privy ſeal.

It might be paid, as *Plowden* expreſſes it, according to the *effect* of the writ, but not by the *authority* of it.

And upon the ſame reaſon it is, that the objection drawn from the *liberate*, which goes from the barons to the treaſurer and chamberlains every term, *pro neceſſariis ſcaccarii*, (as if that inferred any authority in the barons to direct the iſſuing of money out of the receipt,) does fall to the ground. My lord chief juſtice *Treby* did obſerve, that in the payments made of thoſe ſums, *pro neceſſariis ſcaccarii*, never any notice was taken of the *liberate*, but the warrant was formed upon the privy ſeal, authorizing ſuch payments.

And in the entries, which are in the *Pells*, of this payment, all along queen *Elizabeth*'s reign, (I mean from the fourteenth year downwards, for the other books are loſt,) the conſtant entry is, *To Mr.* William Billerſby, *uſher of the* Exchequer, *upon the general privy ſeal, the 2d of* March, 2 Eliz. *and by* liberate *directed to the treaſurer and chamberlains, for the charges of the court of* Exchequer, for ſuch a term.

Indeed in one place I find there is an omiſſion of mentioning the privy ſeal, but that is but the negligence of the clerk: and I find ſuch omiſſions too often made in thoſe entries, in other caſes; tho' it be plain, there was an authority under the great or privy ſeal, by other entries of like payments in the ſame books.

So that this *liberate* amounts to no more than a *certificate* of what the ſum is: the *warrant* for payment is the privy ſeal. Tho', perhaps, in
Dial. de Scac. Lib. 1. c. 3. that particular caſe, the treaſurer and chamberlains have a greater latitude, than in any other: for *Gervaſe* of *Tilbury* reckons up thoſe payments, *de minutis neceſſariis ſcaccarii*, as payments they might make, *ſine brevi regis.*

I have been too long already; but I will add one conſideration more, which does ariſe from the *inconvenience*; no conſiderable argument in law: which is, that if the king's treaſure be ſo far ſubject to the adminiſtration of an ordinary court of juſtice, as that it muſt be regularly iſſued upon the application of the ſubject, who has a demand thereupon for an annuity, or any other debt, (for I do not ſee but the reaſon is the ſame;) this may turn to the weakening of the publick ſafety to a very high degree.

The barons of the *Exchequer* cannot, as ſuch, be conuſant of the neceſſities of the ſtate: and if they were, and knew them to be ever ſo preſſing, they muſt act according to one rule; and muſt order a penſion, granted upon no conſideration, or, perhaps, upon a very ill one, and for a pernicious end, to be paid with the very money, which ought to be employed, and, poſſibly, was provided by parliament, for ſuppreſſing a rebellion, or re ing an invaſion, or ſetting out a fleet.

For they, as a court of juſtice, have no judgment of diſcretion allowed them: whenever the party comes to pray it, the grant muſt be inrolled and allowed, and the judgment given, and the writ go.

And what is the treaſurer to do in ſuch a caſe? Is he to obey the great or privy ſeal, which requires the money for the uſes of the war, and the neceſſary defence of the realm; or the *Exchequer* ſeal, which requires it to be paid for the uſe of a private ſubject?

He would be under a great difficulty; eſpecially if there be ground to think, that ſuch a writ would be the foundation of an action againſt him; which, if I did not miſapprehend, was affirmed by *one*.

The law books may ſay, that the king's treaſure is *ſacred*; Co. Lit. 106. that it does *reſpicere regem, & regnum*; that it is *anima reipublicæ, firmamentum belli, & ornamentum pacis.* It is, after all, at the diſpoſition of the barons of the *Exchequer*. Nay it is, in ſome ſort, at the diſpoſal of the ſubject; who takes his own time to make his demands, may ſuffer his arrears to run as long as he pleaſes, and, at his pleaſure, call for them, in the midſt of a war, and to the diſappointment of the publick ſafety.

What ſhould hinder, but that all the arrears of the annuities and penſions, granted in the reigns of king *James* the firſt, and king *Charles* the firſt, ſhould be demanded in this manner; and all the debts ſecured during the late civil war? At leaſt, ſo far as the old branches of the hereditary revenue would extend to pay.

The truth is, this method does, in effect, ſet aſide the lord treaſurer, one of the greateſt officers of the kingdom. My lord chief 4 Inſt. 110. juſtice *Coke* has a fancy, that his *white ſtaff* was given him, *to drive away importunate ſuitors.* But this would be to little purpoſe: they have a more certain place to reſort to: 'tis but going to the barons of the *Exchequer*, and they will command the treaſure from him.

But the popular objection is, that to ſay this ſuit will not lie, is to leave the property of the ſubject precarious; and that if he has a right, he muſt have a remedy.

The anſwer is, that all I have ſaid goes only to this particular manner of proceeding, as being altogether new. It only relates to the new aſſumed power of the barons immediately over the revenue in the receipt of the *Exchequer*. It does in no ſort leſſen their known power over the revenue, while *in tranſitu*; nor does exclude them from any legal courſe, whilſt the revenue is in the hands of any inferior officer. It does not preclude the ſubject from ſuing to the perſon of the king, by *petition of right.* Conſequently, it does not tend to hinder him from the known and ordinary methods, which have been uſed in all ages, in caſes of this nature, and in which the ſubject has acquieſced for ſo many hundred years.

It does not appear to me, that this method was ever known or practiſed: and under a pretence of aſſiſting property, a new courſe of legal proceedings is not to be introduced; nor a new power placed in the barons of the *Exchequer*, to which none of their predeceſſors pretended.

The law muſt remain as it is, till ſome new law hath changed it. And I ſhould much doubt, whether a new law, for the more eaſy recovery of penſions granted by the crown, would be for the good either of king, or people.

If, as the common law ſtood, grants of penſions and annuities out of the revenue, be, in ſome ſort, depending upon the juſtice and honour of the crown, as to the time and manner of payment, I do not ſee that the public is hurt by it: the revenue is likely to remain the longer with the crown.

If it be ſaid, that the ſubject has a hardſhip in this caſe, and muſt go far about to recover his right; let it be conſidered how much better his caſe is, than it was at common law.

It was hard, indeed, before the ſtatute of *Edward* the third, when he could not interplead with the king, upon an *office* found. It was hard, before the ſtatute of *Richard* the ſecond, when he could not be allowed to ſhew his diſcharge, when he was impeached in the *Exchequer*, without going to the king: and ſo it was before the ſtat. 2 *Ed.* 6. when he had no way to ſave his term, *&c.* upon an *office* found. But yet after all the law was ſo: and whilſt it continued, the courts were to judge accordingly. And if, in caſes like this, it be thought that a better remedy ſhould be provided, the ſame method muſt be taken, of procuring a new law.

The patentees in theſe caſes, I believe, had no notion of this remedy, when the grants were made to them: this is of a later invention.

They were contented to apply for payment in the ordinary courſe, and did obtain warrants from the lord treaſurer for ſome arrears, with an expreſs clauſe in thoſe warrants, forbidding to levy further tallies, without further order.

Nor is it to be ſaid, that in the method, where the application is to be made to the perſon of the king, the ſubject is precarious; for it is to ſuppoſe, what is not to be ſuppoſed in law. It is a ſuppoſition contrary to the principles upon which the *Engliſh* conſtitution is framed, which depends upon the honour and juſtice of the crown.

Such kind of ſuppoſitions may be carried much further. You may as well ſay all property is precarious, becauſe you may ſuppoſe the king will make no judges; or will adjourn the terms from time to time; or will ſuffer no writs to iſſue, without which no ſuits can be.

It muſt be preſumed the crown will pay its juſt debts. But to ſay the king is not to have the ordering the courſe of payments, when the money is in his own coffers, is to deny him that, which is in every ſubject's power. It is to take from him the judgment of publick neceſſities, or, at leaſt, the means of relieving them.

I have ſhewn the reaſons for which I cannot give my opinion for the affirming of theſe judgments. But much the greater part of my lords the judges having delivered their opinions for the affirmance of them, I ſhall defer doing any thing further, till I hear the opinion of the judges upon the point referred to them: *Whether, as this court is conſtituted, judgment ought to be given according to the opinion of the greater number of the judges, who are called by the lord chancellor and lord treaſurer to their aſſiſtance, notwithſtanding they themſelves are of a different opinion?*

Afterwards, on *Tueſday, November* the 24th, 1696, the lord keeper came again into the *Exchequer-Chamber*, and declared, that he had received a paper from the lord chief juſtice *Holt*, containing the opinion of the judges upon the queſtion referred to them : and that three judges were of opinion, *that the lord keeper was bound to give judgment in theſe caſes, according to opinions of the majority of the judges by him called to his aſſiſtance :* but that ſeven judges were of opinion, *that he was not bound by ſuch majority of opinions, but was at liberty to give judgment according to his own :* and declared, *that as to this queſtion, he himſelf concurred in opinion with the ſeven judges.* And accordingly pronounced judgment, *that the judgments given in theſe cauſes, by the court of* Exchequer, *be reverſed.*

Proceedings on error in parliament from the Exchequer-Chamber *by* Robert Williamſon, *plaintiff, againſt the attorney-general, defendant, being a continuation of the caſe of the bankers.*

The caſe of the plaintiff, one of the aſſigns of ſir *Robert Vyner* for 60l. per ann. and the arrears thereof out of the hereditary revenue of exciſe.

1667. SEVERAL goldſmiths and others having lent and advanced great ſums of money to the crown upon the credit of the *Exchequer*, and by encouragement of an act of parliament for aſſigning orders in the *Exchequer* without revocation, paſſed in the year 1667, *(a)* for which monies ſo lent, the goldſmiths were debtors to great numbers of his majeſty's ſubjects, and particularly ſir *Robert Vyner*, one of the goldſmiths, was debtor to the plaintiff for money really lent the ſum of 1000l.

1671. And there having been in *January* 1671 a ſtop put to the payments in the *Exchequer*, whereby the ſaid ſir *Robert Vyner* and the reſt of the goldſmiths were rendered unable to pay their creditors.

1676. His then majeſty king *Charles* the ſecond, (in juſtice and compaſſion to the goldſmiths and their creditors, and to remove the miſeries which attended the ſaid ſtop) was pleaſed to give directions in *April* 1676 to the then lord high treaſurer, to cauſe the accounts of the ſaid goldſmiths to be truly examined and exactly ſtated; which was accordingly done by the then chancellor of the *Exchequer*, auditor of the revenue, and other proper officers of the crown (moſt of them being then members of the houſe of commons), and a report thereof being made to the king in council in *February* 1676,

1677. Letters patents. His then majeſty in and about *April* 1677, by letters patents under the great ſeal of *England*, did grant unto each of the ſeveral goldſmiths, their heirs and aſſigns, and for the benefit of their creditors, in lieu and ſatisfaction of the monies due to them from his ſaid majeſty, a yearly rent or ſum for ever out of the hereditary revenue of exciſe, equal in value to the intereſt of their reſpective debts, after the rate of ſix pounds per cent. per ann. with a clauſe of redemption upon his majeſty's paying the principal money with the arrears of rent; the ſaid rents or annual ſums to be paid quarterly upon tallies to be ſtruck in the receipt upon the commiſſioners, *&c.* of the exciſe; and directs and commands the treaſurer, *&c.* barons and officers of the *Exchequer* of the king, his heirs and ſucceſſors, that they do from time to time perform all acts neceſſary for the conſtant payment of the money, and from time to time to levy and ſtrike tallies without any further warrant, ſo that the yearly ſums may be conſtantly paid, without any further or other warrant to be ſued for from the king, his heirs or ſucceſſors. And if the money ſhould happen to be paid into the receipt of the *Exchequer*, then that the high treaſurer, and commiſſioners of the *Treaſury*, under-treaſurer, chamberlains, and barons of the *Exchequer* for the time being, and all other officers and miniſters of the *Exchequer*, and of the receipt thereof, are authorized and required to pay out of ſuch monies as ſhall be ſo paid into the *Exchequer* or elſewhere, ſo much as ſhall be in arrear, without any further or other warrant; and the ſaid payments to be preferred before any other payment out of the ſame, by virtue or colour of any warrant, order, or directions whatſoever of any after-date, excepting for the management of the ſaid revenue, and about 36209l. 15s. 4½ a-year to the then queen conſort and the duke of *York*. Alſo his majeſty thereby granted, that the letters patent ſhould be expounded and taken moſt favourably and beneficially for the grantees, and covenanted to make further aſſurance if required; and on the 23d of *May*, 1677, ordered in council that the ſaid letters patent ſhould be printed and made public for the information and ſatisfaction of the creditors of the ſaid goldſmiths.

Alſo the right honourable the houſe of peers were pleaſed on the 10th of *July* 1678, to paſs a bill for the confirming the ſaid letters patents; but that ſeſſion ended before the ſaid bill was read in the houſe of commons.

Whereupon many of the creditors of the goldſmiths (amongſt others the plaintiff Mr. *Williamſon*) delivered up their ſecurities for their debts to the goldſmiths, and the plaintiff accepted of an aſſignment from *Vyner* in lieu of his 1000l. debt, purſuant to the ſaid letters patents of a proporable part of the annual ſums ſo granted, and which ſums were accordingly paid in the reigns of king *Charles* the ſecond, and the late king 1683. *James* the ſecond, to *Lady-Day* 1683. And in regard no tallies or monies could afterwards be obtained upon due and repeated application for that purpoſe:

1689. The plaintiff Mr. *Williamſon* in Hilary term 1689, did commence his ſuit in the *Exchequer* by way of *monſtrance de droit*, (as had formerly been very often practiſed) thereby ſetting forth his title as aſſignee under ſir *Robert Vyner* to the ſaid 60l. per ann. (being his proportionable part of the ſaid annual ſum ſo granted by the ſaid letters patents), and prayed that the arrears thereof might be paid unto him, and that the future growing ſums might alſo be paid according to the ſaid letters patents.

1690. Unto which ſuit the then attorney-general (now lord chief juſtice of the *Common Pleas)* had ſeveral days and terms given him to plead or demur as he ſhould think beſt for the crown : and at laſt a demur being by him put in thereunto,

1691. The cauſe had a long agitation, and was argued for about two years by the then Mr. Attorney, Mr. Solicitor, and others of the king's council for the crown, and alſo by council for the plaintiff Mr. *Williamſon*. And the court after long deliberation and view of the precedents and book caſes produced and cited on both ſides in *Hilary* term 1691, gave judgment for the plaintiff, that the letters patents were good and bound the revenue; and that the plaintiff ought to be paid the arrears of the ſaid 60l. per ann. and the growing duty for the future.

Whereupon the then attorney-general on the behalf of his majeſty, brought a writ of error returnable before the then commiſſioners of the great ſeal, who thereupon ordered all the judges to be attended with copies of the proceedings, and that they ſhould give their aſſiſtance at the argument of the caſe: and after the cauſe had been long and many times argued by council at the bar, at laſt the judges aſſiſtants ſeverally and ſolemnly argued the ſame, and were all of opinion (except the lord chief juſtice of the *Common Pleas)* that the letters patents were good in law, and that the plaintiff had a good title, and that the judgment given in the *Exchequer* was good and ought to be affirmed, and that the plaintiff Mr. *Williamſon* ought to be paid his arrears and the future duty according to the ſaid letters patents and judgment. But the lord chief juſtice of the *Common Pleas* was of opinion, that although the grant or letters patents were good in law, yet that the plaintiff had not taken a proper remedy, and that the court of *Exchequer* had no juriſdiction in this cauſe. And the right honourable the then lord keeper, (now lord chancellor) having publicly argued the ſaid cauſe, and being of the ſame opinion as to the juriſdiction of the court, for that and ſeveral other reaſons offered by his lordſhip, was 1696. pleaſed to reverſe the judgment.

Upon which judgment of reviſal, the plaintiff Mr. *Williamſon* hath brought his writ of error in the houſe of lords, and humbly hopes their lordſhips will be pleaſed to reverſe the judgment given by the lord chancellor, and affirm the judgment given for the plaintiff in the court of *Exchequer*. Conſidering,

I. That the plaintiff is a purchaſer upon a full and valuable conſideration from ſir *Robert Vyner* the patentee, having delivered up the ſecurity he had for his debt, and accepted the 60l. per ann. in lieu thereof.

II. That the court of *Exchequer* (who are always exceeding careful of the revenue, and the king's intereſt, being more immediately bound thereunto by the oaths than the reſt of the judges are), upon mature and great deliberation and ſearch and view of many ancient precedents, did ſolemnly adjudge and declare the law to be, that the letters patents were good, and that the plaintiff had taken a proper remedy, and ought to be paid his annuity and the arrears thereof.

III. That all the judges called to the lord chancellor's aſſiſtance (except the lord chief juſtice of the *Common Pleas*), upon ſeveral days ſolemn arguments and debate, gave their opinions for the plaintiff in affirmance of the judgment in the *Exchequer*; and that the ſaid letters patents were good, and ought to be complied with in paying the ſaid annuity, and that the plaintiff had taken a proper remedy to recover the ſame.

IV. Even the opinion of the lord chief juſtice of the *Common Pleas* was (as is humbly conceived), that the grants and letters patents were good, and conveyed a legal right and title to the patentee; yet that this right was without a remedy; for that the court of *Exchequer* had no power over the king's money, when it was brought into the receipt, their power being over it as was alledged *in tranſitu*, before paid in, and only to enforce the payment thereof; whereas a right and title without a remedy (and no other legal remedy was pretended to be pointed out to the plaintiff) ſeems contrary to all laws, and to the rules of juſtice and reaſon : and indeed it would be a hard thing to ſay that the court of *Exchequer* can relieve the king againſt the ſubject, and not help and relieve the ſubject when he produces a legal title againſt the king. This hath not been the practice of that court for near the laſt 200 years.

V. The objections ſo much inſiſted upon, that the lord treaſurer is ſuperior to the barons, and therefore not to be commanded by them to pay monies; and that in caſe the barons can diſpoſe of the king's money, it may weaken and prevent the public ſecurity when the neceſſities of the ſtate require it to be otherwiſe employed, are thus anſwered. That although the lord treaſurer is a greater perſon, yet he and all the ſubjects are inferior to the king's courts. That the barons ſend this command, as they are a court of juſtice, and in the name of the king himſelf; ſo that it is the king by his writs, and not the barons that command the lord treaſurer in this caſe. The barons have no power to diſpoſe of the king's money, but where they have a warrant under the great or privy ſeal (as in this caſe by the grant and letters patents they have) for the doing thereof; ſo that the court of *Exchequer* in this caſe only takes care that the king's grant and letters patents be made effectual, and that the officers of the crown do their duties for that purpoſe, as by the ſaid letters patents they are enjoined to do.

VI. This cauſe in conſequence muſt affect all perſons claiming under the crown, or having any tallies or orders upon or payments out of the *Exchequer*; for all thoſe will be made much better or worſe by the judgment of the lords in this caſe.

Wherefore the plaintiff humbly prays that the judgment of the reverſal may be reverſed, and that the judgment of the court of *Exchequer* may be affirmed.

Samuel Dodd.

(a) 19 *Cha.* 2. *c.* 12. *Keble*'s ed. of Stat. EDITOR.

Extract from the Journal *of the* Lords, *Ann.* 1699---1700.

Die Martis, 4 *Aprilis*.

THIS day Mr. baron *Hatſell*, in the uſual manner, brought in a writ of error from his majeſty's court of *Exchequer*; *(videlicet,)* *Robert Williamſon* plaintiff, againſt the attorney general defendant.

Die Mercurii, 6 *Decembris*.

Upon reading the petition of *Robert Williamſon* merchant; ſhewing, "That, on the fourth of *April*, one thouſand ſix hundred ninety-nine, by a writ of error, the petitioner brought a record before this houſe, for the reverſal of a judgement given for the king, in the *Exchequer-Chamber*, by the lord keeper, now lord chancellor; and that the petitioner hath aſſigned errors on the ſaid judgement of reverſal; and praying a day may be appointed, for Mr. attorney general to reply or demur to the ſaid errors aſſigned:"

It is ORDERED, by the lords ſpiritual and temporal in parliament aſſembled, that Mr. attorney do reply or demur to the ſaid errors, on or before *Wedneſday*, the twentieth day of this inſtant *December*, at ten of the clock in the forenoon.

Die Veneris, 19 *Januarii*.

After hearing counſel, this day, for *Robert Williamſon*, plaintiff in a writ of error depending in this houſe, whereunto his majeſty by his attorney general is defendant:

It is ORDERED, by the lords ſpiritual and temporal in parliament aſſembled, that this houſe will hear counſel for his majeſty thereupon, to-morrow, at eleven of the clock in the forenoon.

Die Sabbati, 20 *Januarii*.

After hearing this day counſel for his majeſty, upon the writ of error depending in this houſe, wherein *Robert Williamſon* is plaintiff; and his majeſty, by his attorney general, defendant:

It is ORDERED, by the lords ſpiritual and temporal in parliament aſſembled, that this houſe will hear the judges, to this matter, on *Monday* next, at eleven of the clock in the forenoon.

Die Lunæ, 22 *Januarii*.

After hearing the judges this day, (purſuant to the order of the twentieth inſtant,) to give their opinion upon the writ of error depending in this houſe, wherein *Robert Williamſon* is plaintiff; and his majeſty, by his attorney general, defendant:

It is ORDERED, by the lords ſpiritual and temporal in parliament aſſembled, that the debate of what hath been offered in this matter ſhall be reſumed to-morrow, at eleven of the clock; and all the judges to attend.

Die Martis, 23 *Januarii*.

After hearing counſel, at the bar, to argue the errors aſſigned upon the writ of error depending in this houſe, wherein *Robert Williamſon* is plaintiff; and his majeſty, by his attorney general, defendant; and debate thereupon:

This queſtion was put, "Whether the judgement of reverſal ſhall be reverſed?"

It was reſolved in the affirmative.

"Leave being aſked, and given, for any lord to diſſent; theſe lords, whoſe names are hereunto ſubſcribed, do diſſent, for the reaſons following; *(videlicet,)*

"For that we conceive it did not appear that ever any ſuch judgement was given by the *Exchequer*, before the annexing the court of *Augmentations* to the *Exchequer*.

"For that, ſince the diſſolving and annexing of the ſaid court of *Augmentations*, there hath no ſuch judgement been given, unleſs in ſuch caſes which were in the cognizance of the court of *Augmentations* before it was diſſolved.

"That the judgements, in the caſes of ſir *Henry Nevil* and ſir *Thomas Wroth*, and others of the like nature cited, ſeem to be by virtue of the powers of the court of *Augmentations* being annexed to the court of *Exchequer*.

"That thoſe courts were duly annexed, appears by the preamble of the ſtatute 1° *Eliz.* cap. 4. by the lord chief juſtice *Bromley's* caſe, and by the caſe of the earl of *Devonſhire* in *Cook's* Reports; and for that the court of *Firſt Fruits* and *Tenths* was diſſolved, and annexed in like manner to the *Exchequer*, as the court of *Augmentations* was; which powers, by that annexation, ſubſiſt in that court to this day."

"*Lonſdale, C. P. S.*
"*Stamford.* *Rivers.*
"*J. Culpeper.*
"*Bergevenny.*
"*Audley.*
"*W. Wigorn.*
"*Gi. Sarum.*
"*Sy. Eliens.*
"*Ric. Petriburg.*
Haverſham.

Whereas, by virtue of his majeſty's writ of error, returnable into the houſe of peers in parliament aſſembled, a record of the court of *Exchequer* was brought into this houſe, the fourth day of *April*, one thouſand ſix hundred ninety-nine, wherein a judgement given by the barons of the ſaid court, in *Hillary Terme*, one thouſand ſix hundred ninety-one, for *Robert Williamſon*, againſt his majeſty's attorney general, for the payment of an annual ſum of ſixty pounds, and the arrears thereof, out of the hereditary revenue of exciſe, was, in *Michaelmas Terme*, one thouſand ſix hundred ninety-ſix, reverſed in the *Exchequer* chamber, by the lord keeper of the great ſeal of *England*, now lord chancellor:

After hearing counſel ſeveral days, to argue the errors aſſigned upon the ſaid writ of error; and due conſideration of what was offered on either ſide; it is this day ordered and adjudged, by the lords ſpiritual and temporal in parliament aſſembled, that the ſaid judgement of reverſal ſhall be, and is hereby, reverſed; and that the ſaid judgement, given by the barons of the *Exchequer* for the ſaid *Robert Williamſon*, ſhall be, and is hereby, affirmed.

The tenor of which judgement, to be affixed to the record to be remitted, followeth; *(videlicet,)*

"Poſtea, ſcilicet, quarto die *Aprilis*, anno regni domini regis nunc undecimo præd. record. et proceſſ. præd. cum omnibus ea tangent. dicto domino regi in præſenti parliamento apud *Weſtm.* in com. *Midd'x* præd. aſſemblat. ſecundum exigent. brevis præd. miſſ. ſunt: poſteaque, ſcilicet, undecimo die ejuſdem menſis *Aprilis*, coram eodem domino rege in cur. parliamenti præd. ven. præd. *Rob'tus Williamſon* in propria perſona ſua, et dic. quod in recordo et proceſſ. habit. in præd. camera concilii juxta ſcaccarium, vocat. *Le Councell Chamber*, ac etiam in redditione præd. judicii, ſic, ut præfertur, per dict. dominum cuſtodem magni ſigilli *Angl.* in eadem camera concilii juxta ſcaccarium præd. reddit. manifeſt. eſt errat. in hoc, *videlicet*, quod præd. literæ patent. et præd. ſcript. aſſignationis in forma præd. ſuperius recitat. ipſi eidem *Rob'to Williamſon* juxta tenorem et effectum eorundem allocari debent; quodque præd. ſumma quadringint. et quinque librar. de arrearag. pro præd. ſeparal. quarter. ann. eidem *Rob'to* ſolvi debet; et quod præd. annual. reddit. ſive ſumma ſexagint. librar. eidem *Rob'to*, hæredibus et aſſignatis ſuis, annuatim ſolvi debet, modo et forma prout præd. barones de ſcaccario dicti domini regis et dictæ dominæ nuper reginæ conſideraverunt et adjudicaverunt, eo tamen non obſtan. conſiderat. exiſtit, per dictum dominum cuſtodem magni ſigilli *Angl.* in præd. camera concilii juxta ſcaccarium præd. quod judicium præd. ſic, ut præfertur, per præd. barones de ſcaccario dicti domini nunc regis et dictæ nuper dominæ reginæ *Mariæ* reddit. revocetur, adnulletur, et penitus pro nullo habeatur: ideo in eo manifeſte eſt errat. Erratum eſt etiam in hoc, quod per record. ejuſdem judicii per eundem dominum cuſtodem magni ſigilli *Angl.* in præd. camera concilii juxta ſcaccarium præd. reddit. apparet, quod idem judicium per eundem dominum cuſtodem magni ſigilli *Angl.* in præd. camera concilii juxta ſcaccarium præd. reddit. in forma præd. reddit. exiſtit. pro dicto domino rege nunc, verſus eundem *Rob'tum*, ubi per leg. terræ judicium illud reddi debuiſſet pro ipſo eodem *Rob'to*, verſus præfatum dominum nunc regem, et ubi per leg. terræ judicium reddit. per barones in cur. ſcaccarii affirmari et non reverſari debuiſſet: ideo in eo manifeſte eſt errat. Et ſic idem *Rob'tus* dicit, quod in recordo et proceſſ. præd. in præd. camera concilii juxta ſcaccarium præd. vocat. *Le Councell Chamber*, ac etiam in redditione judicii præd. ſic, ut præfertur, per dictum dominum cuſtodem magni ſigilli *Angl.* in eadem camera concilii juxta ſcaccarium præd. reddit. manifeſte eſt errat. Et ſuper inde idem *Rob'tus* petit, quod judicium illud, ſic, ut præfertur, per dict. dominum cuſtodem magni ſigilli *Angl.* in eadem camera concilii juxta ſcaccarium præd. reddit. ob errores præd. et al. in record. et proceſſ. præd. in eadem camera concilii juxta ſcaccarium prædict. vocat. *Le Councell Chamber* habit. exiſten. revocetur, adnulletur, et penitus pro nullo habeatur. Et modo, ad hanc ſeſſionem parliamenti tent. per prorogationem decimo ſexto die *Novembris*, anno undecimo ſupradicto, coram eodem domino rege, in eadem curia parliamenti apud *Weſtm.* in com. *Middl'x* aſſemblat. ven. tam prædict. *Rob'tus Williamſon* in propria perſona ſua, quam *Thomas Trevor* Miles, attornat. domini regis nunc general. qui pro eodem domino rege in hac parte ſequitur, in propria perſona ſua; et ſuper hoc idem *Robertus Williamſon*, allegando error. præd. per ipſum *Rob'tum* ſuperius in forma præd. allegat. pet. quod præd. *Thomas Trevor*, qui ſequitur, *&c.* ad error. præd. reſpondeat, *&c.* Et ſuper inde dictus attornat. domini regis nunc general. qui ſequitur, *&c.* dic. quod nec in record. et proceſſ. præd. habit. in præd. camera concilii juxta ſcaccarium prædict. vocat. *Le Councell Chamber*, nec in redditione præd. judicii, ſic, ut præfertur, per dictum dominum cuſtodem magni ſigilli *Angl.* in eadem camera concilii juxta ſcaccarium præd. reddit. in ullo eſt errat. Et pet. quod curia parliamenti præd. hic procedat ad examinationem tam record. et proceſſ. præd. habit. in præd. camera concilii juxta ſcaccarium præd. et reddition. judicii præd. ſic, ut præfertur, per dictum dominum cuſtodem magni ſigilli *Angl.* in eadem camera concilii juxta ſcaccarium præd. reddit. quam mater. præd. per prædict. *Rob'tum Williamſon* ſuperius pro erroribus aſſignat. et allegat. et quod judicium prædict. ut præfertur, per dictum dominum cuſtodem magni ſigilli *Angl.* reddit. in omnibus affirmetur, *&c.* *Thomas Trevor.* Et quia cur. parliamenti nunc hic, ſcilicet, apud *Weſtm.* præd. in com. *Midd'x* aſſemblat. de judicio ſuo de et ſuper præmiſſ. reddend. nondum adviſatur, dies inde dat. eſt tam præd. *Rob'to Williamſon*, quam præd. *Thom. Trevor* militi, qui pro eodem domino rege in hac parte ſequitur, *&c.* coram domino rege, in eadem cur. uſque ad diem Martis, viceſimum tertium diem *Januarii* ex tunc prox. ſequen. apud *Weſtm.* in com. *Middl'x*, de judicio ſuo inde audiendo, eo quod eadem cur. nondum *&c.*; ad quem diem, coram

“ domino rege, in cur. parliament. præd. ven. tam præd. *Rob'tus*
“ *Williamſon* quam præd. *Thomas Trevor*, qui pro eodem domino rege
“ in hac parte ſequitur, in propriis perſonis ſuis; ſuper quo, viſ. &
“ per eandem cur. parliamenti nunc hic plenius intellectis omnibus
“ & ſingulis præmiſſ. maturaque deliberatione inde habita, videtur
“ eidem cur. parliamenti nunc hic, quod in recordo & proceſſ. præd.
“ habit. in præd. camera concilii juxta ſcaccarium, ac etiam in red-
“ ditione judicii per dictum dominum cuſtodem magni ſigilli *Angl.* in
“ eadem camera concilii juxta ſcaccarium præd. reddit. manifeſte eſt
“ errat. Ideo conſ. eſt per eandem cur. parliamenti, quod præd. judi-
“ cium revocation. in præd. camera concilii juxta ſcaccarium vocat.
“ *Le Councell Chamber*, per dictum dominum cuſtodem magni ſigilli *Angl.*
“ reddit. revocetur, adnulletur, & penitus pro nullo habeatur; & quod
“ præd. judicium per prædict. baron. de ſcaccario prædict. in forma
“ præd. reddit. in omnibus affirmetur, & in omni ſuo robore ſtet &
“ effectu; & quod idem *Rob'tus Williamſon* ad omnia quæ ipſe occaſione
“ præd. judicii revocation. in prædict. camera concilii juxta ſcaccarium
“ reddit. amiſit reſtituatur, *&c.* Super quo, record. & proceſſ. præd. in
“ eadem cur. parliamenti in præmiſſ. habit. in cur. ſcaccarii præd. pro
“ executione ſuper prædict. judic. baron. præd. in præd. cur. ſcaccarii
“ præd. pro præfat. *Rob'to Williamſon* fiend. & exequend. juxta for-
“ mam & effectum judicii præd. remittuntur.”

XXIX. *Proceedings in an Action by Mr.* ANTHONY FABRIGAS, *againſt Lieutenant-General* MOSTYN, *Governor of* Minorca, *for falſe Impriſonment and Baniſhment; firſt in the* Common-Pleas, *and afterwards in the* King's Bench, 1773, *and* 1774.

[*The following Caſe is taken from the trial, which was printed from the notes in ſhort-hand of Mr.* Gurney, *ſoon after the hearing. From the addreſs to the bookſeller, which preceded the trial, it is plain, that Mr.* Gurney *was employed to take notes for the plaintiff, and that the trial was publiſhed by the plaintiff or his friends.*] (a)

In the Common Pleas, Guildhall.

Anthony Fabrigas, *gent. plaintiff.*

John Moſtyn, *eſq. defendant.*

Counſel for the plaintiff.	Counſel for the defendant.
Mr. *Serjeant Glynn*,	Mr. *Serjeant Davy*,
Mr. *Lee*,	Mr. *Serjeant Burland*,
Mr. *Groſe*,	Mr. *Serjeant Walker*,
Mr. *Peckham*.	Mr. *Bulier*.

The court being ſat, the jury were called over, and the following were ſworn to try the iſſue joined between the parties.

Thomas Zachary, eſq.
Thomas Aſhley, eſq.
David Powel, eſq.
Walter Eaver, eſq.
Mr. *William Tomkyn*,
Mr. *Gilbert Howard*.
Mr. *Thomas Bowlby*,
Mr. *John Newball*,
Mr. *John King*,
Mr. *James Smith*,
William Hurley, eſq.
Mr. *James Selby*.

Mr. PECKHAM.

MAY it pleaſe your lordſhip, and you gentlemen of the jury, this is an action for an aſſault and falſe impriſonment, brought by *Anthony Fabrigas* againſt *John Moſtyn*, eſq. The plaintiff ſtates in his declaration, that the defendant, on the firſt of *September*, 1771, with force and arms, made an aſſault upon him at *Minorca*, and then and there impriſoned him, and cauſed him to be carried from *Minorca* to *Carthagena* in *Spain*. There is a ſecond count in the declaration, for an aſſault and falſe impriſonment, in which the baniſhment is omitted. Theſe injuries he lays to his damage at 10,000 *l.* To this declaration the defendant has pleaded, *not guilty*; and for further plea, has admitted the charges in the declaration mentioned, but juſtifies what he has done, by alledging that the plaintiff endeavoured to create a mutiny among the inhabitants of *Minorca*, whereupon the defendant, as governor, was obliged to ſeize the plaintiff, to confine him ſix days in priſon, and then to baniſh him to *Carthagena*, as it was lawful for him to do. To this plea the plaintiff replies, and ſays, that the defendant did aſſault, impriſon, and baniſh him of his own wrong, and without any ſuch cauſe as he has above alledged, and thereupon iſſue is joined. This, gentlemen, is the nature of the pleadings. Mr. ſerjeant *Glynn* will open to you the facts on which our declaration is founded, and if we ſupport it by evidence, we ſhall be entitled to your verdict, with ſuch damages as the injury requires.

Mr. ſerjeant GLYNN.

MAY it pleaſe your lordſhip, and you gentlemen of the jury, I am of counſel in this cauſe for the plaintiff. Gentlemen, this is an action that Mr. *Fabrigas*, a native and inhabitant of the iſland of *Minorca*, has brought againſt the defendant, Mr. *Moſtyn*, his majeſty's governor in that iſland, for aſſaulting, falſe impriſoning, and baniſhing him to a foreign country, the dominions of the king of *Spain*. Mr. *Moſtyn* has, in the firſt place, pleaded that he is not guilty of thoſe injuries; in the next, he has offered this juſtification for himſelf, that the plaintiff, Mr. *Fabrigas*, was guilty of practices tending to ſedition, and that Mr. *Moſtyn*, for ſuch

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(a) The title of the proceedings firſt publiſhed, being only the trial of the cauſe at *niſi prius* before Mr. juſtice *Gould*, who ſat as chief juſtice of the *Common Pleas*, was thus expreſſed.

The proceedings at large, in a cauſe on an action brought by Anthony Fabrigas, *gent. againſt lieutenant-general* John Moſtyn, *governor of the iſland of* Minorca, *colonel of the firſt regiment of dragoon guards, and one of the grooms of his majeſty's bed-chamber; for falſe impriſonment and baniſhment from* Minorca *to* Carthagena *in* Spain. *Tried before Mr. juſtice* Gould, *in the court of* Common-Pleas, in Guildhall, London, *on the 13th of* July, 1773. *Containing the evidence* verbatim *as delivered by the witneſſes; with all the ſpeeches and arguments of the counſel and of the court.*

Before the trial there was the following addreſs to the bookſeller.

'I am very glad to find you are going to publiſh the trial between *Fabrigas* and *Moſtyn*, as the knowledge of the particulars of this intereſting cauſe muſt be worthy the attention of the public.

'As I have paſſed a great part of my life in *Minorca*, and have ſome knowledge of the parties, I was induced from curioſity with many others to attend this trial at *Guildhall*, where I was greatly ſurprized to hear the account given by governor *Moſtyn*'s witneſſes, Meſſ. *Wright* and *Mackellar*, of the conſtitution and form of government of that iſland.

'I did indeed expect that Mr. *Fabrigas*'s counſel would have called witneſſes to contradict the very extraordinary account thoſe gentlemen had given, which they might eaſily have done by any perſon who had the leaſt knowledge of the matter. I ſuppoſe they did not, either from thinking the ſubject immaterial to their caſe, or perhaps to preſerve to Mr. ſerjeant *Glynn* the cloſure of the trial by that moſt eloquent and maſterly reply with which it was concluded.

'Whatever the motives of Mr. *Fabrigas*'s counſel might be for leaving this account uncontradicted, I think it very material that the world ſhould not now be miſled, as they would be, ſhould they read the evidence of theſe gentlemen, and not be informed of their miſtakes; I call them miſtakes, for however extraordinary ſome parts of their depoſitions may appear to an obſervant reader, I am unwilling to charge them with any other crime than ignorance.

'I am therefore induced to trouble you with this letter, that (if not too late) you may publiſh it with the trial; my ſole object is, that the public may be apprized of the miſinformation given by theſe gentlemen. I do not expect that the bare contradiction of an anonymous perſon ſhould overſet the declarations upon oath of two gentlemen given in open court. All I mean is, to apprize the public of the truth, and to leave them to make ſuch farther inquiry as they ſhall think fit.

'The purport of that part of the evidence given by thoſe gentlemen, which I mean to diſpute, was, that a part of the iſland called the arraval of St. *Phillip*'s is not under the juriſdiction of the magiſtrates, nor governed by the ſame laws which prevail in the reſt of the iſland, but is under the ſole authority of the governor, and has no law but his will and pleaſure.

'It ſhould ſeem that ſo very extraordinary a conſtitution as abſolute deſpotiſm for a conſiderable number of inhabitants, in a country governed by law, and which is part of the dominions of the crown of *Great Britain*, ſhould have had ſome very urgent and apparent cauſe to make neceſſary that ſlavery which *Engliſhmen* abhor, and if it exiſts, muſt have been eſtabliſhed by ſome particular proviſion. If it had been ſaid, that in the fort of St. *Phillip*'s, in time of actual ſiege, an abſolute military government muſt prevail, the objects and the reaſons could eaſily be underſtood. But to ſay that in time of profound peace not only the inhabitants of fort St. *Phillip*'s, but all thoſe of the arraval, which contains a large diſtrict of country, with many hundred inhabitants, living out of all reach of the garriſon, ſhould be ſubject not to military government, for that has its written laws and forms of trial, but to the abſolute will of the governor, without any law or trial, is in itſelf ſo abſurd, and ſo contradictory to every idea of reaſon, juſtice, and the ſpirit with which this country governs its foreign dominions, that, I truſt, my countrymen will not believe ſuch a monſter exiſts in any part of this empire, without better proof than the information of theſe gentlemen.

'I would not have the reader think that this ſtrange idea originated in the brain of Meſſ. *Wright* and *Mackellar*, for I know it is a favourite point, which the governor of *Minorca* has endeavoured to eſtabliſh; not ſo much, I believe, for the pleaſure of exerciſing abſolute authority, as on account of ſome good perquiſites which he enjoys, and which can be defended on no other ground.

'To eſtabliſh this, it has been endeavoured to alter the ancient diſtribution of the diſtricts or terminos of the iſland from four to five.

'The four terminos of *Cieutadella*, *Alayor*, *Marcadal*, and *Mahon* have their ſeparate magiſtrates and juriſdictions, and comprehend the whole iſland. The arraval of St. *Phillip*'s was always a part of the termino of *Mahon*; in order therefore to eſtabliſh the governor's claim, it became neceſſary to ſet up the arraval of St. *Phillip*'s as a ſeparate and diſtinct termino. If this could be done, it ceaſed to be within the juriſdiction of the magiſtrates of the iſland, who have power only in their four terminos, and accordingly Meſſ. *Wright* and *Mackellar* advance, that there are five terminos inſtead of four; but thoſe who are acquainted with the iſland well know, that this is a modern invention; that in the records of the country, there is not the leaſt foundation for ſuch an idea; on the contrary, that every proof of the reverſe exiſts. The inhabitants of the arraval are ſubject to the particular jurats of *Mahon*, they differ in no reſpect from the other inhabitants of that termino, and the judges poſſeſs and exerciſe the ſame juriſdiction and authority in the arraval, as they do in the other parts of the iſland, which could not be the caſe, if the claim ſet up by the governor really exiſted.

'No proof whatever has been or can be produced that this claim has any foundation; nor indeed did Meſſ. *Wright* and *Mackellar* attempt to give any but their own aſſertions. The only thing that had the leaſt ſimilitude to proof, was their ſaying, that in one inſtance the officer acting as coroner to examine a corpſe that had met with a violent death in the arraval, aſked the governor's leave before he proceeded.

'This fact I do not pretend to diſpute, it proves nothing; and was evidently only a mark of reſpect, which it is no wonder magiſtrates in that iſland pay to a governor who really has ſo much power. But to have made this amount to any thing like proof, ſuch miſbehaviour, by his ſole authority as governor, thought proper to inflict upon him as a puniſhment, what Mr. *Fabrigas*, in his declaration, complains of as a grievance. This Mr. *Moſtyn* takes upon him to inſiſt, in an *Engliſh* court of juſtice, is the juſtifiable exerciſe of an authority derived from the crown of *England.* And the facts which he undertakes thus to juſtify, are, in the firſt place, a length of ſevere impriſonment upon a native of the iſland of *Minorca*, a ſubject of *Great Britain*, living under the protection of the *Engliſh* laws; and, ſecondly, by his ſole authority, without the intervention of any judicature, the ſending him into exile into the dominions of a foreign prince. Gentlemen, ſome obſervations muſt ſtrike you upon the very ſtate of this plea; they muſt alarm you, and you muſt be anxious to know the particulars of that caſe, to which, in the ſenſe of any man who has received his education in this country, or ever converſed with *Engliſhmen*, it can be applied as a juſtification; that caſe, therefore, I will ſhortly ſtate to you:—Mr. *Fabrigas* is a gentleman of the iſland of *Minorca*, of as good a condition as any inhabitant of that iſland, of as fair and unblemiſhed a character too as that iſland produces. It is however enough, for this preſent purpoſe, to ſay that Mr. *Fabrigas* is a deſcendant of the antient inhabitants of *Minorca:* that he lived there under the capitulated rights: that, as ſuch, the national faith was pledged for his enjoyment of thoſe rights that his anceſtors capitulated for; but what is of more conſideration, being born in *Minorca* ſince its ſubjection to the crown of *England*, he was a free-born ſubject of *England*, and claimed, as his birth-right, the privileges due to that character, and the protection of the *Engliſh* laws. There was a particular ſtipulation upon the ſurrender of the iſland, that every occupier or poſſeſſor of land ſhould be intitled, under certain regulations and reſtrictions, to the produce of his lands, and to ſuch profit as by his induſtry he could make of them. Upon that ground a diſpute aroſe, to which alone can be imputed the diſpleaſure of Mr. *Moſtyn* towards the plaintiff, and the treatment he received from him, in the progreſs of it. Mr. *Moſtyn*, as governor, was appealed to, and his good-nature appeared to be ſo ſerviceable to the adverſary of Mr. *Fabrigas*, that early in the morning Mr. *Fabrigas* was ſuddenly taken from his houſe by a file of ſoldiers, and by them conducted to a dungeon, unaccuſed, untried, unconvicted. Thus, without any form of judicial proceedings, this gentleman, who then lived in eſteem in the iſland, finds himſelf all of a ſudden committed to a dungeon, a dungeon that was made uſe of only for the moſt dangerous malefactors, and that only when they were ready to receive the laſt of puniſhments. In this gloomy, damp, diſmal, and horrid dungeon, was this man detained without any previous accuſation, without any call upon him to make his defence, or being informed there was any crime or offence that was alledged againſt him, and without any notice either to him or his family. When he found himſelf in priſon, there was humanity enough in the breaſt of the keeper of that priſon to accommodate him with a bed; but it ſeems that accommodation was by the power of that iſland thought too much for him, and the bed was taken from him; a check was given to the lenity of the keeper. No notice having been given to his family that they might viſit or adminiſter comfort to him; he did, by humble requeſt, deſire that his wife might be permitted to viſit him: that conſolation too was denied him. In this manner was Mr. *Fabrigas* deprived of his liberty for a conſiderable time. It is unneceſſary for me to ſtate particularly the preciſe time that this impriſonment continued; that you will hear from the witneſſes. Nor does a caſe like this depend upon minutes, hours, or days, but this is the nature and kind of impriſonment that Mr. *Fabrigas* endured: ſo cloſely watched that no man could have acceſs to him, deprived of the conſolation of his family, ſevered from all communication with his friends, relations, or acquaintance, that could adminiſter the leaſt comfort to him. For ſeveral days did this man continue under this impriſonment, nor did his ſufferings determine with it; his removal from the dungeon was only a ſubſtitute of one ſpecies of cruelty in the place of another: for the inſtant he was taken from priſon, he was carried by the ſame arbitrary and deſpotic power on board a ſhip, without any previous notice, without any time allowed him to prepare for his departure, without the ordinary viſit or comfort of friends and acquaintance, from whom he was probably to be ſeparated for ever. Thus was this man taken from his native country, and the inſupportable hardſhips of a dungeon were followed by an entire expulſion from his country, and every thing that was dear to him: he was ſent inſtantly on board a ſhip by force, and carried to *Carthagena*, a foreign country, under the dominion of the crown of *Spain*. This is the nature of Mr. *Fabrigas's* caſe.—Now, gentlemen, for a moment, let me remind you of the pretence under which this impriſonment is inflicted. It is ſaid Mr. *Fabrigas* excited ſedition, or attempted to excite ſedition; that he acted or ſpoke in a turbulent and mutinous manner; and therefore that the governor, as his plea ſtates he was well authorized to do, committed him to priſon, and baniſhed him out of the iſland; or rather committed him to priſon for the purpoſe of baniſhing him out of the iſland, for I believe that is the true ſtate of his plea. Gentlemen, you would juſtly accuſe me of a great and wanton waſte of your time, if I ſhould ſay a great deal for the purpoſe of exculpating Mr. *Fabrigas* from the charge and imputation that is thrown upon him in this place, becauſe I am perſuaded that you, an *Engliſh* jury, if you were ſitting in judicature upon the caſe of confeſſedly the vileſt of offenders, you would not ſuffer the atrocity of the offence to mitigate that cenſure and animadverſion which is due to a behaviour like this of the governor's. In private juſtice to the character of Mr. *Fabrigas*, and not as the leaſt relating to any queſtion here to be tried, gentlemen, I will ſtate to you upon what grounds and pretence this mutiny is alledged againſt Mr. *Fabrigas*.—Mr. *Fabrigas*, as I have told you, claimed, among all the other inhabitants and poſſeſſors of lands in the iſland, a right of ſelling the produce of his lands, under certain reſtrictions. The produce of the lands is chiefly wine: Mr. *Fabrigas* had a conſiderable quantity. His majeſty, by his proclamation, had given free liberty to the inhabitants of that part of the iſland where Mr. *Fabrigas* lived, to ſell their wines, the price being firſt ſettled by the authority of the governor:—that price is called the afforation price. Notwithſtanding his majeſty's proclamation, by an act and order, not of governor *Moſtyn*, but of his lieutenant-governor, there was a prohibition that no wine ſhould be ſold without the immediate authority of the muſtaſtaph. An application therefore, by Mr. *Fabrigas*, was made to this officer, either to permit him to ſell his wines under the afforation price, which would be for the general relief and benefit of the iſlanders, and of the garriſon, or that he himſelf would buy it at a fixed price. This officer refuſed to comply with either: Mr. *Fabrigas* therefore was reduced to the neceſſity of making an humble application to governor *Moſtyn*, to permit him this alternative, either to ſell his wine under a certain afforation and regulated price, or that the government would buy his wine of him for their uſe, or the uſe of the garriſon. This petition was thought reaſonable at firſt, and had a kind anſwer; it was received, and it appears to have been taken into conſideration, but nothing was done in conſequence of it. Mr. *Fabrigas* therefore repeats his application, and he receives encouragement to expect that the reaſonableneſs of his petition would be taken into conſideration, and that he ſhould be at liberty to ſell the produce of his land. But, gentlemen, at laſt this anſwer was given to Mr. *Fabrigas:* that if it appeared to be the ſenſe of a conſiderable number of the inhabitants of the iſland, that it was for their benefit that ſuch permiſſion ſhould be given, his application ſhould be complied with. Mr. *Fabrigas* then prepares ſuch a petition; he gets it ſigned, and he preſents it to governor *Moſtyn*. Now, gentlemen, here it is impoſſible to ſtate what paſſed between the parties. If it can be pretended that there was any thing mutinous, menacing, or improper, in this laſt petition, I preſume that petition will be produced to you, and it will ſpeak for itſelf; but ſome indignation was conceived by governor *Moſtyn* againſt the plaintiff, Mr. *Fabrigas*, which produced that ſtrange, unaccountable, unwarrantable, and alarming conduct, which we now, by evidence, impute to Mr. *Moſtyn*. For gentlemen, inſtantly upon this, Mr. *Fabrigas* is conducted in the manner before-mentioned to that horrible dungeon, where he continues for a conſiderable time under ſuch orders as I have ſtated to you, till he was hurried on board a ſhip, and was conveyed to *Carthagena* in *Spain*. Here, for the firſt time, he receives intelligence of what was the provocation that he gave, what was the ground of ſuch treatment of him, what charge was imputed to him, by what authority he was ſo detained and ſo treated: for here appears a letter under the hand of governor *Moſtyn*, avowing this act, and telling him that he thought it neceſſary and expedient, for the puniſhment of his offence, to ſend him into exile, and to direct him to be conveyed to *Carthagena* in *Spain*. Here then you find the governor avowing the whole; and if he did not avow the whole, you could have no doubt under what authority theſe things were done; becauſe you will hear from all, that they cannot be done but under the authority of the governor. Then, gentlemen, the impriſonment, and the ſending this man into exile, are the acts of governor *Moſtyn*. The impriſonment under ſuch ſtrange aggravating circumſtances of horror and ignominy, and the ſending him without notice, without time for preparation, without giving him the opportunity of paying the leaſt attention to the concerns of his eſtate and family, into exile; theſe, gentlemen, we now preſume to treat as the acts of governor *Moſtyn*; and the governor ſays, he is juſtified in ſo doing, as governor of *Minorca*. I ſhould be glad to know upon what idea of juſtice the governor grounds that pretence. I conceive, that in this caſe, there cannot be the leaſt colour or pretence of any judicial examination, or the leaſt form of judicial proceedings. Governor *Moſtyn*, after having been guilty of this outrage to the plaintiff, would have acted much better, if he had not added this inſult to the laws of his country, by aſſuming an authority incompatible with the leaſt poſſible idea of juſtice that can be entertained in this or in any country whatſoever. Gentlemen, if governor *Moſtyn* complains that juſtice is not done to his defence by his plea, that he is fettered and embarraſſed by it, and could now juſtify his conduct upon better grounds, we will freely give him the opportunity of doing it; he ſhall do it in what character he thinks proper. If he has acted under the colour of any judicial proceedings in civil judicature, let thoſe proceedings be produced, let him deſert and abandon the ſhameful plea that he has preſented; he has even our liberty to do it. If the governor means to be juſtified in his military character, I need not tell you, gentlemen, that it is neceſſary in that character, that there

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proof, it ſhould have been ſhewn, that the like attention was not paid to the governor at *Mahon*, and in other parts of the iſland. The truth is, that the inhabitants are ſo dependant on the military, that I have known the ſame civility ſhewn in another part of the iſland to the officer who happened to command there, but certainly without any intention of ſurrendering to him their authority as magiſtrates.

'Meſſ. *Wright* and *Mackellar* alſo ſaid, that the *Minorquins* claimed to be governed ſometimes by the *Engliſh*, and ſometimes by the *Spaniſh* laws, as ſuited beſt for the moment; but inſinuated that the *Spaniſh* laws prevailed, and that by them the governor had a right by his ſole authority to baniſh.

'The fact moſt undoubtedly is, that *Minorca*, a conquered country, preſerves its ancient (the *Spaniſh*) laws, till the conqueror chuſes to give them others; and therefore as *England* has not given them others, it is true the *Spaniſh* laws do prevail in *Minorca*, both in civil and criminal matters, among themſelves: but it is equally true that they have the protection of the *Engliſh* laws againſt their governor, who cannot be amenable to their local laws, and that however deſpotically a *Spaniſh* governor may formerly have acted, it cannot be the law of *Spain*, or of any country (becauſe it is contrary to natural juſtice) that a man ſhould be condemned and puniſhed without either trial or hearing.

'It would have been eaſy for governor *Moſtyn*, if Mr. *Fabrigas* had committed a crime, to have followed the mode of proceeding eſtabliſhed there in criminal caſes, which is for the advocate fiſcal to proſecute in the court of royal government, where the chief juſtice criminal is the judge.

'If I was not afraid of ſwelling this letter to too great a length, I ſhould make more remarks on what paſſed at this trial, and point out many more inſtances of power unjuſtifiably aſſumed by the governors. But I hope that what appears from this publication will be ſufficient to induce adminiſtration to conſider the ſtate of this iſland, and give the inhabitants ſome better ſecurity for the ſafety of their perſons, and enjoyment of their property; for, excluſive of the meanneſs there is in ill uſing thoſe who cannot reſiſt, it is undoubtedly the beſt policy, for the honour and ſtability of our empire, to make all its dependencies happy.

ſhould be judicial proceedings likewiſe of a military court of juſtice. I will be bold to ſay, that the idea governor *Moſtyn* has adopted, that the lives, fortunes, and being of the inhabitants of the iſland of *Minorca* are at his mercy, and that by his ſole authority he can inflict bonds and impriſonment on any inhabitant of that iſland, is the ſingle idea of governor *Moſtyn*; and I ſay the governor does not, in this caſe, talk like a military man, for his ideas are as foreign to the notions of a ſoldier, as of a lawyer. Gentlemen, this is the nature of the caſe that we ſhall offer to you, and which we ſhall produce in proof to you againſt governor *Moſtyn:* an impriſonment, if it had been attended with all the circumſtances of comfort that could have been adminiſtered to a perſon in that ſituation, unjuſtifiable, and without colour or pretence of legal authority, ſufficient to entitle this gentleman to call for conſiderable damages from a verdict of a jury: a baniſhment into a foreign country of a ſubject of *England*, intitled to be protected, to whom the laws cannot be denied without breach of public faith, and a dangerous wound to the general ſyſtem of our conſtitutional liberties. Thus, by the ſole authority of governor *Moſtyn*, without pretence of judicial examination, was Mr. *Fabrigas* ſent into baniſhment. If all other circumſtances were away, the being ſent out of his native country by an arbitrary act of the governor of that iſland, is ſurely ground enough to call for the moſt conſiderable damages. But, gentlemen, you are to add to it every circumſtance of diſcomfort. He was, during the whole time of his impriſonment, kept in a gloomy dungeon; no circumſtance of ignominy that could affect the mind of a man of feeling was omitted: he was put into a place ſet apart and deſigned only for the reception of the worſt of malefactors, ſecluded from any converſation or communication with his friends or acquaintance, his neareſt relations, his wife or his family, deprived of the comfort of a bed, and obliged, for a conſiderable number of days, to ſubſiſt upon bread and water. This is a caſe of the moſt unparalleled cruelty; the moſt ingenious circumſtances of torture being added to the moſt unjuſtifiable and the moſt lawleſs exertion of authority, that I am perſuaded has ever appeared before any court. If governor *Moſtyn* can ſupport the powers of this claim, and vindicate himſelf, as governor, by the plenitude of his powers, and that the ſole judicature of the iſland reſides in his perſon; if it was for a moment poſſible for you to entertain the idea of the legality of ſuch a power being placed in any man, in conſequence of an authority derived from the crown of *England:* I ſay, if it was poſſible for you to conceive that ſuch a power could exiſt; try him even by that rule, try him by that rule, and he's without excuſe; for the moſt deſpotic, the moſt arbitrary and uncontroulable power that is ever exerciſed, profeſſeth at leaſt to act by calling upon the party accuſed to make his defence, and I believe in no part of the globe is it looked upon as juſt to condemn a man unheard. Let general *Moſtyn* travel into *Aſia*, or viſit his neighbours on the continent of *Barbary*, he will not find examples there to juſtify his conduct, in any of the powers aſſumed, or in the uſe he has made of them: for if their powers are not circumſcribed or reſtrained by any laws; if they act, as the general profeſſes he has a right to, by their ſole will and pleaſure; if that is the rule of their government, yet ſtill there is an idea of a principle of natural juſtice that ſhould govern their proceedings there; at leaſt an appearance of it they are anxious to produce. I never heard in my life that it was the avowed privilege of any country, that a man ſhould be charged with an offence, that he received the puniſhment for that offence, without the offence being explained and ſtated to him, and an opportunity given him of hearing the charge and the evidence by which it was produced; but this is the caſe of a tranſaction in the dark, a ſecret indignation conceived, that indignation immediately followed by the moſt horrid exertions of power upon the perſon of Mr. *Fabrigas*—committed to a dungeon, and unapprized of the charge againſt him till ſent out of his native country, and upon the voyage to the deſtined place of his baniſhment. The offer made to general *Moſtyn* not to tie him down merely to the juſtification ſpecified in his plea, but to give him leave to offer any juſtification that may be conſiſtent with the idea of civil or military juſtice, may be called inſidious, becauſe I muſt diſbelieve every thing ſuggeſted on any truſt, if I think the offer can be of no benefit to him if wanted; but it may be added to it, 'Governor, take your ideas of law from *Barbary* or *Turkey*, produce your precedent, *India* or negro law, you are ſtill unable to juſtify your conduct.' Gentlemen, theſe are the circumſtances we are to lay before you in evidence. The governor may, if he pleaſes, endeavour to charge this gentleman with mutiny. If he does, I preſume he will adduce his proof of it. But if it was poſſible to decide that Mr. *Fabrigas* was a mutinous man, though the reverſe of that character is but juſtice to him; nay, if you could decide that he was the worſt and moſt dangerous of offenders, governor *Moſtyn*'s conduct is ſtill deſtitute of any colour of juſtice or law. His conduct is totally unwarrantable, and the pretence he has here ſet up, that he is a prince with a power unbounded and unlimited by any rule or law whatſoever, that he is authorized to act by his own will and pleaſure, muſt repreſent this caſe in ſo alarming a light to you, that I am perſuaded that you, who have taken your ideas of law and juſtice from converſation with *Engliſhmen*, and obſervation on the *Engliſh* conſtitution, will give all attention to the particular ſufferings of the man, as well as to what you owe to yourſelves, your country and poſterity; and we truſt, even in the very beſt conſtruction that is poſſible to put on governor *Moſtyn*'s conduct, that you will think the damages laid in the declaration are not extravagant.

BASIL CUNNINGHAM. *Examined by Mr.* Lee.

Q. You are in ſome military capacity?——*A.* Yes.

Q. Was you in the year ſeventy-one in the iſland of *Minorca?*

A. Yes.

Q. In what character?

A. Acting ſerjeant major for the royal artillery.

Q. Do you remember Mr. *Anthonia Fabrigas* being at *Minorca?*

A. Yes.

Q. Was you ſerjeant major at the time he was ſeized and taken into cuſtody?—*A.* I was, when I ſaw him brought into priſon.

Q. Do you recollect any orders at that time coming in any body's name touching his confinement?

A. There was a general order given us, that three more men ſhould be added to the artillery guard.

Court. Have you that order?—*A.* No.

Q. Was it not your office as ſerjeant major to tranſcribe that order into your book?

A. I gave that order out in the company's order book.

Q. To whom does the cuſtody of that order book belong?

A. When the books are written out, they give them to the captain to whom they belong.

Q. They put three additional men ſentry upon that occaſion?

A. Yes.

Court. Why?

A. To do duty upon the priſoner Mr. *Fabrigas.*

Court. How long had Mr. *Fabrigas* been in cuſtody at that time when this order was given out? Was it immediately upon his coming into cuſtody, or after he had been put there?

A. To the beſt of my recollection, I believe about twenty-four hours after he had been in cuſtody, or the evening of the ſame day; I cannot be certain as to that.

Q. You can tell us what priſon it was that Mr. *Fabrigas* was committed to?—*A.* He was put into priſon No. 1.

Q. What is the general uſe of that priſon? to what is it applied?

A. All the priſoners that are guilty of capital offences, or for deſertion, we commonly put in there.

Q. Do you recollect any circumſtances attending Mr. *Fabrigas*'s impriſonment?—Mention any that occur to you.—Do you recollect the manner in which he was brought or confined?

A. To the beſt of my recollection he was brought by a party of ſoldiers, whether of the 25th regiment or the 6th, I can't ſay; he was brought in handcuff'd, I think, but am not certain.

Q. How long was he confined there?

A. As near as I can recollect, about five or ſix days.

Q. In that priſon?—*A.* Yes.

Q. During his confinement there, can you tell the court or jury whether he was permitted to be viſited by his wife or family?

A. No: the ſentries had orders that he ſhould have no converſation with any body but the prevoſt marſhal.

Q. Do you know of any orders that he ſhould not be ſeen but by the prevoſt marſhal?

A. The ſentry informed me that was his orders; beſides, it was put into the general orders too.

Mr. Serjeant *Davy.* If you mean to affect the defendant with that, you ſhould produce the order.

Mr. *Lee.* Well then, we ſhall produce it.

Q. In fact, do you know whether any body was permitted to viſit him but this prevoſt marſhal?

A. I don't know of any; if they did, it was contrary to orders.

Q. Do you know if any body applied to ſee him?

A. His wife applied to ſee him, but was refuſed, as I was informed.

Q. What is this prevoſt marſhal?

A. One that has the charge of all priſoners that are confined for capital crimes; he has the keys of the priſon.

Q. Is this an executioner too, as well as a gaoler?—*A.* No.

Q. Can you tell us the cauſe for which this gentleman was committed—the occaſion of it?——*A.* I cannot.

Q. Do you know what Mr. *Fabrigas* is?

A. He is an inhabitant of the iſland of *Minorca.*

Q. A native?—*A.* Yes: a *Minorquin.*

Q. Do you know whether Mr. *Fabrigas* is a man of any property, or was a grower of any vines upon that iſland? Do you know in what manner he lived?

A. He lived like a gentleman there.

Q. Was you acquainted with any diſputes touching his liberty to ſell his wine?

A. I know nothing at all of it.

Q. Do you know any thing of what happened to him after his confinement in this priſon? what became of him after?

A. He was ſent out of the iſland.

Q. Do you know of your own knowledge?

A. I did not ſee him taken away.

Q. Do you know of any orders touching his being ſent?

A. I did not ſee any orders.

Q. You being at St. *Phillip*'s at this time, when he was in priſon, you can tell us whether he was tried for any offence previous to his commitment there, or after?

A. No: he was not tried.

Croſs-examination by Mr. Serjeant Davy.

Q. How long had you known this *Fabrigas* before the time of his being brought to this priſon?

A. I had ſeen him different times, being in the iſland for between eight and nine years.

Q. I wiſh to know in the firſt place whether he was a quiet ſubject, or otherwiſe?

A. I never heard any thing to the contrary.

Q. What? but that he was a quiet, inoffenſive ſubject?

A. I never heard to the contrary.

Q. He was looked upon as a very good friend to the garriſon, I believe?

A. I really can't tell what he was; he was an inhabitant of the iſland. I don't know that ever I ſpoke to him in my life.

Q. What part of the iſland did he live in?

A. At St. *Phillip*'s.

Q. There it was he was impriſoned, I preſume?

A. Yes: he was brought a priſoner to St. *Phillip*'s caſtle.

Q. I think you ſay you have been in the iſland five years?

A. Almoſt nine years.

Q. Then you was there before Mr. *Moſtyn* was appointed governor?

A. Yes.

Q. You was there in governor *Johnſton*'s time?—*A.* Yes.

Q. Was you there in governor *Blakeney*'s time?—*A.* No.

JAMES TWEEDIE. *Examined by Mr.* Groſe.

Q. What was you in the year one thouſand ſeven hundred and ſeventy-one?—*A.* A corporal in the royal artillery in the iſland of *Minorca.*

Q. Did you ſee the plaintiff brought to the caſtle?

A. No: I did not ſee him brought; I was a ſerjeant of the guards when he was delivered up to me, from the 61ſt regiment.

Court. Can you recollect the time?

A. No: it was ſome time about the middle of *September*, to the beſt of my knowledge, in the year one thouſand ſeven hundred and ſeventy-one.

Q. In what way was he delivered?

A. He was delivered to me in the priſon No. 1.

Q. What were the particulars of that delivery to you? in what way was he delivered?

A. He was in but a very mean habit; for, by what I could learn, his clothes and every thing that he brought in with him had been taken from him.

Counſel for the defendant. That will not do. What condition was he in?

A. He was in the priſon; he had been in the priſon almoſt twenty-four hours, before he was delivered to the artillery.

Q. What orders did you receive concerning him?

A. That I was to ſuffer no perſon to approach the grate.

Q. What grate?—*A.* The priſon door.

Q. From whom did you receive theſe orders?

A. From the adjutant lieutenant *Froſt*; he was our acting adjutant; he read the orders.

Q. Not to let any one come to that grate?

A. Or converſe, or have any communication with him, upon any account.

Q. Whoſe orders does the adjutant lieutenant give out?

A. I imagined it was a general order.

Q. What do you mean by a general order?

A. Coming from the commander in chief.

Q. Do you mean from governor *Moſtyn?*

A. Yes: he was commander in chief then of the iſland.

Q. What order?

Mr. Serjeant Davy. I will give you no trouble about theſe things. With regard to orders, you have given us notice to produce the orders. The fact is as you contend. We mean to conceal no circumſtances.

Court. I think the right way will be, as it is now admitted that this was done by the defendant's order, to proceed with your parole evidence, and read that at the concluſion.

Counſel for the plaintiff. If your lordſhip pleaſes, we will read the order of impriſonment, and the ſentence of baniſhment.

The ASSOCIATE.

The title is,

Orders given out to the troops in Minorca *by lieutenant general* Moſtyn, *governor of the iſland, who arrived the 21ſt of* January, 1771. September 15: *In order to relieve the main guard at St.* Phillip's, *which now wants a ſentry extraordinary upon* Antonio Fabrigas, *confined in priſon* No. 1, *general* Moſtyn *orders, that three men be added to the artillery guard in the caſtle ſquare, as they are moſt contiguous; and that duty taken by them, the ſentry muſt be poſted night and day, and is to ſuffer no perſon whatever to approach the grate in the door of the ſaid priſon, either to look in, or have any communication with the priſoner, the prevoſt marſhal excepted, who is conſtantly to keep the key in his poſſeſſion.*

To Anthony Fabrigas de Roche.

YOU Anthony Fabrigas, *inhabitant of the arraval of St.* Phillip's, *are by me, chief governor of* Minorca, *baniſhed this iſland for twelve months from the date hereof, not to return hither until that time is expired at your peril, for your ſeditious, mutinous, and inſolent behaviour to me the governor, and for having dared moſt dangerouſly and ſeditiouſly to raiſe doubts and ſuſpicions amongſt the inhabitants of the arraval of St.* Phillip's, *and to excite them to diſpute my authority, and diſobey my orders; and for having further preſumed moſt dangerouſly to inſinuate, that his majeſty's troops under my command, without any authority from them for ſuch falſe and ſcandalous inſinuations, were impoſed upon.*

Mahon, 17*th day of* Sept. 1771. J. MOSTYN, governor.

Q. You ſay you received this order to permit no perſon to approach the grate of the priſon, or have any communication with the plaintiff: did you obey this order?—*A.* Yes.

Q. Did you obey it ſtrictly?

A. Yes, as ſtrict as it was in my power.

Q. Did any perſon apply to ſee the plaintiff?

A. Yes, his wife and two children.

Q. Were they permitted to ſee him?—*A.* No.

Q. How near were they permitted to come to the priſon?

A. As nigh as I can gueſs, about thirty yards.

Q. They were not permitted to come nearer?

A. They were not permitted to come nearer.

Q. Do you know in what way the plaintiff laid?

A. He lay upon the boards.

Q. Were there no beds?—*A.* No beds.

Q. Was any bedding ſent to him?

A. I ſaw his wife with bedding, which was not permitted to be brought to him.

Q. In ſhort, tell the jury whether the guard would ſuffer any thing whatſoever to paſs them?

A. If they did, they were ſure to come to trouble, to puniſhment, by it; and I am certain they never did.

Q. Tell us what his ſubſiſtence was?

A. Bread and water.

Q. What ſort of ſubſiſtence has a deſerter if he is confined in this place?

A. It is a general rule in *Minorca*, that deſerters and priſoners, even for capital crimes, ſhould have proviſions ſent them.

Q. What proviſions?

A. Such as the iſland affords, bread and beef.

Court. Do you know whether any proviſions were brought him?

A. I never ſaw any; there was ſuch a ſtrict order, that nobody ever attempted it.

Q. I believe there was an air-hole at the top of the priſon?—*A.* Yes.

Q. Was any body placed over the air-hole?

A. No; but there was a ſentry upon a baſtion near to it, who had orders given him, that nobody ſhould approach this air-hole.

Q. Upon what account?

A. For fear any thing ſhould be dropped down to him.

Court. Was that particularly upon this occaſion, or generally when deſerters were there?

A. No; I never heard a circumſtance of the kind, but during the time Mr. *Fabrigas* was in priſon.

Q. Did you know the plaintiff?

A. Yes, I have been at his houſe ſeveral times; I was at the iſland almoſt nine years.

Q. What family had he?

A. A wife, when he was in priſon, and five children, to the beſt of my knowledge.

Q. Now, during the time you have known him, have you never heard him ſay any thing diſreſpectful of the governor?

A. No; he only complained of his hardſhips, of his own bodily ſufferings.

WILLIAM JOHNS. *Examined by Mr.* Peckham.

Q. Was you at *Minorca* in 71?—*A.* Yes.

Q. In what ſituation and capacity?

A. I was garriſon gunner.

Q. How long were you in the iſland?—*A.* Almoſt nine years.

Q. Did you know Mr. *Fabrigas?*—*A.* Yes.

Q. Did you know Mr. *Fabrigas*'s ſituation in the iſland?

A. He lived very genteel in St. *Phillip*'s.

Q. Did he live in the ſame ſtate as the principal inhabitants of St. *Phillip*'s?

A. Yes, as much ſo as any man in St. *Phillip*'s.

Q. Do you remember any thing of his being impriſoned?

A. I ſaw him brought to the priſon.

Q. In what manner was he brought?—*A.* By a file of men.

Q. Were his hands bound?—*A.* I cannot ſay.

Mr. Serjeant Davy. I admit that he was with his hands bound, as the firſt witneſs ſaid, and that he was kept in priſon by order of the governor.

Mr. Peckham. Do you admit that he was hand-cuffed?

Mr. Serjeant Davy. Yes, that he was hand-cuffed, and kept in the way deſcribed by the former witneſs.

Q. Was he kept hand-cuffed in priſon?—*A.* I believe not.

Q. What ſort of a place is this priſon?

A. It is ſet apart for capital puniſhments, for priſoners that are under ſentence of death.

Q. Is it a priſon dug out of a rock?

A. It is a ſubterraneous place in the body of the caſtle.

Q. Is it under ground?—*A.* No, under the top of the caſtle.

Q. Is it a ground floor?—*A.* A ground floor, I believe.

Q. This being the priſon, and you ſtanding there to guard him, do you remember any of his children coming to ſee him?

A. I ſaw his ſon the firſt day he was confined there, a boy about fifteen, come to ſee him.

Q. What did he come for?

A. He had ſome proviſions in a baſket.

Q. Did he apply to you, that thoſe proviſions might be given to his father?

A. He applied to the regiment then upon duty to give them to his father, but was denied.

Mr. *Serjeant* Davy. I admit he was ſent hand-cuffed to the priſon, as deſcribed by the former witneſs: I meant to include the matters of belief as well as matters of knowledge.

Court. For my part, I like to hear the evidence in any caſe, to know the truth, and then we have no ſquabbles afterwards.

JOHN CRAIG. *Examined by Mr. Serjeant* Glynn.

Q. What are you?—*A.* A matroſs.

Q. Was you in the iſland of *Minorca* in 71?—*A.* Yes.

Q. Do you know Mr. *Fabrigas?*—*A.* Yes.

Q. How long have you been in *Minorca?*

A. Pretty nigh nine years.

Q. What condition was Mr. *Fabrigas* in?

A. In very good circumſtances there; he is reckoned one of the beſt in circumſtances in the iſland.

Q. Do you remember the time when he was in the dungeon there?

A. Very well.

Q. You did not do any duty upon him, I ſuppoſe?—*A.* Yes, I did.

Q. Do you remember whether people were admitted to ſee him?

A. I am ſure there were none admitted to ſee him.

Q. Do you know whether any perſon came to ſee him that was refuſed?

A. I know his wife and children came, and they were refuſed.

Q. Do you know of his being taken out of the priſon?

A. I ſaw him put on board a ſhip in the harbour.

Q. How many days after his firſt impriſonment?

A. I am not certain of the days.

Q. About what number of days was he in confinement?

A. Five or ſix days, to the beſt of my knowledge.

Q. In what manner was he taken out of priſon, and put on board a ſhip?

A. I happened to be down at the quay, and ſaw him put on board a boat, to be taken to the veſſel.

Q. What time was this?

A. Early in the morning. I am not ſure to the time, but to the beſt of my knowledge I think between three and four in the morning.

Q. Had he any time allowed him on ſhore?

A. No, he was hurried on board; his wife and family were coming down to ſpeak to him, and the ſoldiers kept them off, and would not let them. I wanted to ſpeak to him myſelf, and the ſoldiers would not let me.

Q. You ſaw his wife and children come to him, do you remember whether they brought any thing for him?

A. I think they had ſome bedding, to ſee if they could get it on board the ſhip he was going to, and it was turned back again, they would not allow any thing to come to him; he was put on board a boat and taken into a ſhip which was laying in the harbour there, the ſhip was under ſail.

Mr. Serjeant Davy. I admit he was baniſhed to *Carthagena.*

Counſel for the plaintiff. You admit he was baniſhed by governor *Moſtyn* for a year?

Mr. Serjeant Davy. Yes, I do.

Colonel JOHN BIDDULPH. *Examined by Mr.* Lee.

Q. You are an officer in the regiment that was at *Minorca?*

A. I was not in *Minorca* at the time this matter paſſed.

Q. But you have been at *Minorca?*—*A.* Yes.

Q. Did you know Mr. *Fabrigas?*

A. Yes; I knew him from the time I arrived in the iſland 'till I left it.

Q. When did you arrive there?

A. I think in the year 63, about *May* or *June*, and ſtaid about eight years.

Q. When you knew Mr. *Fabrigas*, in what condition and circumſtances was he?

A. He ſeemed to me to be of the ſecond ſort of people in the iſland; he had ſome vineyards and ſome houſes, and ſome property, and was received not as of the firſt quality, but as a gentleman; he was eſteemed a man of property: I ſhould call him a gentleman farmer.

Q. While you knew him what character did he bear? or how did he behave himſelf, as far as you had an opportunity of obſerving?

A. As far as I could obſerve, he behaved very well, and had a very good character. I uſed to employ him in getting wine for me, and other things the iſland produced, becauſe I had a family; and often he was very uſeful to me in procuring things at a reaſonable price. When I was at *Citadella*, at the other end of the iſland, he came there, and was with ſome of the better kind of people; he was always with a don *Vigo*, or a don *Sanchio*, who were reckoned the principal people of the place; they are nobles in that iſland.

Q. While you knew him, I aſk you what was his behaviour? Did he behave like a peaceable ſubject, or like an unruly and factious one?

A. He always behaved with very great decency and decorum.

Croſs-examined by Mr. Serjeant Burland.

Q. Do you know whether he was a man of property in the iſland?

A. As far as I underſtand he was, but it is impoſſible for me to ſay poſitively; he was reported ſuch.

Q. He had a father living?

A. I believe he had, an old man.

Q. You do not know whether it was his own property or not?

A. It ſeemed to be his.

Q. He converſed with the two noblemen you mentioned?

A. Yes; he was at their houſes as a gentleman.

Q. Did you uſe to viſit at his houſe?

A. I have been there.

Q. Did you ever dine or ſup with him?

A. I think I dined with him once.

Court. The gentlemen ſuggeſt, but you don't mean to make a diſtinction between the claſſes there?

A. I do make a great diſtinction.

Q. What promotion has general *Moſtyn* in the army at this time?

A. He is a lieutenant general, and commander in chief of the iſland of *Minorca.*

Q. Has he any military promotion at home? has he any regiment?

A. Yes.

Q. What regiment is it?

A. I don't recollect the number; it is a regiment of dragoons.

Q. Do you know of any office that the general has about his majeſty's perſon, any place at court?

A. I don't recollect it; I believe he has.

Mr. Serjeant Glynn. My lord, we have done for the plaintiff.

Mr. Serjeant Davy, *for the defendant.*

MAY it pleaſe your lordſhip, and you, gentlemen of the jury, I am of counſel in this cauſe for the defendant, general *Moſtyn*, who is charged with a miſbehaviour towards the plaintiff, in the defendant's capacity, as governor of this iſland. The plaintiff, *Fabrigas*, being a ſubject of the crown of *England*, a native of that iſland, a *Minorquin* by birth, and living in the town of St. *Phillip*'s, there is a reaſon why his reſidence in the town of St. *Phillip*'s is, in my apprehenſion, material, for ſome matters which I ſhall trouble you with before I ſit down. The defendant was appointed governor of the iſland of *Minorca* on the ſecond of *March*, 1768. His predeceſſor was governor *Johnſton*, whoſe predeceſſor was general *Blakeney*. So far I am able to trace back the governor of this iſland, whom the queſtions before you have any ſort of relation to; and any further is unneceſſary. I don't know whether it may be new to any of you, gentlemen, to inform you, moſt probably not, the hiſtory of your country will tell you, that this iſland of *Minorca*, whoſe ſituation is in the *Mediterranean*, and is of extreme uſe in the protection of the *Mediterranean* trade, was taken in queen *Anne*'s wars from the crown of *Spain*, and was ceded by that crown to *Great Britain*, by the treaty of *Utrecht* in 1713: that upon the ceding of that iſland, the condition annexed was a requiſition on the part of *Spain*, which was acceded to on the part of *Great Britain*, that the inhabitants of this iſland of *Minorca* ſhould continue in the free exerciſe of the *Roman* catholic religion, which could be no farther than was conſonant to the laws of *Great Britain*. For whereas the laws of *Great Britain* will not allow the pope's bulls, excommunication from the court of *Rome*, the inquiſition, and ſome other matters of that ſort; therefore a free exerciſe of the *Roman* catholic religion was not with the exerciſe of any powers in the biſhop of *Rome*, but what were acknowledged by the laws of *Great Britain*. They had only the free exerciſe of their religion, as *Roman* catholics. All other rights which they had, and all laws by which they were to be governed, were to be given to them by the king of *England*. He was to eſtabliſh what code of laws he thought proper in that country. They were to be ſubject either to civil juriſdiction in particular ſorts, or military, or whatever ſort the king of *England* pleaſed. They were a conquered people, a conquered iſland, and no terms were annexed to that treaty of *Utrecht*, but only the exerciſe of the *Roman* catholic religion. The king was to appoint his governor of the iſland, to govern them by ſuch laws as he thought proper to direct; an arbitrary deſpotic government, or a qualified government, or whatever government, under whatever ſort of magiſtrates, or whatever order the crown of *England* ſhould think proper. There is a manifeſt and very wide diſtinction, to be ſure, between a *Minorquin* by birth (I don't ſpeak of an *Engliſhman* that goes over there, and the caſe of an *Engliſhman*): I juſt mention theſe things, which will be very proper for your conſideration throughout the progreſs of the ſeveral facts I ſhall mention in this cauſe. They are, in my humble apprehenſion, eſſentially neceſſary to your conſideration. Some time after theſe people (I don't know exactly the date of it) had become ſubject to the crown of *England*; after 1713 they petitioned for a confirmation of the uſages and cuſtoms of *Spain*, and to be governed by the laws of *Spain*, as they had been uſed to do before: and that was granted, ſo far as the wiſdom of the crown thought proper to grant; and there were certain regulations, which I will take notice of by-and-by. Many regulations were made from time to time occaſionally, by the crown of *Great Britain*, for the internal police of the iſland. Gentlemen, I ſhould inform you too, that the iſland of *Minorca* conſiſts of five ſeparate diviſions or diſtricts. In four of theſe they have magiſtrates annually elected. In the fifth, which is called the arraval of St. *Phillip*'s, which is the fort of the iſland and its ſecurity, there the particular diſtrict which is juſt the ſuburbs which takes the town of St. *Phillip*'s adjoining cloſe to the foot of the citadel, that diſtrict is under the immediate government of the governor of the iſland appointed by the crown. There are no jurats, which are the common name of the magiſtrates in the other diviſions, who are elected by the people; but the proper officer for the police of the arraval is appointed by the governor himſelf, and I think his title is muſtaſtaph: he is the officer appointed by the governor of the iſland. There is an extreme neceſſity, that more particular care ſhould be taken in the regulation of the police of that part of the iſland which is immediately contiguous to the fort of St. *Phillip*'s, and where there is a perpetual garriſon, for the ſake of preſerving military diſcipline. A law of this iſland, amongſt others which is neceſſary to mention to you, becauſe the hiſtory of the tranſaction has immediate reſpect to it, is, that the jurats in the ſeveral parts of the iſland in the four other diſtricts of the iſland, and the muſtaſtaph in the arraval of St. *Phillip*'s, which is the fifth dependent diſtrict under the immediate dependence and government of the governor himſelf, ſet a price, and value, and meaſure, upon the ſeveral commodities. I don't know whether it includes all commodities, but wine, and corn, and other things, which they call the afforation, that is the aſſize, or price to be paid, upon commodities to be ſold. Gentlemen, in the year 1752, the date here is material, there was a regulation appointed by the crown, made by the king in council. I extract that part of it that regards the preſent queſtion; that is, that the jurats of all the univerſities (now univerſities are the diſtricts, and you ſee there are no jurats of any univerſities, but theſe four: diſtricts and univerſities are ſynonymous terms) "that the jurats of all the univerſi-
" ties be left at full liberty, without the intervention of the command-
" ant, or any other of the royal officers, to make the afforations, and
" ſettle the aſſize and prices of all manner of corn, and all manner
" of proviſions, the produce of the iſland; and alſo the prices of corn im-
" ported into the iſland, and bought by the univerſities for the good of
" the public; and that the natives and the inhabitants be at all times per-
" mitted to ſell the ſame at or under the afforation, without any inter-
" vention of the governor or ſecretaries, or any other perſon or per-
" ſons acting under his authority." You ſee, gentlemen, that this order of council imports, that theſe people are under the abſolute deſpotiſm, if I may ſo ſay, of the crown of *Great Britain*, becauſe this is a language that we in this country are not acquainted with. Whether to ſell or buy our goods, or not, does not ſuit an *Engliſh* genius, the genius of the *Engliſh* law. This is an order made by the king in council, in the year 1752. That order of council, and ſome other proviſions that were made by that order, occaſioned ſome uneaſineſs and miſapprehenſion; and therefore another order of council was made the following year, the 10th of *Auguſt*, 1753, which you will in the courſe of the evidence have read to you. There are ſome matters in it I will trouble you with. It was made upon the conſideration of ſeveral papers tranſmitted from *Minorca* by general *Blakeney*, who was governor at that time. Several things were adviſed by the privy council. Among the reſt, I ſhall juſt extract a few things. With reſpect of the firſt article in the civil branch, relating to the making the afforations, about which great complaints have been exhibited, that the governor be inſtructed to require the jurats of the ſeveral terminos in the iſland, at all proper times and ſeaſons, to make the ſame afforations: and in caſe the ſaid jurats ſhould refuſe or neglect to comply

with his command therein, that then the ſaid governor be authoriſed to make the ſaid afforations himſelf: but due care is to be taken, that the ſaid afforations be made equal and general, as to all the things and perſons ſubject to the ſaid afforations, as well as at all proper ſeaſons. This word *ſeaſons* will have ſome meaning by-and-by. Then they go on with a great many regulations. Amongſt the reſt is, adviſing the king for the future, by his letters patent under the ſeal of *Great Britain*, to authoriſe the governor, or in his abſence the lieutenant-governor, or commander in chief for the time being, to exerciſe the power of civil government, as well as thoſe of the military, taking care to preſerve the one ſeparate and diſtinct from the other: and that they ſhould receive all this power, but that they ſhould be ſubject nevertheleſs to ſuch inſtructions as ſhould be given by his majeſty. He is to govern according to theſe directions contained in the letters patent, as alſo to ſuch inſtructions as ſhall be given to him by the king. Then, among other things, here is a direction, and this is very material: you ſee, it mentions ſome confuſions that have ariſen in reſpect to the regulations made before in fifty-two: that it may be proper for the governor to endeavour to make the inhabitants ſenſible of the great happineſs they enjoy under the king's protection and government, and to ſhew them that they have not only at all times been treated with juſtice and equity, but with lenity: that the encreaſe of riches amongſt them is owing, amongſt other things, to the great ſums of money conſtantly circulated from the pay of the king's forces, and from the number of foreigners now ſettled among them on account of their trade: and alſo the extenſion of their trade, they being permitted to carry on commerce in like manner with the reſt of his majeſty's *Britiſh* ſubjects: and that it is therefore expected, that they ſhould, in return for ſo many great and real benefits, moſt heartily and effectually concur with his majeſty's governor in any thing he ſhall propoſe for his majeſty's ſervice, and the good of the iſland, and demean themſelves as become good ſubjects, *&c.* and it may not be improper for the ſaid governor therefore to inform them of all their privileges. Gentlemen, obſerve theſe are founded upon the 11th article of the treaty concluded at *Utrecht*, on the 13th of *July*, 1713; and that they can't be intitled to any other privileges than thoſe ſignified therein. And for the better information thereof, that they do lay the ſaid articles before them, a copy whereof was annexed thereunto; by which it appears, that they are allowed to enjoy their honours and eſtates, and have the free uſe of the *Roman* catholic religion, and that means ſhall be uſed to ſecure it to them ſo far as is agreeable to the laws of *Great Britain*, which they ſtill continue to enjoy without the leaſt interruption, and without any fear or dread of the court of inquiſition; and that at the ſame time may inform them, that, by the ancient laws of this country, the pope's bulls, *&c.* are not permitted to be executed in his majeſty's dominions, nor any penalty levied or puniſhment inflicted under ſuch decrees, without permiſſion of the crown of *Great Britain*: and then it goes on and gives farther directions with regard to the governor's authority, and the neceſſity of theſe perſons demeaning themſelves chearfully to the order of the governor; which is the government and conſtitution of that country. Now, gentlemen, you ſee that in 1753 ſome conſiderable regulations were made, to explain, and in ſome reſpects to alter, the regulations which had been made in the year 1752. And another thing is clearly obſerved; that the tenor of all the inſtruments I have read ſome parts of to you, theſe regulations neither in 52, much leſs by the explanation of them in the ſubſequent year, 53, with regard to the afforation, could not poſſibly extend to the arraval of St. *Phillip*'s, for the jurats were the perſons who were to make the afforation in their ſeveral univerſities, or diſtricts, or terminos, as they are called. Now, in the arraval of St. *Phillip*'s, there were no jurats at all; conſequently, that was to be made by the proper officer appointed by the governor himſelf, namely, the muſtaſtaph. In caſe of the failure of the jurats making the afforation, the governor was to make it himſelf: but in this diſtrict there are no jurats. There is another thing to be noticed; and that is, that if particular care was not taken as to the afforation and manner of ſelling wine in the arraval of St. *Phillip*'s, that is, where the garriſon is; if great care was not taken of that, it might tend to the intoxication of the ſoldiers of the garriſon, and might be attended with moſt pernicious conſequences. For this reaſon general *Blakeney*, when he was governor of the iſland, ſoon after an explanation of the former regulation now made in fifty-three, that was continued afterwards by his ſucceſſor governor *Johnſton*, made a very proper regulation with regard to wine, particularly in this arraval of St. *Phillip*'s. That was ſoon after the order of council in fifty-three; I believe it was in fifty-three, or moſt likely was the beginning of the year fifty-four, that general *Blakeney* made the regulation I am now going to mention to you. The muſtaſtaph was an officer there that did the office of jurat in the other diſtricts: he was appointed immediately by the governor. The jurats in the other diſtricts were choſen annually by the people, in order to avoid any partiality, and to take care that the muſtaſtaph ſhall do his duty regularly, that the inhabitants that have wine to ſell ſhall ſell their wine by turns; that all the people within the arraval of St. *Phillip*'s ſhall ſell their wines by turns; for if they were at liberty all to ſell their wine as faſt as they could ſell it, that would, as I mentioned juſt now, tend to the intoxication of the ſoldiers, and to the ruin of the iſland. And the way that was appointed by general *Blakeney* in the year fifty-four was, that they ſhould ballot, or caſt lots, for turns; and then the ſeveral people that had the lots to ſell, ſhould ſell at an afforation ſettled by the muſtaſtaph, at ſuch a given time. Then the others ſhall come to their turn, as ballotted for; ſo that every one, in the courſe of his turn, taking the chance of the ballot, will ſell his wine at or under, if he pleaſed, the afforation price, during the time ſpecified. This was a regulation governor *Blakeney* made upon the order of council. The people of that diſtrict were all very well pleaſed, and things went on in very good order. The people were glad to be ſo regulated. This being approved of, and conſequently being found by experience to be a very good regulation, and to anſwer all the good ends of government, it was continued during all the remainder of the time that general *Blakeney* was governor of the iſland of *Minorca*. When governor *Johnſton* ſucceeded to the government of the iſland, he found this regulation, and the iſland in very good order and tranquillity. He found the regulation had anſwered all the good ends propoſed by it, and he continued the regulation during all the time that he was governor of the iſland. In this ſituation the iſland was found by general *Moſtyn*, the preſent defendant, when he ſucceeded Mr. *Johnſton* to the government, on the ſecond of *March*, 1768, now five years ago. The preſent governor found it juſt as governor *Johnſton* had found it before, and which certainly bore teſtimony to the wiſdom of general *Blakeney*, as well as of the government from whom he received his orders. It had been approved of in *England*, and was approved of by the inhabitants there, the *Minorquins*. It anſwered all the good ends propoſed by it. It produced peace, tranquillity, and harmony in the iſland; which had been torn by ſeditions and diſputes before, as the order in 53 recites. General *Moſtyn* continued it. And, gentlemen, the continuance and obſervance of that order is the very cauſe of the complaint now before you: and this made my friend ſo particular. There is nothing more nor leſs, as you will ſee by-and-by, than his continuation of the order of government, which had been preſcribed, you ſee, in 54, and continued all the time down, till the revolting ſpirit of the plaintiff thought proper to break through all order. Gentlemen, it will be time now for me to take notice, as I have ſo far gone into the general hiſtory, of another circumſtance, which is notorious to all the gentlemen who have been ſettled in that iſland, as well governors as the other military gentlemen that have been there, that the native inhabitants of *Minorca* are but ill affected to the *Engliſh*, and to the *Engliſh* government. It is not much to be wondered at. They are the deſcendants of *Spaniards*. They conſider *Spain* as the country to which they ought naturally to belong; and it is not at all to be wondered at that theſe people are not well diſpoſed to the *Engliſh*, who they conſider as their conquerors. A ſtrong inſtance of that happened at the time of the invaſion of *Minorca* by the *French*, when the *French* took it, which I believe was in the year 56, the beginning of laſt war: and it is very ſingular that hardly a *Minorquin* took arms in defence of the iſland againſt the *French*; the ſtrongeſt proof in the world that they were very well pleaſed at the country being wreſted from the hands of the *Engliſh*. The *French* did take it, as we all very well know; but, thank God, we have it again. Of all the *Minorquins* in that iſland, perhaps the plaintiff ſtands ſingularly and moſt eminently the moſt ſeditious, turbulent, and diſſatisfied ſubject to the crown of *Great Britain*, that is to be found in the iſland of *Minorca*. Gentlemen, he is, or chuſes to be, called for this purpoſe the Patriot of *Minorca*. Now patriotiſm is a very pretty thing among ourſelves, and we owe much to it; we owe our liberties to it: but we ſhould have but little to value, and perhaps we ſhould have but little of the liberty we now enjoy, were it not for our trade. And for the ſake of our trade it is not fit we ſhould encourage patriotiſm in *Minorca*; for it is there deſtructive of our trade, and there is an end to our trade in the *Mediterranean* if it goes there. But here it is very well; for the body of the people of this country they will have it: they have demanded it, and in conſequence of their demands they have enjoyed liberty, which they will continue to poſterity; and it is not in the power of this government to deprive them of it. But they will take care of all our conqueſts abroad. If that ſpirit prevailed in *Minorca*, the conſequence of it would be the loſs of that country, and of courſe our *Mediterranean* trade. We ſhould be ſorry to ſet all our ſlaves free in our plantations. Gentlemen, having now troubled you ſo far in general concerning the law, the ſituation, and government, of this iſland, and given you a hint too of the ſpirit of the plaintiff, which I don't wiſh to make the leaſt impreſſion upon you, unleſs the evidence of facts, which we ſhall produce, makes impreſſion upon you; give me leave to deſcend to the particular circumſtances which gave riſe to the matter now complained of. The plaintiff, *Fabrigas*, was a native of the town of St. *Phillip*'s, and within the arraval of St. *Phillip*'s, and conſequently under the immediate eye of the governor himſelf, as he was within that diſtrict which is regulated by the muſtaſtaph. In *July* 71 he thought proper to preſent a petition to governor *Moſtyn*, the defendant, in this form: "ſheweth, that your petitioner has now by him 12 caſks of wine of the produce of his own vineyards, without having purchaſed ſo much as a grape of any other perſon, of which he has not ſold a drop, when ſeveral other inhabitants of the town have ſold all theirs, as well from the produce of their own vineyards, as what they bought to make a profit by; and this with Mr. *Allimundo* the muſtaſtaph's permit. That the petitioner, on the 28th inſtant, (*July*) applied to Mr. *Allimundo* for meaſures to ſell wine by, of the rate of two doublers per quarter leſs than the afforation price, which would have raiſed a profit to the troops and the poor inhabitants of St. *Phillip*'s: but notwithſtanding his demand was very reaſonable, and conformable to the expreſs diſpoſition (direction I ſuppoſe he meant) of the firſt article of his majeſty's regulations of 52, regulating this iſland, where it is expreſly mentioned that the inhabitants ſhall always be permitted to ſell at the price of the afforation, or under it; Mr. *Allimundo* refuſed his petition, telling him that he would not buy his wine: and that this is not only againſt the reaſon and juſtice of the public, and the garriſon of *St. Phillip*'s, but alſo contrary to his majeſty's orders in the ſaid regulation:" and he mentions that the muſtaſtaph had made fifty caſks of wine, and ſold them. Now, gentlemen, two or three obſervations occur, before we go any further. In the firſt place, this gentleman, if I may call him ſo, this *Fabrigas*, goes upon the idea of the regulation of fifty-two being diſannulled. In the ſecond place, he goes upon the idea, that the order that was made of fifty-two, was univerſal over all the iſland, without diſtinction of this diſtrict in the arraval of St. *Phillip*'s, in both which you ſee he was miſtaken. Another thing, which don't ſtrike ſo immediately from what I have read, and yet here give me leave to take notice of it: it is artfully thrown into this petition, as if the good of the garriſon was very much concerned in his having his petition granted. And, gentlemen, I do aſſert, and ſhall be juſtified in the aſſertion, I dare ſay, by your opinion, before I have done, or at leaſt before the evidence is gone through, that his deſign, from the beginning to the end of it, was to ſtir up ſedition and mutiny; and amongſt the reſt, particularly to point to the paſſions and inclinations of the ſoldiers of the garriſon to take his part againſt the governor. This petition being preſented to the governor, the governor called upon Mr. *Allimundo* to give an anſwer to this man: for you ſee he complained, that he, *Fabrigas*, had not the permiſſion to ſell his own wine, *Allimundo* having refuſed him the meaſure by which he ſhould ſell it; and in the next place, that *Allimundo* himſelf had ſold his wine. *Allimundo* did give an anſwer to this; for the governor, willing to ſerve every body, and to act with the moſt impartial juſtice, and being uneaſy himſelf, that any *Minorquin* ſhould be uneaſy; for the uneaſineſs of a *Minorquin* perhaps diffuſes itſelf further than a particular man, and is a fit matter to be attended to by government; he called upon *Allimundo* to explain this matter. *Allimundo* gave a full and clear anſwer to the matter; and ſtated in that anſwer, that *Fabrigas*'s complaint was, becauſe his turn for ſelling wine had not come, according to the lots I mentioned juſt now, and that was the only reaſon why he had not yet ſold a drop; for no man could ſell a drop, till by ballotting his time was come: ſo that *Fabrigas* had nothing to complain of. But he inſiſts, that no man ought to be bound by the lots, but that every man had a right, by the regulation of fifty-two, not taking notice of the regulation ſince that, but that any man might ſell under the afforation price: therefore he, offering to ſell under the afforation price, ought to be permitted to ſell his wine without waiting for ballotting. He was miſtaken here: firſt, becauſe that order of fifty-two had been reſcinded, and was not the binding order: ſecond, that he lived in a diſtrict, where it was not to be regulated by jurats, but by order of the governor: thirdly, that the regulation which had been obtained in the former governor's time had been the way I have repreſented to you: in all which particular heads he was groſly miſtaken; and therefore he had no cauſe of complaint that he had not ſold any of his wine, his time for ſale being not yet arrived, according to the regulation of the lots. With regard to the other part of the complaint, that *Allimundo* ſold his wine; *Allimundo* freely inſiſted, that he had a right to do ſo. He claimed a right which had been enjoyed by all his predeceſſors, and which he could not, without an order from the governor, depart from, not only for his own ſake, but for the ſake of his ſucceſſors; that he had a right to ſell his own wine without reſorting to the lots, and that he had not bought any wine, but ſold his own wine. This anſwer being given by *Allimundo* to the governor, the governor upon that ſent word to the plaintiff, that he had enquired (for he had not taken *Allimundo*'s word for it, but had enquired) into the matter, and found what *Allimundo* had done was right, and afforded no cauſe of complaint. This was ſome time in *July*. Upon the 11th of *Auguſt*, this *Fabrigas* thought proper to prefer another petition in theſe words: ‘I had the honour to preſent a memorial to your excellency, ſhewing, the tranſgreſſing and not obſerving in the ſaid town two regulations given upon the 28th of *May* fifty-two by his *Britannic* majeſty [ſtill adhering to the order of fifty-two, as if there had been no ſubſequent order] that the inhabitant ſhould be permitted to ſell his fruit at the fixed price, the afforation, or under: ſecondly, that no commander, judge, or officer, be allowed to have any traffic, bargain, or ſo forth: [It cites a great deal of this order, and then he takes notice] that *Allimundo*, who does the functions of muſtaſtaph, bought grapes and made wine. And then he offers to ſell to the inhabitants in the garriſon of St. *Phillip*'s, twelve caſks of wine that he has got by him of his own vineyard's produce, at two doublers leſs than the ordinary afforation and fixed price. The petitioner has applied ſeveral times to your ſecretary's office for your excellency's decree [that is, for his anſwer]. Your ſecretary told your petitioner verbally, that your excellency was ſatisfied with the anſwer given by *Allimundo*; at which he is ſurpriſed, as he is ready to prove, in a judicial way, the truth thereof. [Then he prays the governor to give his decree at the foot of the memorial, and to have the ſatisfaction to juſtify himſelf, and to prove his charges againſt *Allimundo*.]’

Gentlemen, this ſecond petition being preſented to the governor upon the 16th of *Auguſt*, which was five days after the date of it, governor *Moſtyn* took the only poſſible ſtep for a man in his ſituation to take, conſiſtent with wiſdom and juſtice; and that is, to refer both the petitions, or memorials, as well the former as the ſecond, to the proper officers of juſtice, for their determination. Accordingly he did refer not only the two petitions, but alſo the anſwer or juſtification of *Allimundo*. He referred all theſe papers to the only proper officer there to refer this matter to, namely, the ſolicitor general of the iſland, and Dr. *Markadal*, the firſt law officer, in order that they might enquire into the matter of complaint, and impart their opinions. They made their report upon the 21ſt of *Auguſt* to the governor. Now you will ſee what were the opinions of the lawyers of the iſland at that very time, that the orders of his majeſty in council, of the year 52, relative to the ſale of wine, had never been executed in the ſuburbs of the caſtle of St. *Phillip*'s. You ſee it is juſt what I told you at firſt; that is, the arraval of St. *Phillip*'s, that order of 52 was never underſtood to extend to that particular diſtrict, which is under the immediate government of the governor himſelf, that is the place where this man dwelt. Then they ſay, ſecondly, that the cuſtom obſerved in the ſuburbs, upon the ſale of the wines of the inhabitants, has been, that the muſtaſtaph had the direction of diſtributing the meaſures among thoſe inhabitants, which was continued till ſome years paſt; when lieutenant general *James Johnſton*, lieutenant governor of the iſland, in order to avoid complaints, formed a regulation, dividing the ſaid ſuburbs into four quarters, and ordered that the wine ſhould be ſold by ſuch of the inhabitants unto whom it ſhould fall (I ſee I am miſtaken; it was introduced, I ſee, by governor *Johnſton*), which regulation at this time exiſts. The third is, that *Antonio Allimundo* was elected muſtaſtaph. Fourthly, that *Allimundo*, *Joſeph Neto*, *Ralph Preter*, and *Joſeph Leſlie*, who are the perſons that have executed the office of muſtaſtaph of the ſaid ſuburbs for ſeveral years paſt, have been accuſtomed to purchaſe grapes for making wines:—this is the defence of *Allimundo*. Then, fifthly, that the bailiffs, jurats, muſtaſtaphs, and other public officers, make, and have been accuſtomed to make wine from grapes bought by themſelves. And then, laſtly, that the making of wine from grapes bought had not been reckoned an illicit traffic, nor incompatible with the office of bailiff, jurat, muſtaſtaph, and ſo forth. Now ſee what method theſe officers took to be informed of this matter, in order to give the anſwer to the governor. “This, ſir, is what, in obedience to your excellency's order, we can inform you of, according to what appears to reſult from the declarations which we have received upon oath from the propereſt perſons, whoſe original depoſitions remain among the archives of the royal government.” Theſe two obſervations naturally occur. In the firſt place, that the governor took the only method he could, upon the complaint of this man, to refer it to the only proper officer of the iſland, upon whoſe report he might depend, with the power of examination by this officer, of all proper perſons upon oath, for their information. That, upon the reſult of the report of this officer, it appears that the complaint of *Fabrigas* was groundleſs. It was groundleſs both with reſpect to his claim of right to ſell out of the order, by caſting of lots; it was groundleſs, likewiſe, with regard to his complaint againſt *Allimundo*, for having ſold wine himſelf. For they ſay that the regulation made in 52, had never applied to the diſtrict of St. *Phillip*'s, that is, the arraval of St. *Phillip*'s. They ſay, ſecondly, that within that diſtrict they had always ſold their wine by lots. And they ſay, thirdly, that the muſtaſtaph, and the other officers that do fix the afforation, have always ſold wine the way that *Allimundo* has. This was the anſwer that was given, and this the report that was made to the governor, in conſequence of his having referred to them the two petitions of *Fabrigas*, as well as the anſwer of *Allimundo* to the petition. Gentlemen, they afterwards made another report; for this, I told you, was on the 31ſt of *Auguſt*: They made another report four days after upon the 4th of *September*: they gave an account, for the governor was very deſirous to know in what manner theſe gentlemen had proceeded. (You ſee there is a general alluſion at the foot of the report, to their having examined proper perſons upon oath.) The governor was exceedingly deſirous to know in what order theſe gentlemen had proceeded, to ſee whether all poſſible care had been taken to avoid complaint, and from an earneſt deſire he had, that all cauſes of complaint might ſubſide, that there might be one univerſal rule of good government preſerved among the *Minorquins*: and to be ſure, he muſt be anſwerable to the crown of *Great Britain* for any improper conduct. “We, upon the ſame day, the 16th, that is the day of reference, we wrote to the ſaid *Allimundo* and *Fabrigas*, citing them by our commiſſion, and ordering them to appear upon the 20th; and in obedience to which they having appeared, we again ordered them to appear on the 23d following with their proofs and documents. At their appearing on the 23d, we demanded of them their proofs and juſtification; when *Fabrigas* anſwered, he did not intend to enter into the ſame, till he had obtained the decree of the 3d memorial, that is, the anſwer of the governor in writing. On the 26th, *Fabrigas* was convoked in your excellency's office, where it was aſked, what action it was he intended by theſe memorials againſt *Allimundo*, whether civil or criminal? And having time given him to anſwer, he replied, a civil one; all which appears by the acts to which we refer. As the ſaid *Fabrigas* hath not this day repreſented before us any proof by way of juſtification of his ſaid two memorials, we therefore, for this reaſon, have the honour to ſubmit the ſame to the conſideration of your excellency's wiſdom, that you may not impute to us the leaſt omiſſion of the lively deſire we have to execute the orders of your excellency.” This is dated the 4th of *September*. Upon this order, this report that was then made upon the 4th of *September*, which gave a clear ſatisfaction that every thing had been done with proper care and caution to prevent any complaint, this *Fabrigas* preſented a third petition or memorial. I call them petitions, remonſtrances—I don't know what name to call them by, but ſtill they have the title of a petition—he called it the humble petition—and in this third, as in the ſecond, he had complained of *Allimundo*. Now here is a remonſtrance againſt the judges: That “whereas the judges delegated by your excellency”——

Court. What date is this?

Mr. Serjeant Davy. I have no preciſe date to it. “The judges have denied him a communication of the anſwer given by *Allimundo*, who does the functions of muſtaſtaph of St. *Phillip*'s: prays you will be pleaſed to order the judges to receive the witneſſes which are produced to juſtify the articles.” And then follows upon this, no leſs than twelve articles of impeachment, as it were; articles upon which the witneſſes were produced to prove ſome facts committed by *Allimundo* againſt his majeſty's orders, and to prove ſome injuſtice done by *Allimundo* againſt the *Minorquins* inhabiting the town of St. *Phillip*'s, and againſt his majeſty's troops of that garriſon.—Then follows a ſtring of twelve articles, which I don't mean to read to you now: you will have them by-and-by in due order. Then he ſpeaks of the prices of meat, fiſh, and ſeveral other things, all which he complained are not well done: and there is a general complaint throughout the government of all the officers, that all the *Minorquins* are ill-uſed by the miſconduct, miſrule and miſmanagement, by the under-officers of the garriſon. Now, gentlemen, you would have ſuppoſed, if governor *Moſtyn* had been, what the world knows he is not, a raſh man, he might, perhaps, have very well juſtified ſome cenſure at leaſt, of what ſort is another queſtion, upon the conduct of Mr. *Fabrigas*, whoſe conduct points very ſtrongly to ſedition. For conſider where we are ſpeaking of. We are not talking of the city of *London*; we are not talking of a town in *England*; but are talking of the town of St. *Phillip*'s, juſt at the foot of the glacis of the citadel: and this ſtirring up ſedition among the *Minorquins*, who were already too ill diſpoſed to government. But governor *Moſtyn* did act in this buſineſs with that candour and humanity, that deliberation and wiſdom, for which his character is ſo eminent. And therefore, after this third memorial and articles, the next ſtep he took was to take farther advice of all the ſuperior law officers and magiſtrates of the iſland, that is, on the 5th of *September*, 1771. And, gentlemen, he ordered his ſecretary to write a letter to doctor *Markadal*, (I ſhall not pronounce their names well) the ſolicitor general, and the other perſons; and, upon that, they gave this anſwer. He ſent the 5th for their opinion; on the 10th they give their anſwer.

“We received your excellency's letter of the 5th inſtant, with twelve articles exhibited by *Anthonio Fabrigas* annexed. In anſwer to the contents of the ſaid letter, it appears to us, that in ſundry of the ſaid articles he mentions and repreſents injuries or impoſitions upon the troops quartered in St. *Phillip*'s, which, if divulged among them, might occaſion tumults and diſorders, and alſo raiſe murmurings againſt their proper ſuperiors, of whom they are ſuſpicious, and have not a due regard to their own advantage: from which it appears to us, pernicious conſequences may ariſe in military diſcipline. This our opinion we ſubmit to your excellency."

Upon the receipt of this letter, ſtill the governor was determined there ſhould be no perſon unaſked; therefore he, upon the receipt of this letter, ſent it with *Fabrigas*'s anſwer to the aſſeſſeur criminal, who ſits as the aſſiſtant to the governor in trying of civil or criminal cauſes, the great judge of the iſland under the governor: he ſent to him for the ſanction of his opinion upon it. The anſwer is wrote to the ſecretary of the governor, and, 'having examined all the ſaid papers, it appears to me, 'that the opinion of the ſaid gentlemen is very learned and juſt.' So that you ſee he concurs entirely in opinion with thoſe other gentlemen that had made the report that I read to you juſt now. Gentlemen, when this was done, then, and not till then, the governor, the defendant, general *Moſtyn*, ſent an anſwer in form to *Fabrigas*; and I flatter myſelf that you, and every one who hears this, muſt be of opinion, that the governor acted with all poſſible caution in this buſineſs. He writes, therefore, this anſwer; for you ſee the other had preſſed for an anſwer in writing, and would have it in a great hurry; but, however, the governor would not give an anſwer till he had informed his underſtanding upon the ſubject, by all that could give him information and advice. "Underſtanding that *Antonio Alexander Allimundo* hath acted in obedience to the directions of his ſuperiors, as in the manner practiſed by his predeceſſors in the ſaid ſuburbs, by thoſe that held the office before him, as it appears to us (mentioning their names) upon a charge ſet forth in the repreſentations made by *Fabrigas*, and upon the other part by the ſaid petition of the people there to attend to the regulation made by governor *Johnſton* [I ſhould have told you, that all the *Minorquins* there prayed it might be continued] for which cauſe it is not regular to receive witneſſes to juſtify the different articles exhibited by *Fabrigas*, ſome of which ſeem to tend to diſturb the public tranquility, in prejudice of his majeſty's ſervice: [now, gentlemen, remark this] notwithſtanding which, if *Antonio Fabrigas* is ſufficiently entitled to pretend, that *Antonio Allimundo* hath committed any crime or miſdemeanor, he is to apply to the royal governor's court, and there make his complaint in the uſual form; where he will have juſtice done him according to law, that is, according to the law of the iſland." Now, any mortal would ſuppoſe that *Fabrigas*, if he was not poſſeſſed of a moſt malignant and turbulent ſpirit, would have acquieſced in this, and taken ſuch meaſures as, according to the law and conſtitution of the iſland, were open to him, and not have plagued and teazed the governor with reiterated remonſtrances and complaints in matters which were out of his own principal power to relieve, if there was any cauſe of complaint; though, by the way, the governor had the ſtrongeſt reaſon to ſuppoſe he had no cauſe of complaint. But it was the determination of this man to drive home every thing poſſible to the governor, and to ſet up an oppoſition of the *Minorquins* ſubject to his civil government, and the garriſon ſubject to his military government. The unavoidable conſequence of this would have been the total loſs of this iſland, and infinite bloodſhed, which muſt have enſued upon the revolt of this iſland. However, the man ſtill uſes a great many threats, which you will have a particular account of by-and-by. The governor thought proper on this, (ſince you find all which had been done, and which this *Fabrigas* complained of, was the purſuing the regulations which had been made by governor *Johnſton*—you will be amazed, perhaps, at my telling you—it is the ſtrongeſt proof of the lenity and moderation of the governor that, perhaps, can ever be imagined) in order to ſee whether that regulation was a right one, and ought ſtill to be continued, the governor ſummoned a meeting of the inhabitants, even *Minorquins*, the inhabitants of this diſtrict, in order to take their ſenſe of the governor's regulation, to ſell by lots, or whether that regulation ſhould be aboliſhed, and that he, or any perſon within the diſtrict, may be at liberty to ſell wine as faſt as they can under the afforation price. In order to have their full ſenſe of the matter, he took the utmoſt cautionary means. This doctor *Markadal* and doctor *Oliver* ſummoned all the inhabitants; and becauſe they might be at full leiſure from their vineyards, (for it was about the time of making wine) that they might be at full leiſure to attend and meet together, they appointed the meeting to be on a *Sunday*, as the moſt leiſure day, when they might be ſpared from their attendance upon their vineyards, and in order to have a full meeting. Mr. *Fabrigas*, in the mean time, uſes all pains, (as if an election was going forwards) he uſed all imaginary pains to get together as many people as he could muſter to think with him, and to have this regulation of the governor aboliſhed, and that the matter he complained of might be put an end to, and the matter he required enforced: but ſuch was the ſenſe of the inhabitants, that there was a majority, I am told, almoſt twenty to one, of all the *Minorquins* who attended upon that *Sunday*; all pleaſed with what had been done by governor *Johnſton*, and deſirous to continue that regulation. They found it moſt beneficial to themſelves; they found it attended with leaſt trouble; they found it moſt for their profit: they all were againſt their countryman *Fabrigas*, and all prayed that the eſtabliſhment made by governor *Johnſton*, and had continued to that time, might ſtill be uſed and continued without any alteration. *Fabrigas* was now very much diſſatisfied. Now I will tell you a new objection. All this is unlawful, becauſe it was on a *Sunday*, and the ſenſe of the people taken upon a *Sunday* is no ſenſe at all; a further inſtance of the turbulence of his diſpoſition! All was wrong; and, at the ſame time, a threat that he would now prefer a petition, and he would take care that there ſhould be two hundred men armed at his heels! Now let me aſk any man that hears me, what the governor was to do? The governor (whoſe ſpirit was not inferior to his other qualities that make up the character of a gentleman and a ſoldier) was not to be ſo frightened. He was a ſtranger to perſonal fear; and a *Minorquin* appearing at the head of two hundred people armed, though it is ſerious, and deſerves conſideration—however, the governor's ſpirit was ſuch, he did not convoke any force in order to repel this: but he took a very wiſe ſtep; and that was (for the next day was the time of this inſurrection he had cauſe to apprehend), he gave an invitation to the commanding officers of the different regiments, to meet him next morning; and if there had been any force at the heels of Mr. *Fabrigas*, the commanding officers being then in the houſe, it would not take up any time, perhaps, to ſummon their force to repel it: but he would not ſummons the force of the iſland any farther than I tell you. At the time this petition was to be preſented by *Fabrigas* with two hundred men at his heels—I miſtake; the petition was then preſented, and he would come for an anſwer the next morning with a force of 200 men at his heels—the governor thought proper to aſk the advice of the officers who attended there, what ought to be done with this man, and what was fit to be done? Every one of the officers who attended upon the occaſion concurred in the opinion—and it was a matter about which I think there could not be two opinions,—that nothing was ſafe to be done, but immediately laying hold of this man the firſt opportunity, and ſending him out of the iſland. And he did ſo. There is the complaint. Now, gentlemen, I have let you into the whole hiſtory why this was done that *Fabrigas* complains of; why *Fabrigas* was kept cloſe, as he complains of. A man that threatened an inſurrection in the iſland, it ſurely would be imprudent in the governor to ſuffer any of his friends in the iſland to have acceſs to him: general *Moſtyn* therefore ſent him off as ſoon as poſſible, which I believe was four or five days, into *Spain*, with a prohibition to return to the iſland again within the courſe of a year. But all this, ſay they, this is tyrannical, this is arbitrary; this is what *Engliſh* government, and *Engliſh* laws, and an *Engliſh* court of juſtice cannot bear. Say they, it is a very improper behaviour in governor *Moſtyn*, and ought to be the ſubject, the matter of a civil action: Mr. *Fabrigas* therefore does very right to take a voyage over to *England*, to come here to *Guildhall*, and take the ſenſe of an *Engliſh* jury upon governor *Moſtyn*'s behaviour. Let me obſerve to you, this is not a novel proceeding; for though, very fortunately for governor *Moſtyn*, it is the firſt time that he has had an occaſion to behave in this way, and to proceed in this particular manner; yet former governors of this iſland, upon much leſs occaſions and emergencies than this, have done the very like thing. Do not be aſtoniſhed, gentlemen, nor let it fright you, when I tell you, that the governor has an abſolute right to do it, and is accountable to nobody but the privy-council. The government of that iſland is, in many reſpects, an arbitrary government, and as deſpotic, in many inſtances, as any of the governments in *Aſia*, particularly in the part now in queſtion; and yet governor *Moſtyn* would be ſorry, for his own character's ſake, if it was in his power, to take any legal advantages concerning the impropriety of bringing the action here in *England*. His character calls upon him, which is to him the firſt of all conſiderations, to explain his conduct in the fulleſt manner poſſible. A general acquittal of him upon the idea that the law won't puniſh him, would be but a poor ſatisfaction to governor *Moſtyn*, who is charged in this action with having exerciſed a tyrannical power. Gentlemen, the general tenor of the general's behaviour, from the time of his being firſt appointed to this government five years ago, to the moment he laſt left the iſland, has been to preſerve and to maintain order and good government, without a wiſh, or rather an abhorrence, to oppreſs any one man that is under his government there: leaſt of all could he ever wiſh to oppreſs or injure this man, too inconſiderable in his own particular private ſtation of life, too remote from a connexion or acquaintance with the governor, for him to have made him the object of vindictive—I won't call it juſtice, but of any vengeance or reſentment upon any occaſion whatſoever. When the man made a complaint, he wiſhed to enquire into the grounds of it; and when he found it was groundleſs, and the man reiterated the complaint, however he might be teazed by this reiterated complaint, (for it is grievous and troubleſome to a man to be teazed with new remonſtrances and petitions, when he ſees the impropriety and impoſſibility of granting what is requeſted) ſtill takes all poſſible occaſion to enquire into the grounds of the complaint, to anſwer the complaint. But when, after every means had been tried, the man threatens the diſſolution and deſtruction of government in the iſland, it became his duty then to treat this with ſome ſerioufneſs: and yet for the general good of the iſland he did it, never complaining of theſe two hundred men that were to be armed, only laying hold of the man himſelf, and, as ſoon as a ſhip could be got, to ſend him out of the iſland. And now governor *Moſtyn* is called upon in an action. The laws of a foreign country, gentlemen, are matters of fact here; and it is very well worthy conſideration—it is very well worthy conſideration indeed (I do not mean to trouble you with a diſcuſſion of that queſtion; but ſince his lordſhip has hinted about it, it is very well worthy of conſideration) whether ſuch conduct, upon ſuch occaſions, in ſuch a place, can be the ſubject of litigation in a court of juſtice in *England*; it is very well deſerving of conſideration. I know very well, upon a former occaſion, when an action was brought againſt the governor of the iſland of *Barbadoes*, by a man who ſucceeded in his abſence to the government, without any particular appointment ſo to do, and having been guilty, in the governor's abſence, of ſome male practice, (he was appointed by him, but had not took the oath) there was an action in that caſe brought againſt the governor for ſome proceedings againſt his deputy, as was the ſubject of an action, and there was judgment in that caſe given for the plaintiff; but a writ of error being brought, and that being removed afterwards to the houſe of lords, that judgment was reverſed. As well as I recollect it, one of the chief grounds inſiſted upon on the part of the defendant was, that being a matter abroad,—(for that it was upon demurrer to a plea)—that being upon a matter abroad, it was not cognizable by the courts of juſtice in *England*. In anſwer to that, it was inſiſted—

Court. Was it not the main queſtion in that trial, whether the council of ſtate, or the governor of *Barbadoes*, had a power to commit?

Mr. Serjeant *Davy*. That was a queſtion. I have Sir *Bartholomew Shower*'s parliamentary caſes upon the table.

Court. I think the courts held they had no power to commit: the houſe of lords held they had a power.

Mr. Serjeant *Davy.* Your lordſhip will find the particular reaſon of the reverſion of the judgment is not ſtated, but only that the judgment was reverſed. But one of the particular reaſons was, that the iſland might be governed by particular laws, and that he was not reſponſible here for what he did there. To this it was anſwered and inſiſted upon by the other ſide, that they were governed by *Engliſh* laws; that they were not a conquered country; that they were inhabited by the ſubjects of the crown of *Great Britain*, who came of *Engliſh* or *Britannick* ſubjects, going from *Great Britain* to that country to reſide and ſettle there, and were not like the caſe of a conquered country. The reaſon of it does not appear. Upon that report, the houſe of lords thought proper to reverſe the judgment. In the preſent caſe, ſee how ſtrong it is! for every objection made upon that caſe applies with double force here. Suppoſe it comes to that queſtion of law, will not that queſtion be of too great magnitude for me to ſay a ſingle ſyllable about it? This that I have now mentioned, and your lordſhip has gone before me in what I was going to ſay, is a very important queſtion of law indeed; a very great queſtion; a queſtion of the firſt magnitude, and which will therefore deſerve to be diſcuſſed and determined by the higheſt court of juſtice this kingdom is acquainted with. It is a queſtion of infinite difficulty and great importance, with regard to the reſponſibility of the governor in a conquered iſland, with reſpect to their being amenable to foreign ſubjects, with regard to being amenable for their conduct.

Mr. Serjeant *Glynn.* They are the deſcendants of foreigners, all of them.

Mr. Serjeant *Davy.* I mean thoſe that are born in *Minorca*, deſcend from the ancient inhabitants of the iſland. They are ſubject to be governed by whatever laws the king of *Great Britain* ſhall think proper to impoſe upon them. The king of *Great Britain* may, if he pleaſes, alter his government of that iſland, and give what laws he pleaſes under a general ratification; and they are all bound by it. I ſay, a diſcuſſion of that queſtion, as a queſtion of law, is of great magnitude. I do not mean to trouble you with it. To be ſure, it is too much for my graſp; it is too much perhaps for the graſp of any one man ſitting in judgment, much more for me ſtanding here as a counſel, who have no judgment at all, only a duty I owe my client; and perhaps, and moſt probably, it will be a queſtion to be referred to the determination of the court above. And you, at the ſame time, will certainly, if you think proper to find a ſpecial verdict in this cauſe, which I ſuppoſe you will, you will do well to conſider the ſubject with regard to the damages, which we call contingent damages: it was therefore exceeding fit to mention all thoſe circumſtances to you, not only with regard to the matter of fact, but alſo for your conſideration with regard to the damages. For ſuppoſe (it is upon that ground I now addreſs you) ſuppoſe the governor miſtook the law upon this occaſion; ſuppoſe he was wrong, and ought not to have proceeded in this way; ſuppoſe that notwithſtanding all the opinions he had took, as well from the civil officers in their different departments, the law officers, and the aſſeſſeur judges, and ſo forth, confirmed by all the military officers, whom he aſſembled together upon the threat of the inſurrection; ſuppoſe, notwithſtanding all theſe opinions, he ought, inſtead of doing what he did, rather to have kept this man a priſoner, and brought him before ſome tribunal to be tried: ſuppoſe that ought to be his conduct; that therefore he did wrong, inſtead of it, to impriſon the man immediately, and baniſh him, upon his own authority; now to be ſure the aſſeſſment of damages by you muſt go upon that ſuppoſition. I think I ſpeak fairly upon the occaſion: I mean in this and all other occaſions to act with character: I ſuppoſe that to be ſo: what mighty damages ought, on that occaſion, to be given againſt the governor? He in that inſtance miſtook the line of his duty; he acted as he thought for the beſt, for the ſafety of the iſland; but he acted precipitately. Why, let Mr. *Fabrigas* or his friends (for I do not know whether he is in *England* himſelf or no), let them put one queſtion to themſelves to decide it. If general *Moſtyn* had done the thing, the not doing of which they now complain of; if general *Moſtyn* had brought this man to a trial, what might have been his fate? The leaſt ſurely could have been that which he now complains of, baniſhment for a ſingle year; for with regard to the impriſonment, it is not an unuſual thing in any country. Upon great and emergent occaſions, it is not an unuſual thing to confine a man for a few days, and debar him the acceſs of his friends: that is not an extraordinary thing. But ſuppoſe in that he did wrong: I will ſuppoſe the whole to be wrong. Wherein is it wrong? It is wrong from a miſapprehenſion of judgment, from a miſtake: it is wrong merely in reſpect to miſtake. It is not wrong from malice, from wilful wickedneſs towards this man, from a tyrannical diſpoſition, from a deſire to oppreſs or hurt him. If this had been the caſe; if the governor, reſpectable as his character is, could for a moment be ſuſpected to be capable of acting in this manner, from tyrannical, cruel, or wicked motives, he would have done ill to call upon me to be his advocate; for though even in that caſe I would diſcharge my duty towards him, I could not have ſpoke with chearfulneſs for him. But here I conſider him, and the whole tenor of his conduct bids me ſo to do, as a gentleman willing to diſcharge his duty to the crown; to preſerve this iſland, as it is his duty, to the commonwealth of *England*; willing to do all that was good, right, and juſt, without any vindictive motive to this man, to whom he is a ſtranger. But upon this occaſion the governor will pardon me, if I take notice upon this occaſion, of what is too well known ever to be queſtioned, his general good character. And yet I have leſs need to aſk his particular pardon upon this occaſion, becauſe that gentleman from whom I received my inſtructions, the attorney in the cauſe, has filled my brief with, I think, not leſs than thirty of the firſt names in this kingdom, who, I am told, are all attending here, or within a moment's call from this hall, ſome of the moſt reſpectable characters in this kingdom, ſome of the higheſt rank, and gentlemen of the firſt character in this kingdom, to tell you that they have at different times ſerved under general *Moſtyn*, and that they do not know in all their acquaintance, a man of a more cool, diſpaſſionate temper, a man of greater character, humanity, and juſtice, than general *Moſtyn*; as celebrated for it as any man of any rank or of any degree of honour in the world: and yet general *Moſtyn* muſt be ſuppoſed, in order to juſtify vindictive or exemplary damages upon this occaſion, muſt be ſuppoſed to be actuated by motives which his heart abhors, and which motives never actuated his heart a moment in his life. I leave it upon this idea, that if he has acted improperly in every ſtep, yet, upon the idea of its being a miſtake in general *Moſtyn*, I apprehend the plaintiff has no right to expect exemplary damages.

Mr. Serjeant *Burland.* I ſuppoſe it is a fact admitted between us, that this is a conquered iſland, ceded by the treaty of *Utrecht*?

Mr. *Lee. Minorca* was ceded to this crown by the 11th article of the treaty of *Utrecht.*

JAMES WRIGHT, *eſq. Examined by Mr. Serjeant* Burland.

Q. You reſided ſome years in *Minorca*?

A. From about *January* 71, to the middle of 72.

Q. In what character?—*A.* As ſecretary to the governor.

Q. To Mr. *Moſtyn*?—*A.* Yes.

Q. You know the diviſion of the iſland, do you?—*A.* Yes.

Q. What are the diſtricts they are divided into?

A. I believe originally five; but two are blended together, that there now are but four.

Q. Do you mean to include in one of theſe diſtricts the ſuburbs of the fort of St. *Phillip*'s?---*A.* They never do, when ſpeaking of them; that is, extrajudicial of the common officer of the iſland.

Q. Under whoſe particular juriſdiction is that?

A. I always underſtood it to be under the direction of the governor.

Q. What do you call that diſtrict?---*A.* The arraval of St. *Phillip*'s.

Q. Are you ſure you underſtood it to be diſtinct and ſeparate from all the other diſtricts?

A. Yes; inſomuch that I was always led to believe, and told, that no magiſtrate of *Mahon*, which is the diſtrict next adjoining to it, ever did go there, or could go there, to exerciſe any ſort of function, without leave had of the governor; and whenever there was occaſion to ſend any of them down there, the fort-major received orders for their admiſſion.

Q. Are theſe laws varied at any time, and by what authority?

A. The iſland is governed by *Spaniſh* laws, ſubject to be varied by the governor, with regard to all interior matters. A proclamation of the governor is as binding there to try a man upon a treſpaſs as any laws whatſoever, ſubject to be varied by the order of the governor; not in reſpect to property, not with regard to *meum* and *tuum*, but with regard to the internal police.

Q. What do you mean by proclamation?

A. That if the governor iſſues a proclamation, and inflicts a penalty for the breach of it all over the iſland, and if any perſon is guilty of the breach of that proclamation, he is ſubject to the penalty of it, and for want of payment is impriſoned.

Q. I ſuppoſe you mean they enforce an obedience to that proclamation by impriſonment?

A. There is there the chief juſtice criminal, and the chief juſtice civil: both have their ſeparate courts. If the governor's proclamation is broke with any penalty annexed to it of impriſonment or fine, the man is ſeized and brought into that court: the proclamation is exhibited againſt him, and by that he is condemned to either fine or impriſonment, though that proclamation was made perhaps but the day before.

Q. According as that proclamation affects, whether a civil or criminal matter?---*A.* I do not recollect any of a civil matter.

Court. What are the nature of the proclamations you are ſpeaking of?

A. In all the memorials preſented to the governor, he iſſued an order, that no memorials or petitions, except for mercy, ſhould be preſented to him without being ſigned by an advocate admitted in the courts.

Q. You mean governor *Moſtyn* iſſued this?---*A.* Yes.

Q. Whether, tho' the *Minorquins* by the treaty of *Utrecht* are governed by the *Spaniſh* laws, yet whether our government here do in fact, or not, from time to time make alterations and regulations in thoſe laws?

A. The king in council, upon all occaſions of application to them, iſſue out ſuch orders as the caſe requires, and they are recorded in the royal court there, and are as binding as any laws whatſoever.

Q. They are regiſtered there, are they not?---*A.* Yes.

Q. What do you call the royal court?

A. The court of royal government is the criminal and the civil court.

Q. You know Mr. *Fabrigas*?---*A.* Perfectly well.

Q. What is he in the iſland?

A. I was directed by governor *Moſtyn*, who was very much teazed by his repeated applications, to enquire what ſort of a man he was.

Q. Firſt, as to his quality in the iſland; what ſtation is he?

A. His father holds ſome vineyards, very ſmall. He himſelf I believe actually, for his bread, labours and digs and prunes the vineyards, and talks and chatters about politics perhaps five days out of ſix. It has been repeatedly ſaid, Mr. *Fabrigas* is a man of property. I believe he had at that time no property upon the earth. General *Moſtyn* ordered me to make enquiry, and that was the reſult of it.

Q. We know what the ſtation of general *Moſtyn* is; that he was then and is now lieutenant-governor of *Minorca*; that he is commander of a regiment, and a man of family: what is his character as a man and as an officer? Is he a man of humanity?

A. I believe as much ſo as it is poſſible for a man to have; that is, in my opinion. I have ſeen much of him. I do not believe there exiſts in the world a man of tenderer feelings, for any ill effects that may be produced from him.

Q. Is that his general character?

A. I believe him to be much more ſo than common. I think that is his conduct that will be found upon every enquiry that can be made of him.

Q. And it has been ſo under your own knowledge?

A. I am ſure of it: I have had many opportunities of ſeeing the working of it in a very ſurpriſing manner.

Q. Will you let us know as much as you do know of this tranſaction between Mr. *Fabrigas* and the governor?

A. May I refer to ſome minutes I have here?

Counſel. Yes.

Mr. Serjeant *Glynn.* Did you take them at the time?

A. No; but all within three days. I hope I ſhall be excuſed if I ſhould make any miſtakes in reſpect to date. Mr. *Fabrigas* preſented a memorial, I believe to myſelf, to be delivered to governor *Moſtyn*—that was the 31ſt of *July* 71—complaining that Mr. *Allimundo*, the muſtaſtaph, the only officer in the arraval—I think that was the firſt petition, complaining of ſome abuſes in buying wine. The governor ſaid, what does the fellow want? He bid me order *Allimundo* to anſwer it, for he knew nothing about it. I ſent for *Allimundo* up to the head-quarters. The muſtaſtaph is the only civil officer of St. *Phillip*'s, that is, in the arraval: he is put in by the governor, and turned out by him at pleaſure.

Q. Did you order *Allimundo* to give in an anſwer to it?

A. I ſent for him, and deſired him to come up to me. I gave him the memorial, and told him it was the governor's orders that he anſwered it. Upon *Allimundo*'s anſwer coming up, it was read to the governor.

Counſel. That anſwer is dated the 8th of *Auguſt* 71?

A. I read it to the governor. The governor ordered me to tell Mr. *Fabrigas* and *Allimundo*, by an interpreter, that he was very well ſatisfied with the defence *Allimundo* had made to *Fabrigas*'s charge. I told them both ſo. *Fabrigas* came again, and deſired to ſee the defence that *Allimundo* had made. I told him I was not authoriſed to ſhew it him, nor did I think it was a matter for him to demand. He came again the next day, or the day after, giving in another memorial, deſiring that that might be ſhewn to the governor.

Counſel. That was delivered the 13th of *Auguſt*?

A. Yes: in ſhort, deſiring to ſee the juſtification of *Allimundo*, and ſhifting the ground of his complaint, and, I think, adding another article.

Q. You ſhewed theſe two memorials to the governor?

A. I did. Governor *Moſtyn* ordered that Dr. *Markadal*, who then acted as chief juſtice civil, ſhould receive and hear any complaints that *Fabrigas* had to make againſt *Allimundo*; and he added to him the advocate fiſcal, the ſecond officer in the iſland that acts under the king's commiſſion: the chief juſtice civil is the firſt, the chief juſtice criminal is the ſecond, the advocate fiſcal is the third, next after the governor: he gave them authority to ſend for papers and perſons, and whatſoever might be uſeful in the inquiry in his name. By my memorandum, I think it was the 20th of *Auguſt*, that theſe two law gentlemen, as commiſſioners, met, and ordered *Fabrigas* and *Allimundo*, who were then preſent, to attend them the 23d following. It may be neceſſary to obſerve, that though theſe two gentlemen were then ſitting in their own civil courts, they acted as commiſſioners of inquiry, becauſe the man was one of the arraval of St. *Phillip*'s. I won't charge my memory by oath, but I am very ſure they had a ſeparate commiſſion on purpoſe under the governor's own ſeal.

Q. Was the inquiry made?

A. On the 23d, *Fabrigas* declared he would proceed no further till he was allowed to ſee the defence that *Allimundo* had made, and given in to the governor.

Q. Where was that declaration made?

A. In the court before the commiſſioners. Mr. *Fabrigas* preſented a third memorial to governor *Moſtyn*, ſaying nothing more than what he had ſaid before the commiſſioners, that he could not proceed till he had ſeen *Allimundo*'s anſwer to his petition.

Q. Before the third memorial that was preſented, had the commiſſioners made any report?——*A.* None.

Q. Do you recollect whether the third memorial was after or before the report?——*A.* I am pretty ſure before.

Mr. Serjeant *Burland.* That is the third memorial, containing the 12 articles he exhibits againſt *Allimundo*: there is no date to it.

Q. Can you fix the date to that?

A. I think it muſt be between the 23d and 26th of *Auguſt*. General *Moſtyn* referred him to the commiſſioners.

Q. What was done afterwards?

A. The commiſſioners reported to the governor, that Mr. *Fabrigas*, by the manner of his carrying on this accuſation againſt *Allimundo*-----

Q. When was their report?

A. The 24th or 25th of *Auguſt*, I imagine: here is their report.

Court. I dare ſay this report he is ſpeaking of now, don't contain the commiſſioners anſwer about the 12 articles?---*A.* There are two reports.

Mr. Serjeant *Davy.* I took a great deal of pains to collect dates, and I did it from the contents: I believe they were right, as I opened it.

A. There were two reports, one the 31ſt of *Auguſt*, the other the 4th of *September*, that *Fabrigas*, by the manner of carrying on this charge, intended to ſow diſſention.

Mr. Serjeant *Davy.* Mr. *Wright*, I find, confounds two reports together: it is the third report where they report that it is to breed ſedition.

Q. Then he preſented this third memorial containing the 12 articles?

Mr. Juſtice *Gould.* My brother *Davy* ſtated, that it was the 10th of *September* that they took notice of the articles.

Q. Was there another report about the 10th of *September*?

A. Yes, there is. On the 26th of *Auguſt* the governor ordered me to deſire the criminal chief juſtice, and the civil chief juſtice, the advocate fiſcal, and the ſecretary to the court of the royal government, to come to me next morning, that being the 26th. *Fabrigas* came there. I aſked him in the governor's name, by an interpreter, what he meant? whether a civil proſecution to recover damages againſt *Allimundo*, which he had ſuſtained? or whether he meant to make an example of him for any abuſe he had committed in his office? Theſe gentlemen were preſent.

Q. What anſwer did he make?

A. None; I could get no anſwer from him.

Mr. Serjeant *Davy.* That is, upon the articles.

Court. Is that ſubſequent to the delivery of the articles?

Mr. Serjeant *Davy.* Yes.

Q. This queſtion aroſe upon his preſenting the 12 articles to the governor?---*A.* Upon the whole of his conduct.

Q. But that was after he preſented the articles?---*A.* Yes.

Q. What did he ſay to that?

A. He ſaid nothing. I deſired him to make ſome kind of anſwer, that I might tell the governor. His anſwer at laſt by extortion was, that if I would give him a quarter of an hour, he would go and come back with an anſwer.

Q. Being confounded at the queſtion at firſt, and giving no anſwer for ſome time, at length he ſaid that?

A. He did not know which he wanted, nor what he wanted. He gave no anſwer at laſt, but only aſked that he might have a quarter of an hour. I told him that he was not confined to a quarter of an hour; but it being then between 10 and 11 o'clock, I believed that they would be ſo attentive to him, that he might call again at 12 o'clock if he pleaſed. He came back again within the time, and gave notice that he meant a civil action.

Mr. Serjeant *Glynn.* I would not interrupt this evidence, as it does not appear to be of great conſequence to us; but I ſubmit to your lordſhip, whether this is properly evidence, the anſwer being conveyed through an interpreter? and whether the interpreter ſhould not be produced, who knows what anſwers were given?

Mr. *Lee.* We are now to take the anſwer from a man that does not know what the queſtions were, in a language the witneſs does not underſtand, and conſequently cannot report if there were any, or what anſwers given; whereas there is a man living in the world who could report the anſwers that were given. I ſhould not object to it, if that gentleman could himſelf underſtand the anſwers that were given.

Mr. Juſtice *Gould.* I think it is very clearly ſufficient evidence.

Mr. *Peckham.* The interpreter was appointed by the governor, or by his order, therefore we cannot tell whether that interpreter gave the fair and true conſtructions of the converſation which paſſed between Mr. *Fabrigas* and Mr. *Wright*; but from the perſon appointing him, we have reaſon to apprehend the contrary.

Court. Firſt, it is very clear, from what Mr. *Wright* ſays, and I ſuppoſe nobody will doubt from the ſubſequent action, but what this interpreter very fairly and rightly interpreted that this man deſired to have a quarter of an hour to conſider of it: that is clear. He has two hours given him. He comes back again, and then the ſame interpreter officiates. The act proves that he had explained the firſt very clearly, becauſe he went away in conſequence of it.

A. The aſſeſſeur criminal talks as good *Engliſh* as any gentleman in court, and he, whenever there was the leaſt miſtake or confuſion of ſound or words, ſet it right inſtantly. He returned again, and ſaid he meant a civil action.

Q. How long time do you think he was abſent?

A. Within two hours, probably an hour, the aſſeſſeurs both of them walked out and came in again. The commiſſioners not finding Mr. *Fabrigas* would attend them, were deſired by the general to ſend him an anſwer in writing to ſix queſtions.

Q. When was this?

A. Subſequent to his ſaying he would proceed by civil action.

Q. I ſuppoſe then that meeting broke up?

A. Yes. The governor conſented that he might have a civil action againſt him. I reported it to the governor.

Q. Did you tell him of that?

A. I never ſaw him afterwards, but the judges preſent heard him ſay he meant a civil action. They told him they would admit it.

Mr. *Peckham.* Did you hear that?

A. Yes, I did. I was to ſignify to him that the governor aſſented to his having a civil action, if he choſe it.

Q. And was it ſignified to him?---*A.* Yes, it was.

Q. You ſay he did not proceed by a civil action, and therefore ſix queſtions were propoſed to him?

A. The aſſeſſeur civil came to the governor, and informed him this man did not proceed in a civil action: then the governor ſent ſix queſtions to him.

Q. How long after was it that they were ſent him?

A. I cannot recollect.

Q. Was it the ſame day?

A. No; it might be three or four days. The general ſent for his own information ſix queſtions, relative to the conduct complained of, of the muſtaſtaph, for the opinion of the chief juſtice civil, whether the muſtaſtaph had or not exceeded his commiſſion. The queſtions are in court, and the anſwers.

Q. Is there any date to theſe ſix queſtions?

A. The muſtaſtaph of St. *Phillip*'s hearing this great confuſion, in which he was the great perſon complained of, ſpontaneouſly ſent up an atteſtation, or rather a deſire, of many of the inhabitants of the arraval of St. *Phillip*'s, to requeſt the continuance of the old regulations, and that the alterations propoſed by Mr. *Fabrigas* might not be made. That was ſigned by a great number of them, and was as much the object of converſation there, as any thing ever was.

Q. Was any order made upon that, or what was done?

A. On *Sunday* the 8th of *September*, the governor having firſt aſked Dr. *Oliver*'s leave, a very conſiderable merchant in the town, a doctor of laws, and the chief juſtice civil, he gave them a commiſſion to go the next morning, the *Sunday*, to the arraval of St. *Phillip*'s, to a country-houſe the governor has there, that is called *Stanhope*'s *Tower*, telling them he would give directions to all the people that dealt in wine, that they ſhould come before them ſeparately to be examined, and give their opinions, and whether they choſe the new reſolutions, or to adhere to the old rule.

Q. What do you mean by aſking Dr. *Oliver*'s permiſſion ?

A. He was no officer. For them to ſay whether they choſe the new inſtitution of general *Johnſton*, or whether they choſe the general ſale of wine, as every body pleaſed. A great many of them did appear the next morning ; I ſuppoſe all : I underſtood at leaſt all that choſe to come.

Q. What was done ?

A. They reported to the governor, that 93 were for the then practice, (that is, general *Johnſton*'s inſtitutions) 41 were for the old regulations, and 6 appeared to be indifferent, and 4 wanted ſome alterations of their own.

Q. Which were the old ones ?

A. They never were in practice in the arraval of St. *Phillip*'s ; but, upon all the enquiry, they could find that the king's regulation ſubſiſted about ſix months, and made great confuſion, but that the regulation of 1752 never obtained at all in the arraval of St. *Phillip*'s.

Q. When was this reported, and dated ?

A. The 8th of *September* ; that was on a *Sunday*.

Q. What followed ? Was this reported to the governor ?

A. Yes ; but the governor was well informed of what had paſſed on the *Sunday*. Mr. *Fabrigas* came on the *Monday* morning with a new memorial, complaining that it was *Sunday* ; and he proteſted againſt what was done, and that Dr. *Oliver*, and the chief juſtice civil, had uſed threats and menaces to the people.

Q. Then the next memorial I have in my hand is Dr. *Markadal* and Dr. *Oliver*'s ?

A. The governor was ſo exceedingly cautious in every thing, whether of conſequence or not, upon this nonſenſical memorial, that he ſubmitted every tranſaction to the people of the iſland. He ſent this report to Dr. *Markadal* and to Dr. *Oliver*, for them to anſwer. They anſwered it on the 10th.

Q. What followed the next day after that ?

A. I think it was the ſame day *Fabrigas* came for an anſwer, the 10th, which was *Tueſday*. He came to me to deſire an anſwer to his memorial about the *Sunday* affair. I was not at home. He enquired then for the governor's aid-de-camp, and gave him the memorial.

Q. Here is another of the 10th of *September*, of Dr. *Franciſco Segui*, and Dr. *Markadal*'s.

A. *Franciſco Segui* is the advocate.

Q. That was an opinion of their's, as the lawyers of the iſland ?

A. I fancy that accompanied the anſwer to the articles ; I cannot be poſitive to dates. Returning home, I met Mr. *Antonio Fabrigas* immediately after he had been with the governor's aid-de-camp ; I think the 10th. I rather avoided having any thing to ſay to him : I had had ſo much, I was quite ſatisfied. He came to me. I called *Segui*, a prieſt, and got *John Vedall*, who ſerved for an interpreter, and who happened to be in the ſtreet, almoſt under the governor's wall. I deſired Mr. *Fabrigas* in the moſt civil manner I could, having done ſo fifty times before, to ſay what he wiſhed or wanted. If he would only point out what he wiſhed, it ſhould be done : I would undertake to anſwer, the governor meant to do any thing that he wanted ; but that he had acted in ſuch a manner hitherto, that no body knew how to pleaſe him. Mr. *Vedall*, who knew this matter, as every body in the iſland did, joined with me in deſiring him to go home and mind his family affairs. All his anſwer to me was, complaining of the enquiry being on a *Sunday*. I told him that it could not be altered. *John Vedall* joined with me in deſiring him to go home, and not bring miſchief upon himſelf. *John Vedall* told me, he ſaid he would come again the next day with one hundred and fifty people. I think it was under his interpretation, though I had the prieſt there ſome part of the time.

Q. from the Jury. Was it armed men ?——*A.* No, no.

Q. What did he ſay ?

A. He would come with one hundred and fifty men to back the petition, or whatever the word was, with a petition and one hundred and fifty men, or with a petition backed by one hundred and fifty men.

Q. from the Jury. What do you apprehend he meant by that expreſſion ?

A. Upon my word I catched at the expreſſion, and deſired *John Vedall* to deſire him to deſiſt from ſuch an idea ; which *John Vedall* did, and treated it as laughing : but if I underſtood any thing by it, it was not to come with guns, for they had no ſuch thing, but to come as a mob.

Q. from the Jury. Did he ſpeak *Spaniſh* or *Engliſh* at the time ?

A. *Minorquin.*

Q. What was the other interpreter's name ?

A. *Segui*, a prieſt, one of the *Spaniſh* prieſts : he was there the firſt part of the time, and *John Vedall* the latter part.

Court. And then in conſequence of that, you thought he meant a mob ?

A. Yes ; or I ſhould not have got *John Vedall* to enter into a long converſation to deſire him to deſiſt.

Q. What did he ſay upon that ?

A. He went on, I believe, repeating the ſame again. I believe the converſation was cloſed upon that.

Q. from the Jury. Has *Allimundo*, by virtue of his office of muſtaſtaph, any particular limited quantity of wine to ſell ?

Mr. Serjeant *Davy*. When the papers are read, that will be particularly ſpoke to.

Q. You informed the governor of what was ſaid about 150 men ?

A. Yes.

Q. What paſſed after that ?

A. I think on *Wedneſday*, the governor ſent his compliments to moſt of the officers of the corps, deſiring they would come to him the next morning, to ſee the honour that was to be done to him.

Q. Did they meet there ?

A. There were moſt of them there. Every one, I believe, expected a full meeting of the inhabitants of St. *Phillip*'s.

Q. What meeting was That that was expected ?

A. Thoſe people *Fabrigas* had ſpoke of. They waited ſome time, and at laſt four people came, (I think all four were ſhoe-makers) and they brought a memorial. I believe a gentleman is in court that received it from their hands. He took the memorial of them, read it, and I think colonel *Mackellar*, after reading it, told them that they were to go about their buſineſs, to go home peaceably, and behave themſelves as good ſubjects to his majeſty ought to do. I think there was a converſation preceding, to ſhew they did not know the contents of that memorial they were delivering, which I believe will, by-and-by, come out. The general aſked the opinion of the general officers, as well as I recollect, whether they all knew that this was founded by *Fabrigas*'s proceeding ? and the next day he aſked them what they underſtood by it ? They ſaid they underſtood that the man was to be baniſhed the iſland.

Q. You was not there when they gave their opinions, I believe ?

A. I cannot tell.

Q. And ſo, in conſequence of it, he was baniſhed the iſland ?

A. The general ordered him, in conſequence of that, to be taken up that night. He could not be found. The general ſent to the chief juſtice civil, and the chief juſtice criminal, and the advocate fiſcal, to know what he ſhould do in that caſe ; that he thought him not ſafe to be left at large in the iſland. They told him.

Q. from Mr. Serjeant *Glynn*. Was you preſent, or do you ſpeak from information ?

A. I am ſpeaking of what they told me : I was ſent by the governor to aſk their opinion. This is their anſwer.

Q. What was you to aſk of them ?

A. The governor's power upon this occaſion. They ſaid, the governor's power extended over the man, and he might do with him what he pleaſed ; and if he choſe to baniſh him, they would anſwer for it with their ears.

Q. Theſe gentlemen are themſelves *Minorquins* ?

A. Yes ; and both talk very good *Engliſh*.

Court. This anſwer you carried back to the general ?

A. Yes ; and they told it him *vivâ voce*. The chief juſtice civil, upon my having many doubts about it myſelf, and ſaying that it was not quite the idea of *Engliſhmen*, and that we had not any ſuch law in *England*, ſaid it over and over again. He gave me a piece of paper with his own hand, which he called a quotation from the law of that land, a royal order in the year 1500 and ſomething elſe ; a poſitive order from the then king of *Spain*, wherein the king ſays, that the opinion of the aſſeſſeur criminal is conſultative only ; that the governor may be guided or not by it, as he pleaſed ; but not ſo in civil caſes. Although the governor is abſolute in regard to the politics and œconomical government of the iſland, it is not improper, but very prudent, to take the advice of the aſſeſſeur criminal, as has been recommended by the king of *Spain* to the governor ; although it muſt be obſerved, that in theſe caſes the aſſeſſeur only gives his advice, and conſequently it is in the governor whether he will follow it or not, and is not deciſive, as in civil caſes. This man being a *Minorquin*, the governor wanted to know how he ſhould apprehend him, no officer of his knowing him. The aſſeſſeur criminal ſaid, that the officer that attended him as tipſtaff was an old fellow. Says the other, 'You ſhall have mine, who is a young able man :' and he was apprehended by the tipſtaff who walks before the aſſeſſeur civil every day of his life when he goes in or out of court.

Q. How long was he kept in priſon ?

A. I do not know ; the books will ſhew it.

Q. Was he put in the common and uſual priſon ?

A. There is no other priſon in the arraval of St. *Phillip*'s, but where he was put, I believe.

Q. Why do they call it No. 1 ?---*A.* I do not know.

Court. It has been particularly deſcribed to me and to the jury as the priſon where capital offenders are confined, and is called No. 1 : why is it called No. 1, if there is not ſome other priſon ?

A. There are gentlemen better informed of the caſtle of St. *Phillip*'s than I am. I believe there is no other priſon. That may be No. 1. room in the priſon.

Croſs-examined by Mr. Serjeant Glynn.

Q. I think you told us your reſidence in *Minorca* was about a year and a half : who was governor during the time of your reſidence ?

A. Upon our arrival there, the lieutenant-governor commanded ; and upon our arrival the command devolved upon general *Moſtyn*.

Q. Then the command immediately devolved upon him ?

A. Within two days, or ſo.

Q. And the other two days Mr. *Johnſton*, as his lieutenant, commanded ?

A. I believe the general came there on *Monday*, and took the command on *Thurſday*. Reports under general *Johnſton*'s ſignature that the governor was arrived made it neceſſary.

Q. Then your experience of the laws of *Minorca* have been collected in that reſidence ?

A. That is all I know of them in the world.

Q. Which has been during the government of governor *Moſtyn* or his lieutenant. Now you told us, that the proclamation of the governor, with regard to the criminal court, was the ſame as a law ; and you diſtinguiſh the court of *Property*, which regards *meum* and *tuum*, from it ?

A. Quite.

Q. Do you mean that, without any limitation whatſoever ? Suppoſe the governor intended to inflict a capital puniſhment upon any offender, muſt that law be obeyed by the judges ?

A. I ſhould imagine it would. It is only my imagination, obſerve.

Q. I think you was ſo kind before as to tell us, that though that proclamation came out but the morning before, it would be equally obligatory upon the courts of juſtice ?——*A.* I underſtand ſo.

Q. Now this muſtaſtaph, *Allimundo*, ſells wine, does he not ?

A. He makes wine of his own vineyards, and buys grapes of other people to make wine, and ſells it in the arraval. He does not ſell it retail.

Q. That was a regulation of governor *Johnſton*'s?---*A.* I believe ſo.

Q. I would aſk you, whether *Allimundo* had not a lot himſelf to ſell his wine, and exclude every other perſon?

A. I think, as the papers are upon the table, they will ſpeak for themſelves. I think *Allimundo* for his own vindication urges——

Q. But I aſk you, of your own knowledge, whether the lot did not fall upon him?

A. I believe he did not draw any lot at all; it is not the cuſtom for the muſtaſtaph to draw lots.

Q. You think he did not draw lots?—*A.* No.

Q. You did not underſtand the *Minorquin* language?---*A.* No.

Q. It is a mixture of *Italian* and *Spaniſh?*

A. Yes, I believe ſo, and a kind of bad *Spaniſh.*

Q. You have told us of the two interpreters: I think you don't recollect exactly the words the laſt interpreter ſaid? You think father *Segui* was gone before *Fabrigas* ſaid, 'I will come with a petition with 150 men, or backed by 150 men?'

A. I cannot be ſure; I think it was *Vedall*; and the more ſo, from his joining with me in endeavouring to perſuade him from his intention.

Q. I think you communicated this matter to the governor?---*A.* Yes.

Q. Did you carry *Vedall* with you?---*A.* No.

Q. Did you make any enquiry after the 150 people?---*A.* No.

Q. You yourſelf was the perſon that reported the converſation to the governor?---*A.* Yes.

Q. What time did you write this paper?

A. I fancy the memorandums of that paper were wrote, I ſhould think, I could not ſwear to it ſo particularly, I ſhould think, within an hour of every one of theſe tranſactions happening.

Q. Then I take it for granted, that this is a faithful copy of a faithful collection, according to your memory, within an hour and half after ſuch tranſaction?

A. It was not put down for the public eye, but to refreſh my own mind.

Q. Then you did not put down any thing which you did not believe to be true?

A. No; I ſhould not dream of ſuch a thing.

Q. How long after did you communicate to the governor what *Fabrigas* had ſaid?

A. I never was longer between communicating to *Fabrigas* what the governor ſaid, and to the governor what *Fabrigas* ſaid, than going from this wall to that; unleſs the governor was not arrived in the morning, and I waited his return.

Q. Then you could make no miſtake of what *Fabrigas* had ſaid. You communicated to the governor what you put down: you are ſure you are under no miſtake on that head?

A. I know I might miſtake.

Q. But I do not aſk you about any miſpelling or miſdates, but the effect of the converſation?

A. Upon my ſoul, I believe ſo.

Mr. Serjeant *Glynn.* Then, ſir, I will read it.——*The ſame day Mr.* Fabrigas *came for an anſwer to his petition, and told the governor's ſecretary he ſhould come the next day with a petition of people concerned in grapes and vines, which they will ſign and come with themſelves, to the number of* 150.

Mr. Serjeant *Glynn.* I deſire it may be read; but I won't aſk Mr. *Wright* any more queſtions.——*(It is read by the aſſociate.)*

Mr. *Peckham.* Pray read the next paragraph.

On Wedneſday *the* 11*th, the governor, having the field-officers in and near* Mahon *with him, received a memorial from four men, ſigned by perſons of St.* Phillip'*s, deſiring the old practice might be purſued: to which he anſwered, that the four men ſhould return home, and behave themſelves as good and peaceable ſubjects to his majeſty ought to do.*

Mr. *Lee.* Your lordſhip will give me leave to aſk upon this paragraph a queſtion of Mr. *Wright.* *Q.* You ſay there were four men came with a memorial ſigned by perſons of St. *Phillip*'s, deſiring the old practice might be purſued: did you ſee that memorial?

A. I did.

Q. Can you take upon you to affirm by what number it was ſigned?

A. I ſhall ſpeak merely from memory, for they were all ſcratches: I do not believe there were ten names legible to it.

Q. What number of ſignatures were there upon this paper?

A. I have already ſaid I really and upon my word do not know.

Q. Were there nearer 150 or 100?

A. It is merely a matter of memory; there were from 41 to 47, I believe.

Q. Now can you take upon you to affirm, that there were not more people ſigned this memorial than had ſigned the memorial for the new inſtitution?

Court. I underſtand it is in the report. There is a report of the aſſeſſeur civil and Dr. *Oliver*, that 93 were for governor *Johnſton*'s inſtitution, and 41 for the old regulation; 6 appeared to be indifferent, and 4 wanted ſome alterations of their own.

Q. There were 90 odd for the new inſtitution?

A. My memorandum ſays ſo.

Q. Can you tell me whether there were or were not upon this memorial which was brought by the four men, the ſignatures or requeſts of more or leſs than that number for the old inſtitution?

A. I have already ſaid ten times, that I cannot take upon me to aſcertain the number of ſignatures upon this laſt memorial; but I do know *Allimundo* proved many of them to be falſe.

Q. You know that is not an anſwer to my queſtion. I did not aſk you what were the number of men that ſigned this memorial: I don't mean you ſhould anſwer with that preciſion, whether 46, 50, or 150: but my queſtion is, whether you can take upon you to affirm at this diſtance of time, that the memorial which was brought by four men was ſigned by more or leſs than 90?

A. I can ſay no more: if I knew, I would tell you. I looked at the memorial, it was full of croſſes; and what makes me think it was between 40 and 50 was, becauſe I counted it.

Q. Then you did count it?---*A.* I did begin to count it.

Q. Did you proceed to count them through?

A. What ſignifies anſwering that?

Q. Becauſe I expect an anſwer. What ſignifies counting numbers, and not going through it?

A. I wiſh your head was capable of retaining every little circumſtance of no conſequence.

Court. The gentleman means, whether you have now ſuch a certain recollection of the number of ſignatures upon that paper as to ſay, whether there were more or leſs than 90?

A. I don't recollect any thing but one---that is, that I began counting ---any other circumſtances that ſhall lead me to the number, whether I left off at 40 or what.

Q. We underſtand that a conſiderable majority ſigned this very memorial---we want to know that fact?

A. Every attention was employed, every argument uſed, and every poſſible means was taken, for finding out the true ſenſe of the inhabitants; and amidſt the various methods taken, there did not appear, when enquired into fairly and honeſtly, to be one in ten of all the names that were preſented to the general in ſupport of *Fabrigas*'s complaint. Mr. *Allimundo* was ſuppoſed to be a man that would produce the truth.--- The fort-major was ſent to examine with him.

Mr. *Lee.* The Serjeant will tell you, that is no evidence at all. Let me aſk you, when this particular paper was copied that I have in my hand?

A. As ſoon as I was at leiſure to do it myſelf.

Q. When was this particular paper copied?

A. I have ſaid half a dozen times, as ſoon as I had time to put all the bits of paper together---inſtantly.

Q. Was this paper copied from a memorial in which this number is ſtated blank as it is here, or have you that original memorial by you? ---In whoſe poſſeſſion was that memorial?

A. Not in mine.

Q. To whom was it given?---*A.* I think to colonel *Mackellar.*

Q. He was an officer of the governor's?

A. Commander in chief of the corps of engineers.

Q. So he had the poſſeſſion of that memorial, the contents of which you have ſtated by blank perſons?

A. All I can recollect of that particular memorial that you ſpeak to is this, that four people brought it; it is a hard thing to be pinned down to ſuch a thing as that. The muſtaſtaph himſelf was preſent. I think col. *Mackellar* was talking of this memorial: I think I had it out of his hand, and was going to read it, and count it. I believe he or *Allimundo* took it; and I believe *Allimundo* took it home to confute many of the names, which he did afterwards.

Q. And that you conceive to be the reaſon why you did not get through them, why you did not proceed to tell the number?

A. I ſhould believe ſo, upon my word and honour.

Q. You do ſtill take upon you to affirm that there was nothing like the number in this, that there were for the other regulation?

A. I did not attempt to ſay ſuch a thing.

Q. Upon the inſpection you then had, you cannot take upon you to affirm that?

A. I have told you all I know of it: I fancy there was much leſs.

Mr. Serjeant *Burland.* You was aſked about the lieut. governor being general *Moſtyn*'s lieut. governor; I believe the governor does not appoint his own lieut. governor?—*A.* No.

Q. I believe thoſe regulations made by general *Johnſton* were ſome years before general *Moſtyn* was governor?

A. The date will ſhew it.

Q. I ſuppoſe about 52?—*A.* O no; ſince that.

Q. I meant 62?—*A.* I believe prior to the execution of the office of muſtaſtaph by Mr. *Allimundo.*

Q. Prior to the time Mr. *Moſtyn* was made governor?—*A.* Yes.

Q. You was aſked a good deal about that memorial that had theſe croſſes upon it: you ſaid *Allimundo* took it away with him in order to confute—— ——

A. I know he had it; I don't know whether he took it away.

Q. Had the governor any reaſon to apprehend that thoſe names at the bottom of that memorial were not put there by the perſons?

A. Yes, he had reaſon to believe it.

Q. Did he enquire into it?—*A.* Yes.

Q. What was the reſult of his enquiry?

A. The report made to him was, that a certain number of their names were abſolutely forged; that the hands of others were obtained under a ſuppoſition that the memorial related to oil.

Court. You ſaid juſt now, that upon a ſtrict enquiry there did not appear above one in ten; did you yourſelf make enquiry of what was the general ſenſe of the inhabitants?

A. To every body, and with every body that could poſſibly give me information; and from the general converſation I had, it did not appear to me that there was, I might ſay one in twenty that ever wiſhed it; and it would be worth your lordſhip's attention to ſee what theſe regulations are.

Court. Then by the general's direction you made the ſtricteſt enquiry you poſſibly could, to ſee what the ſenſe of the people might be, and did not find above one in ten that wiſhed for this alteration that *Fabrigas* deſired?

A. I, according to my own opinion, give a great allowance when I ſay that.

Q. Did you inform the governor of this?

A. When I uſe the word report, I don't mean an idle ſtory picked up from one or other, but a military term, an anſwer to the enquiries made by the governor.

Q. Then the intelligence you conveyed to the general was, that the opinion of by far the greater majority was againſt this *Fabrigas*'s deſire?

A. All almoſt: I ſave my oath by ſaying almoſt, but there was almoſt all.

JOHN PLEYDEL. *Examined by Mr. Serjeant* Walker.

Q. You was aid-de-camp to general *Moſtyn*, I believe?—*A.* Yes.

Q. Upon the 9th of *September* 71, give an account of what you know of this affair when *Fabrigas* came to the governor's?

A. He aſked me to ſee the governor in the morning. I told him he could not then ſee the governor, but I was aid-de-camp to the governor, and any favour or any thing he had for the governor I was ready to receive. After a little heſitation he gave me a paper, a memorial: he deſired at the ſame time I would inform the governor that he ſhould come the next day for an anſwer; he ſaid he ſhould come accompanied by 200 or 250 of the inhabitants of St. *Phillip*'s.

Q. Two hundred or 250?

A. I don't exactly remember the words.

Q. Was that all the converſation you had with him?

A. Yes. I immediately acquainted the governor with this meſſage: I read the memorial to the governor immediately, and informed the governor of what he had ſaid to me. I think it was that day the governor ſent to the field-officers of the garriſon and to the commanding officers of the corps, to meet at his houſe the next day, in order that they might be witneſſes of the manner in which he ſhould receive this *Fabrigas* and the people he mentioned to come along with him. Only four men came the next day, and brought a memorial.

Q. Were any of the commanding officers there?

A. Yes; I think all the commanding officers were there when theſe men came.

Q. What were the ſenſe of the commanding officers?

A. I think the ſenſe of the commanding officers was, that, in ſhort, this man ſhould be taken up.

Q. Why would they take him up?

A. As a troubleſome, ſeditious, and dangerous perſon in the iſland. The governor mentioned to me, that he had conſulted the chief *Minorquin* judges of the iſland. I know he had conſulted them, which corroborated the opinion of the field-officers that were there attending.

Q. Who is this Mr. *Fabrigas*?

A. An inhabitant of the arraval of St. *Phillip*'s.

Q. Of that diſtrict that does not belong to the four where there are jurats?—*A.* Yes, and is cloſe by the glacis of the fort.

Q. What, has he there any property?

A. His father is alive; he takes care of his father's vineyards, I believe. That is all the property he has.

Q. That is, the liberty of working in his father's vineyard?

A. I believe ſo.

Q. What ſort of a character does he bear there?

A. He is generally ſuppoſed to be a ſeditious, turbulent man; that is the general character of the man. General *Moſtyn* is very far from being a tyrannical, overbearing man. I had more opportunity of knowing him; I ſerved immediately under him the greateſt part of the laſt war.

Q. A man of temper and humanity?—*A.* Yes, very much ſo.

Croſs-examination, by Mr. Lee.

Q. You was aid-de-camp to general *Moſtyn*?—*A.* Yes.

Q. Do you remember *Fabrigas* declaring that next day he would come accompanied with 250 men?—*A.* Yes.

Q. Do you know whether there had not been a diſpute amongſt the inhabitants, and upon which ſide there was a majority, whether for the new or old regulations?—*A.* I cannot tell.

Q. What were theſe 250 men to come for?

A. I imagined it was to give weight to the petition.

Q. Do you conceive that the object of Mr. *Fabrigas* was to bring 200 or 250 men that were of his opinion to give weight to his requeſt?

A. Yes.

Q. My learned friend thought he meant to attack the garriſon of St. *Phillip*'s. You did not apprehend he meant to take the garriſon of St. *Phillip*'s, that ſtood out againſt the whole force of *France* for a conſiderable time, and, by the bye, might have ſtood out a great while longer? You did not underſtand that he was to come at the head of theſe armed peaſants?—*A.* Not of armed peaſants.

Court. You apprehend he was to bring theſe people to ſhew there were ſo many people to back his petition?

A. No; I apprehend he meant a mob that would breed confuſion in the garriſon.

Q. Whether you underſtood that he meant to bring theſe 200 people to occaſion and raiſe a tumult, or whether he meant to bring ſo many people to ſhew they favoured his petition?

A. So many people together in a garriſon would breed confuſion.

Court. What did you underſtand?

A. I really thought he meant to give weight to his petition.

Q. Had you heard at the time that *Fabrigas* ſpoke of bringing 200 or 250 of his friends—had you heard of any diſpute, whether there were more of one opinion, or more of the other; or had it been aſſerted that the people in general of the arraval of St. *Philip*'s were conſenting to the new regulations?

A. I think the people in general wiſhed to have the old regulation continued—I took it in that light.

Q. What do you mean by the old cuſtom? the cuſtom *Fabrigas* contended for, under the order of council in 52?—*A.* Yes.

Q. I dare ſay the Serjeant will not acknowledge that you mean that?

Mr. Serjeant *Davy*. No more he does.

Court. Do you mean by the old cuſtom, that which was ſettled by governor *Johnſton*?

A. I do; it was ſome years before general *Moſtyn* came to the iſland.

Court. Or do you mean a cuſtom that was before the order of 52?

A. I do not.

Mr. *Lee.* Then am I to underſtand you, that you think the majority of people were againſt the opinion of Mr. *Fabrigas*?

A. That is my opinion.

Q. Do you recollect that having been alledged to governor *Moſtyn* as the general opinion?---*A.* Yes.

Q. Do you recollect that having been alledged to *Fabrigas*, that the popular opinion was againſt him?—*A.* I don't exactly recollect.

Q. Don't you recollect that the very end he had in view, and profeſſed to have in view, in bringing a number of his friends and a number of people concerned in vineyards to preſent this memorial, was for the purpoſe of convincing the general that a majority of people were with him, and not againſt him?

A. I ſuppoſe he muſt mean ſo.

Q. Did not you underſtand him ſo at that time, when he talked of bringing a memorial, and coming accompanied by 200 or 250 men? Did not you underſtand him to mean that ſuch a number of people that were concerned in the wine trade and in the produce of vineyards would come and ſignify that to be their intention?---*A.* Certainly he meant ſo.

Q. Was you preſent when the four men, not the 200 or 250, came with the memorial ſigned by others?—*A.* I was.

Q. Was that memorial ever in your hands?

A. I don't remember ever having it in my hands. I ſaw it in colonel *Mackellar*'s hand, the chief engineer, when he queſtioned them about it; and theſe very people ſeemed ſhocked when he explained to them the tenor of the memorial. It was wrote in *Engliſh*, and they ſeemed not to underſtand the import of it.

Q. They were *Minorquins*?—*A.* Yes.

Q. Can you tell me what number of ſignatures were in that memorial?

A. I cannot gueſs at it: I ſhould think much about 50 or 60, but cannot gueſs.

Q. You did not count them at all?—*A.* No.

ROBERT HUDSON. *Examined by Mr.* Buller.

Q. You was, I believe, fort-adjutant at this time?---*A.* Yes.

Q. Was any application made to you by the civil magiſtrates?

A. Yes; the muſtaſtaph of St. *Phillip*'s came to me on the 10th or 11th of *September*, and told me, upon reading ſome orders of general *Moſtyn*, that *Fabrigas* ſaid he would come with a mob, and ſaid they were null and void, and they would ſee better days to-morrow.

Mr. *Peckham.* You need not mention what the muſtaſtaph told you; that is not regular.

Counſel for Defendant. That is the regular method there.

Mr. *Peckham.* It may be regular there, but it is very irregular here, and cannot be admitted as evidence.

Mr. Juſtice *Gould.* I ſhould be glad to know how the governor can be apprized of any danger, unleſs it is by one or other of his officers informing him there is likely to be ſuch and ſuch a thing happen? I ſuppoſe he gives the governor an account of what he has heard, then the governor makes an enquiry into the matter.

Mr. *Peckham.* Hearſay is no evidence. Beſides, the muſtaſtaph is an intereſted and a prejudiced perſon; at leaſt he appears ſo throughout the different parts of this cauſe. Now can what he has ſaid in *Minorca* to this witneſs be admitted as evidence here? The muſtaſtaph is living; why don't they produce him? If they had brought him here, we ſhould have his evidence on oath, and could croſs-examine him to the facts.

Court. We do not take it for granted that it is really ſo; only that this gentleman, hearing of this, tells the governor.

Mr. *Lee.* It is no evidence of the fact: if you mean it only as a report, we do not object to it.

A. The muſtaſtaph told me, that upon giving out ſome orders to the inhabitants of St. *Phillip*'s, ſome orders relative to the ſelling wine in St. *Phillip*'s, he came with a mob, and ſaid, 'It is null and void, and we will ſee better things to-morrow.' He further ſaid, that if there were not ſome immediate meaſures taken with this *Fabrigas*, he was afraid of the conſequence, the riſing of the people.

Q. This was enough, I ſhould think, to give an alarm. Did you acquaint the governor of it?---*A.* Yes, I did.

Q. What was done after that? Did the governor call you together?

A. I was not privy to what the governor did in conſequence of this; my poſt was two miles off.

Court. Gentlemen of the jury, then all this comes to nothing; he proves no fact---

Mr. Serjeant *Davy*. No: this is to introduce the next evidence, of the governor ſummoning the officers together.

Q. You knew this *Fabrigas*; what was his behaviour in the iſland?

A. Extremely troubleſome, as was repreſented to me: there never was any objection to governor *Johnſton*'s regulation till by this man. Governor *Johnſton* did this, becauſe the wine uſed to turn four, by every body being allowed to ſell wine at a time: they diſtreſſed one another by opening too many caſks at a time. The general made this regulation, in order that no more might be opened at a time than could be ſold before it was four.

Court. I choſe to hear the reaſon and foundation of the regulation.

Q. What is the conſequence of that among the ſoldiers?

A. Diſorders of different kinds, fluxes and the like.

Court. There being no cellars, I ſuppoſe they could only buy from hand to mouth.

A. In general they are open ſheds; they are hardly better than ſheds.

Q. Did that produce any diſagreements among the ſellers themſelves, that they underſold each other?

A. Some poor people, that had but little wine, were almoſt ſtarved: the ſeveral years after governor *Johnſton* made this regulation, there never was known to be a caſk ſour.

Court. I was rather apprehenſive that this might enhance the price.

A. The price was never raiſed upon that account.

Mr. *Buller.* There was an afforation price.

Mr. *Lee.* Yes; but this was a liberty of ſelling below it.

A. The town of St. *Phillip*'s was divided into four diviſions, and four people uſed to ſell at a time.

Colonel PATRICK MACKELLAR. *Examined by Mr. Serjeant* Davy.

Q. Was you at the garriſon in *Minorca* in 71?---*A.* Yes.

Q. Did you know Mr. *Fabrigas* before the time of his being apprehended?

A. I have known him by character a great while; they called him *Red Toney.*

Q. You happened to ſay you knew him by character; what was the character he bore?

A. A very bad one ever ſince I have been in the iſland, and for ſome time before.

Q. Of what ſort?

A. He was ſeditious, troubleſome; a drinking, gambling fellow; ſat up of nights with low-life people; and he kept women.

Q. In ſhort, he is a man of an ordinary character?---*A.* Yes.

Q. But the character that I wanted chiefly to be informed about was, concerning his obedience to government, whether he is a turbulent man?

A. I have had many complaints of him from two muſtaſtaphs, when I have been commanding officer of the gariſon.

Q. How long have you been there?

A. I was one of the firſt that went there when the iſland was reſtored after the laſt war, and had been there a good many years before. I went firſt in 36, and left it in 50. I went in *May* 63, and remained there till *May* laſt.

Q. Then you muſt be pretty well acquainted with the laws, and government, and conſtitution of this country?

A. I have a good deal of knowledge of it, as much as a military man can have: we cannot ſtudy theſe things as lawyers do.

Q. Pray is there not a diſtrict they call by the name of the arraval of St. *Phillip*'s?---*A.* Yes.

Q. How far is that?---*A.* It is incloſed by a line wall on one ſide, and ſurrounded by water on the other.

Q. Pretty near to the fort?---*A.* Within a muſket-ſhot.

Q. This diſtrict within this line is called the arraval of St. *Phillip*'s?

A. Yes.

Q. What do you mean by the word royalty?

A. It is where the governor has a greater power than any where elſe; where the judges of the iſland cannot interpoſe their authority or power, but by his permiſſion; and people of the arraval have particular privileges upon that account. The judges cannot convene any perſon to appear before them, but by the governor's approbation, within the arraval.

Q. It is not ſo in the other parts of the iſland?---*A.* No.

Q. You have, I believe, in the other parts of the iſland, officers called jurats?---*A.* Yes.

Q. Is there any ſuch in the arraval?

A. No; the muſtaſtaph is the only magiſtrate there.

Q. Then there is an officer within this royalty, within this arraval, called a muſtaſtaph, who is the only magiſtrate there?---*A.* Yes.

Q. In other parts of the iſland there are other magiſtrates of different names, jurats and ſo forth?---*A.* Yes.

Q. Who is the muſtaſtaph of the arraval of St. *Phillip*'s appointed by?

A. The governor, or commander in chief, when there is no governor.

Q. Does he diſplace him at his pleaſure?---*A.* Yes.

Q. What is the office of muſtaſtaph?

A. He takes care of the weights and meaſures of markets; takes an account of all the wine that is made, and of the expenditure of the wine; and ſettles any little diſputes among the inhabitants, in what they call the firſt inſtance.

Q. What, is that with regard to the afforation, or ſettling of the price of the wine?

A. That is done by the magiſtrates at *Mahon.* The magiſtrates of *Mahon*, as they do every where elſe, ſet a price upon the wine, which they call an afforation or market price, and the arraval of St. *Phillip*'s is always ruled by the afforation at *Mahon*; the magiſtrates at *Mahon* do not put the price upon it, but it is always adopted.

Q. Who is the officer that in point of form ſettles the afforation price?

A. There are different prices in different terminos, but that is governed by the price that is fixed at *Mahon.* *Mahon* is the neareſt diſtrict to St. *Phillip*'s?

Q. Who is the perſon that in point of form does ſo adopt it?

A. The muſtaſtaph is the officer that does, and he only ſignifies what the price is.

Q. He is the trumpet, the mouth by which they underſtand what is the afforation price, he being regulated and governed by the afforation at *Mahon?*

A. Yes; the price that is paid at *Mahon* is always paid at St. *Phillip*'s.

Q. What is the general law? Are the *Minorquins* governed by the *Engliſh* or *Spaniſh* law, or what ſort?

A. They always plead the *Spaniſh* laws, as it was ſettled by the treaty of *Utrecht*; but when the *Engliſh* laws are convenient for them, they plead them.

Q. So that which is convenient they will plead, thoſe that are moſt ſuitable?——*A.* Yes.

Q. But which is the law that moſt prevails?

A. The *Spaniſh* law. When the iſland was given up, I believe nothing at all was ſettled with relation to them, and therefore we were ſuppoſed to receive them upon the ſame footing that the *French* had them; but ſince that time they made intereſt at home to reſtore to them the ſame laws and privileges that took place before the iſland was taken, that is, the *Spaniſh* laws.

Q. Was you there when the place was taken by the *French?*

A. No; I was in *America.*

Q. Pray what is the temper of the *Minorquins* in general? Are they well affected to the *Engliſh* government?

A. Some are very well, I believe; others are not ſo.

Q. Pray do you remember the occaſion?—was you one of thoſe that were invited to meet governor *Moſtyn*, with the other gentlemen, upon the occaſion of being conſulted about Mr. *Fabrigas?*

A. I was, once or twice.

Q. Had you been acquainted that it was a matter of public notoriety of what had happened with regard to *Fabrigas?*

A. I have been at the preſenting ſeveral memorials to the governor.

Q. Did you hear of the report of what had prevailed, the general talk of the place?—*A.* Yes.

Q. What was the univerſal opinion, if there was but one? or if there were various opinions, what was the opinion of you and the reſt of the gentlemen that were called in?

A. The opinion of the other gentlemen as well as my own was, that he was a very dangerous and troubleſome man. By his former hiſtory, and from ſome anecdotes of thoſe times, it was thought a very unſafe thing to let him be at liberty; that it would be a right thing to take him up, and bring him to puniſhment, leſt he, who was a man very likely to be practiſed upon, would take other meaſures productive of miſchief.

Q. What was agreed upon?

A. It was in looſe converſation thought beſt that he ſhould be baniſhed.

Q. According to the practice of former times, do you remember a practice of that kind having been done?

A. I have heard of ſeveral; when the *Engliſh* were in poſſeſſion of the iſland, as well as when the *Spaniards* were.

Mr. *Lee.* This is proving a preſcription.

A. I tell you what I have heard.

Mr. Serjeant *Glynn.* It is impoſſible that it can be admitted: if he had known an inſtance, he might have mentioned it.

Court. It is one queſtion, whether, according to the exigence of the caſe, the general might inflict this baniſhment? and another thing, whether it is the ordained law eſtabliſhed in ſuch a caſe to be applied to ſuch behaviour? Now, if you go into a uſage of that kind, you muſt prove particular facts, not produce this gentleman to ſay he has heard ſuch things: it does not follow from hence that this might be the proper puniſhment.

Mr. Serjeant *Davy.* You have known general *Moſtyn*, I believe, a great while?

A. Only ſince he became governor of the iſland.

Q. I wiſh to know of you, what is his character and behaviour?

A. I always heard a character of him as a good officer, a polite, well-bred man, that carried his command in the genteeleſt manner.

Q. Is he a man of humanity, or rather ferocity?

A. I always underſtood him to be a man of great humanity.

Croſs-examined by Mr. Lee.

Q. You ſay the general opinion of the field-officers was aſked, of which you are one?

A. I do not believe the general opinion was aſked; I believe it was private converſation.

Q. Did general *Moſtyn* then call for your opinion, or the opinion of any other general officer, touching what he ſhould do to *Fabrigas?*

A. Afterwards we thought upon the ſubject.

Q. After the man was gone to *Carthagena?*

A. The ſame day, perhaps an hour.

Q. The ſame day you was aſſembled there?—*A.* Yes.

Q. The day that *Fabrigas* had ſpoken of aſſembling a number of his friends together, the general ſent to convene a body of you?—*A.* Yes.

Court. You was a field-officer?—*A.* Yes.

Court. Did you and the other field-officers meet together at the governor's?—*A.* We came there by his order, by his deſire.

Q. He propoſed to you then for your opinion, what ſhould be done with this man; and you, partly from the former hiſtory, and partly from modern anecdotes, thought he ſhould be baniſhed?

A. Yes, I did ſo.

Q. That was the ground of the accuſation; former hiſtory, and late anecdotes?---*A.* Yes.

Court. I ſhall certainly hear his evidence, if you aſk him the motives and grounds.

Mr. *Lee.* I only aſk whether I had taken it right.

Court. Did not you object to enquiring into former inſtances of baniſhment?

Mr. *Lee.* No; he has ſpoke of former inſtances of bad conduct in *Fabrigas.*

Q. Did any of you propoſe to the general, or did he propoſe himſelf, to have any trial of this gentleman before his baniſhment?

A. I believe he never did propoſe that; for the judges there gave it as their opinion, that that was lodged entirely in the governor's own breaſt; two of them particularly, that it was entirely in his own breaſt.

Q. And needs no trial at all?

A. I do not know that there was any form of trial there.

Q. You heard of no trial?

A. I heard no trial mentioned.

Q. You tell me the opinion of the field-officers was this?

A. Yes.

Q. As I don't know exactly who all the field-officers were, and as I wiſh to deliver as many of them as I could from the imputation of that opinion, pray did major *Norton* concur in that opinion?

A. I do not remember particularly whether he did or not.

Mr. Serjeant *Davy*. That is, whether he was there or not?

A. He was there, but I do not remember what his opinion was upon the occaſion.

Q. Then you cannot take upon you to ſay whether it was a majority of opinion, or unanimity of opinion?

A. A majority of opinion. I believe there might be a difference of opinion.

Q. Do you know a colonel or a major *Rigby*—I do not know what rank?——*A.* Major.

Q. Was he there?——*A.* Yes.

Q. Did he concur in that advice to the governor?

A. Both the gentlemen are here, and can tell. We were talking among one another; our opinion was in general.

Q. Thoſe that choſe to give an opinion in favour of baniſhment gave it, and thoſe of another opinion either might give it or were ſilent?

A. It was not talking of giving an opinion, but talking of the man's caſe, and what ought to be done.

Q. Then you cannot tell what number diſſented?---*A.* No.

Court. Were there any of the field-officers preſent that did diſſent to it?

A. I do not remember that any did indeed.

EDWARD BLAKENEY. *Examined by Mr. Serjeant* Burland.

Q. I believe you officiated as ſecretary to general *Blakeney?*

A. Yes; I was there about ſeven years.

Q. What ſort of power does the governor exerciſe in the arraval of St. *Phillip*'s?

A. There is no writ; nothing can be executed there without his commiſſion.

Q. What authority does he execute there?

A. An abſolute authority; it is a royalty.

Q. Have you known any inſtance of people being ſent out of the arraval?

A. A few months after general *Blakeney*'s arrival, he baniſhed two *Franciſcan* friars immediately by his own authority.

Q. Where did he ſend them to?

A. To the continent.

Court. Into *Spain?*

A. I cannot tell whether to *Spain* or *Italy?*

Q. from Jury. Was it in peace or war this happened?

A. In peace time. They found the way to *Rome*, and complained to the general of the *Franciſcan* order, who correſponded with the general upon the ſubject. Several letters paſſed; and general *Blakeney* wrote in one of his letters, if they did not behave better for the future, he ſaid he would baniſh all the *Franciſcans* out of the iſland, and make barracks of their convent. Interceſſion was made for them: they aſked pardon for the offence they had committed, and upon a promiſe of behaving well they were allowed to come back.

Q. Did you ever hear that the power of the governor upon that or a like occaſion was ever called in queſtion in the iſland?

A. No; I took it for granted it was handed down by the *Spaniſh* governor, and they were governed by *Spaniſh* laws.

Q. Are they governed by *Spaniſh* laws?---*A.* Yes.

Q. We are told the arraval is a diſtinct juriſdiction from the reſt of the iſland, and there is more authority exerciſed by the governor?

A. Yes; it is within gun-ſhot of the fort. The judges have applied to me to obtain leave for them to execute writs in the arraval.

Q. I don't know whether you remember any other inſtances of baniſhment but theſe two you have mentioned?

A. I remember an inſtance of a prieſt. I will tell you ſhortly: the caſe was this. Four regiments were ſent out by the late king, to relieve four regiments that had been a long time then in the garriſon. The governor received orders to ſend home every creature belonging to the four regiments then there: they had been many years in the iſland. A report had been made to him, that a daughter of one of the military people was miſſing. An enquiry was made: ſhe was proved to be laſt in the poſſeſſion of a prieſt. The prieſt was called upon; he denied knowing any thing about her, or of her. He was brought before the governor; he gave bail of two people; (this was a military affair entirely) and next day he was deſired to produce her. He did not. The governor embarked him directly, and ſent him on board, I believe, in the very tranſport that was to carry this young woman away. The fleet ſailed to *Gibraltar*; and application was made immediately to the governor by the magiſtrates of *Mahon*, and by the religious order, begging the governor to forgive him, and ſtay the ſhip, and, if the governor would give leave, to put the girl on board, and bring back the priſoner. They begged, and petitioned, and prayed the governor. Upon that the girl was delivered up, brought from the vicar-general, who lived at a remote end of the iſland. She was brought to me. The ſtory ſhe told me was, that the vicar-general had, out of charity and compaſſion, taken care of her. She was a very pretty girl. She was put on board the tranſport, and ſent after the fleet, and the prieſt was brought back, and there were great rejoicings upon his arrival.

Mr. *Lee*. You know how little material that is.

Q. In what office was you in this place?

A. Secretary to the governor and commander in chief by the king's commiſſion.

Q. When did you go firſt?—*A.* In the year 48.

Q. You was in *Minorca*, I fancy, when a poſitive order came from *England*, that if any friar of the *Franciſcan* order, not a native of the iſland, ſhould come into that iſland, he ſhould not be ſuffered to remain upon it?—Do you know of any ſuch order in the firſt place?

A. Be ſo good as to repeat the order.

Q. 'That in caſe any friar of the *Franciſcan* order, not being a native 'of *Minorca*, but an itinerant friar, ſhall come into the iſland, he ſhall 'not be permitted to take his reſidence there, *&c.*' You don't recollect any thing of this, or that it was in obedience to the order of council that this *Franciſcan* was ſent away? So you forget this, though it happens unfortunately when the governor obeys the order of his ſuperior, that is now to be quoted, as a precedent of his own regal authority?

Q. What was the prieſt?—*A.* A native of *Minorca.*

Q. And the friar?—*A.* I underſtood them to be *Minorquins.*

Q. Can you be poſitive about that?

A. I do believe that as a certainty and a fact: I am morally certain of it; I was not preſent at their birth or regiſtry.

Q. It ſeems that you have forgot even that ſuch an order exiſted, till I reminded you?

A. I am not clear that I remembered ſuch an order exiſted; I have been over a great deal of ground ſince.

Q. Was it the nature of your office to acquaint you with all the orders of the council of *England?*

A. It came through my hands, yet very likely and probably I forgot it.

Q. But you might not have forgot it at the time the friars were ordered away?

Mr. *Lee*. This was in 53.

A. That is long ſubſequent: the affair of the friar was in 48 or 49.

Mr. Serjeant *Burland*. Then you admit that the king has a right to make ſuch orders?

Mr. Serjeant *Glynn*. No; the council may make ſuch orders, but we do not admit them to be legal.

Court. The caſe of the prieſt was ſome years after the caſe of the two friars?

A. Not a great while; about a year I believe, ſome ſuch time: it is a great many years ago; I cannot be poſitive to a few months.

Captain JAMES SOLAIRE. *Examined by Mr. Serjeant* Walker.

Q. I think you are a native of *Minorca?*—*A.* I am.

Q. You know Mr. *Fabrigas?*

A. Not very particularly.

Q. I thought you had known him at fort St. *Phillip*'s?

A. I know he is an inhabitant of that place.

Q. You have ſeen him there?—*A.* Several times.

Q. What ſort of a temper and diſpoſition has he?

A. I cannot anſwer very particularly.

Q. Do you know any thing of his general character?

A. No; I do not.

Mr. Serjeant *Burland*. I have a very long and reſpectable liſt of perſons here to ſpeak to the character of general *Moſtyn*, and his general behaviour: I ſuppoſe the gentlemen on the other ſide don't diſpute the general character which has been given of him.

Mr. Serjeant *Glynn*. I ſhall not make the leaſt attempt to aſperſe general *Moſtyn*'s character; I ſhall found myſelf upon the facts.

RAPHAEL PRATO. *Examined by Mr.* Buller.

(He not ſpeaking Engliſh, *an interpreter was ſworn.)*

Q. Do you know Mr. *Fabrigas* the plaintiff?—*A.* Yes.

Q. What character has he borne for ſome years paſt in the iſland of *Minorca?* Is he a peaceable man, or what?

A. A troubleſome man, that meddles too much with affairs.

Q. What affairs do you mean?—*A.* With the government.

Court. The queſtion is, whether upon the facts and circumſtances of the tranſaction itſelf, the general was juſtified in what he did; otherwiſe they may empty the iſland?

Mr. *Lee*. Yes, this iſland of all the people.

Q. to Mr. *Wright*. You delivered in theſe different memorials and papers: all that you delivered in, are they genuine papers or copies of papers that were preſented in *Minorca?*

A. All, except the laſt, which was delivered to the general's aid-de-camp, were delivered to me; that is endorſed on the back——*Reads*—

"To his excellency general *Moſtyn*, governor and commander in chief of the iſland of *Minorca*, *&c. &c.* the humble petition of *Antonio Fabrigas*, a native and inhabitant of St. *Phillip*'s in the ſaid iſland, ſheweth, that your petitioner has now by him 12 caſks of wine, the produce of his own vineyard, without having purchaſed ſo much as a grape of any other perſon, of which he has not ſold a drop, when ſeveral other inhabitants of the ſaid town have ſold all theirs, as well of the produce of their own vineyards, as that proceeding from what they bought to make a profit by; and this with the permit of Mr. *Allimundo*, who does the function of muſtaſtaph. That the petitioner, on the 25th of *July*, applied to the ſaid *Allimundo* for meaſures to ſell wine by the rate of two doublers leſs than the current price, which would have raiſed a benefit to the troops and poor inhabitants of St. *Phillip*'s; but notwithſtanding this demand was very reaſonable, and conformable to the expreſs condition of the firſt of his majeſty's regulation of the 17th of *May* 52, regarding this iſland, where it is expreſsly mentioned that the inhabitants of this iſland ſhall always be permitted to ſell at the price of the afforation or under it, Mr. *Allimundo* refuſed your petitioner, telling him he ſhould not ſell his ſaid wine. And as this is not only againſt the reaſon and juſtice of the public, and the garriſon of St. *Phillip*, but alſo contrary to his majeſty's order in the ſaid regulation, where it is mentioned that the inhabitants may ſell their wines whenever they pleaſe without any permit, under the afforation-price in the iſland; therefore he prays your excellency will be pleaſed to order Mr. *Allimundo* to be more regular in this (for he has made above fifty caſks of wine himſelf, of grapes he bought to make a profit by, of which he ſold more than the half, in prejudice of thoſe perſons who have old and new wine by them), and to give your petitioner the correct and juſt meaſures at the aforeſaid rate of two doublers.'

Court. There is no date to this petition, I obſerve?—*A.* No.

Mr. *Lloyd.* It is marked on the back, 'delivered the 31ſt *July*, 71.'

The next is incloſed in the anſwer of the muſtaſtaph's reply to *Fabrigas* the 7th of *Auguſt*, 71. 'To his excellency lieutenant-general *Moſtyn*, governor and commander in chief of the iſland of *Minorca*, the humble petition of the under-written inhabitants of the ſuburbs of St. *Phillip*'s, ſhews, that during the government of his excellency lieutenant-governor *Johnſton*, on account of ſome complaints that were made concerning the direction, and ſelling wine, a regulation was made in the following manner: that the ſuburbs of St. *Phillip*'s ſhall be divided into four wards; that the people ſhall draw lots; that they who ſhall come out ſhall have the liberty to ſell their own wine, the accidents of the caſks, and the preference of the poor helpleſs people being intirely under the direction of the muſtaſtaph. That regulation was accepted by the inhabitants of the ſuburbs, and they are glad of its continuance as it is obſerved to this day. They have heard that ſome of the inhabitants are intending to deſtroy the aforeſaid regulation, in order that every one might ſell their wine at the place they pleaſe, without dividing the wards. This will be not only the total ruin of the inhabitants, but it will alſo make them careleſs in the culture of their lands, and leſs careful in making their wines, and conſequently there will be very little wine of a good quality; therefore your petitioners humbly crave your excellency to be ſo good as to caſt an eye of pity upon them, in not permitting that ſuch a good regulation ſhould be ever altered: and as in duty bound ſhall ever pray.' Signed by 58.

Mr. Serjeant *Glynn.* Are they marks or names?

A. Moſt of them marks.

Directed to lieutenant-general Moſtyn.

'The humble petition of *Antonio Allimundo*, muſtaſtaph of St. *Phillip*'s, ſheweth, that your excellency deſiring to be informed about a petition made by *Anthony Fabrigas* of St. *Phillip*'s, relating to the ſelling of wine, ſays, that formerly the ſelling of the wine of the inhabitants of St. *Phillip*'s was under the direction of the muſtaſtaph of that ſuburb; but as ſeveral diſputes and difficulties aroſe from this, his excellency lieutenant-governor *Johnſton* found it proper to make a regulation for the ſelling of the wine, which was accepted with an entire ſatisfaction by all the inhabitants of St. *Phillip*'s, and by them practiſed to this day. At the time I had the honour to be made muſtaſtaph of that ſuburb, the aforeſaid regulation was in its full force and execution, and the ſaid lieutenant-governor charged me particularly to have it carefully obſerved. In conſequence of this, the ſaid *Anthony Fabrigas* having applied to me a few days ago for the meaſures to ſell his own wine two doublers cheaper than the common price, I thought it was impoſſible to grant it to him without forfeiting the duty of my employ, becauſe his demand was contrary to the ſaid regulation, by which the inhabitants of that ſuburb are permitted to ſell their wine only by turns, after they have drawn lots; for which reaſon your petitioner told the ſaid *Fabrigas*, that he could not ſell his wine; intending to ſay, by this, that he could not ſell it in the manner he had propoſed, that is to ſay, without drawing lots, it being inconſiſtent with the ſaid regulation; thinking it was his duty to have it obſerved till ſuch time as your excellency ordered him to the contrary. In the former petition he had the honour to preſent your excellency, he thinks to have the ſame privileges with other inhabitants of St. *Phillip*'s, that is, to buy grapes, to make wine, and ſell it; and beſides, ſeeing that his predeceſſors ſold this wine when they pleaſed, notwithſtanding the ſaid regulation, he thought that the muſtaſtaph of St. *Phillip*'s was not included in it; in which caſe your petitioner did not think it was proper to prejudice his rights, or thoſe of his ſucceſſors, unleſs your excellency ordered him to the contrary; but to comply with the inhabitants of that ſuburb, that they might be ſatisfied, your petitioner always impoſed a rule upon himſelf to ſell his wine at different times, and ſometimes by the groſs, inſomuch that moſt of the inhabitants of that ſuburb have ſold the half of their wine, whilſt your petitioner has not yet ſold a third part of his. If *Anthony Fabrigas*, or his father, ſays, that he will not ſell his wine under the common price, and that he has ſold none of it as yet, the former having none to ſell, the reaſon is only becauſe his turn did not come at the time when the lots were drawn, to which all the reſt of the inhabitants of St. *Phillip*'s are agreed; but his wine will be ſold when his time ſhall come.'

The petition of Anthony Fabrigas, 13 Aug. 71, *directed as before.*

'The humble petition of *Anthony Fabrigas.* On the 31ſt of *July* 71, the petitioner had the honour to preſent a memorial to your excellency, ſhewing the tranſgreſſion and non-obſervance in the ſaid town of two regulations given on the 8th of *May* 52, by his *Britannic* majeſty, *&c. &c. viz.* that any native or inhabitant of this iſland ſhall be permitted to ſell his fruits at the fixed price of the afforation, without any perſon's authority: ſecondly, that no commander, judge, nor officer, directly or indirectly, for himſelf nor through any other perſons, ſhall be allowed to have any concern in any traffic, bargain, or commerce whatſoever: your petitioner having likewiſe repreſented to your excellency that *Antonio Allimundo*, who does the function of muſtaſtaph in St. *Phillip*'s, has bought grapes to make, as he really made afterwards, 50 caſks of wine, of which he ſold more than one half, in prejudice of the inhabitants of St. *Phillip*'s, who have the old wine by them; and that your petitioner wanted to enjoy the liberties granted to him in the ſaid regulations, offering to ſell to the inhabitants and garriſon of St. *Phillip*'s, 12 caſks of wine he has by him of his own produce, at two doublers leſs than the ordinary afforation or fixed price, *&c.*: yeſterday, the 12th of *Auguſt*, your excellency's ſecretary told your petitioner verbally, *&c.* at which your petitioner was greatly ſurprized; as he is ready to prove judicially, before any one of his majeſty's judges of this iſland that your excellency may think proper to appoint, all that he has ſaid in his laſt and this preſent propoſal; in which caſe, *&c.* being ſure from the juſtice he has in his favour, and from your excellency's good adminiſtration to adminiſter it, prays your excellency will be pleaſed to give his decree at the foot of this memorial to your petitioner. He hopes thereby to be at liberty to ſell his wines at two doublers leſs than the afforation ſet by the muſtaſtaph of St. *Phillip*'s, *&c.* and that the muſtaſtaph has acted unbecoming the office he exerciſes of muſtaſtaph of St. *Phillip*'s; which being evidently proved, will undoubtedly oblige your excellency to give the neceſſary orders for the relief and better advantage of the inhabitants and garriſon of St. *Phillip*'s.'

Mr. Serjeant *Glynn.* May it pleaſe your lordſhip, and you gentlemen of the jury, to favour me in this cauſe by way of reply. Conſidering the length of time that has been ſpent already in this cauſe, I ſhould aſk your pardon and indulgence for adding more than I could wiſh to the time that you have already ſpent, in anſwer to thoſe arguments that have been uſed in behalf of the defendant, and in ſubmitting to you ſuch obſervations as occur to me. For, gentlemen, the cauſe, as I conceive, having already wandered very far from its true merits, and being perplexed with matters very foreign to the queſtion, it is incumbent upon me to make ſuch an attempt as my powers will enable me to do, to recal your attention to the real and true queſtion in this cauſe.

The queſtion, gentlemen, is ſhortly ſtated; the diſcuſſion of it, however, requires ſome time.----The queſtion is merely what ſatisfaction and reparation Mr. *Fabrigas*, a ſubject of *Great Britain*, as much as any man even born in the city of *London*, has a right to demand for the treatment he has received. He is a native of the iſland of *Minorca*, born in the *Britannic* dominions; and his lordſhip will tell you that every perſon that is ſo born is a free-born citizen of *Great Britain*, intitled to all its liberties and privileges.

The queſtion therefore is, how a man thus circumſtanced is intitled to have his caſe conſidered by an *Engliſh* jury, and what ſatisfaction you ſhall think due to him for ſuch kind of treatment as he has undergone; ſuch tortures of the moſt ſtudied, and the moſt perplexing and excruciating kind, (if you take into conſideration the feelings of a man's mind, as well as his corporal ſufferings) as have by the wantonneſs of power been inflicted upon him.

Gentlemen, in the diſcuſſion of this queſtion, I ſhall now barely mention to you one topic upon which a great deal of your time has been taken, and which I mention merely for the purpoſe of clearing the cauſe of it, and diſmiſſing it totally from your conſideration; and that is, what reſpects the character of Mr. *Moſtyn* the defendant. You are told of the high and reſpectable names of great men that have given their attendance here to countenance that character which you are told Mr. *Moſtyn* indiſputably poſſeſſes. My anſwer to it is, that if he had brought the privy-council, if he had come with teſtimonials in his hands from the two houſes of parliament, it would not have varied the conſideration of this cauſe. The queſtion here is wide of all conſideration of character: you muſt decide it upon the facts which appear before you in evidence, and from them you muſt judge of the merits of this cauſe. The motives of Mr. *Moſtyn*'s conduct, and every circumſtance that is material or relative to that queſtion, you are to decide upon; and beyond that, gentlemen, it is neither my deſire nor my duty, it is far from my province, and far from my inclination, to attempt throwing any kind of calumny or aſperſion. Let Mr. *Moſtyn*, with all my heart, if he can, reconcile that conduct that has appeared before you to ſuch a character, to that verdict which I am confident you muſt pronounce upon this cauſe. Let Mr. *Moſtyn* enjoy the eſteem of his great and noble friends; I have no deſire to deprive him of it: I have however a zeal for the juſtice of this country, that goes ſomething beyond the mere line and duty of an advocate,---I owe it to humanity,---I think it is a queſtion of humanity, not depending upon the particular laws of any country: but it is a queſtion highly affecting the honour of the *Britiſh* nation, and a queſtion that will throw diſgrace upon our laws, our conſtitution, and the humanity of our judicature, if this man ſhould be ſent back into the iſland of *Minorca* with his wrongs unredreſſed, and an accumulation of expences upon him.

I own therefore, gentlemen, upon theſe grounds and theſe conſiderations I feel a warmth and a zeal in this cauſe, which I hope will juſtify me for the pains that I mean to take, if my ſtrength will ſupport me in it, in laying before you what I conceive neceſſary for your conſideration. I have ſaid, that I mean to deprive general *Moſtyn* of nothing that is not neceſſary to the reparation of the wrongs of this much-injured plaintiff; that he ſhall enjoy his good name and his character as far as my duty will permit him to enjoy them; I ſhall make no obſervations upon him but what ariſe from the cauſe now before you. I have ſome reaſon to wiſh, and to complain that the like conduct has not been obſerved on the other ſide. General *Moſtyn* is to be graced with the countenance of great men; and a plain *Engliſh* jury is to hear the titular teſtimonies of the character of a man inveſted with an high office, in high power, and poſſeſſed of great riches; yet the character of a poor, unhappy, helpleſs individual, an inhabitant of an iſland part of the territories belonging to the crown of *Great Britain* (confident too that he lived under the protection of the conſtitution of *Great Britain*), is to be treated as a ſubject of ridicule, becauſe he is not a man of high rank, though you are told he is a man of character and of fortune, ſuch as has intitled and recommended him to the company of men of rank in that iſland. Have we not ſome reaſon to complain, that ſuch matters are now introduced to rebutt his juſt and well-founded expectations to receive ſatisfaction from an *Engliſh* jury for the wrongs he has already ſuſtained?--Is it not enough that this man has endured an impriſonment of ſix days, under the moſt unparalleled hardſhips of rigour and cruelty that can be inflicted upon a human being? is it not enough that he has endured a baniſhment from his native country? but, to heap calumny and obloquy upon the head of a man that he has injured, ſhall he with impunity be permitted to digreſs wide from the facts in this cauſe, to tell you that he is a profligate idle man; that with a family he neglects all the duties of a huſband and the maſter of a family; that he is devoid of moral character? Is a poor helpleſs ſtranger in this kingdom thus to be repreſented, after having been driven out of his own by cruelty unparalleled in the *Britiſh* hiſtory? Nor can any hiſtory be produced, even of any other country, that did not receive a moſt ſignal diſcountenance from the power of that country. A man thus driven out, ſeeking refuge from the *Engliſh* laws, friendleſs in this country, ignorant of its language, is treated in this manner! A gentleman comes forth, and entertains you with the connexions, character, and acquaintance of the powerful defendant: he then enters into the private concerns and private character of the plaintiff, and dwells upon the ignominy of it, and endeavours to impreſs you with a prepoſſeſſion that it will not be in his power to remove it. I truſt this conduct has not eſcaped you. Not a word has fallen from us of the character of general *Moſtyn*; I mean on that head to be ſilent for ever; and if I had it in my power to aſperſe his character, unleſs it was ſomething relative to the cauſe, that made it my duty to produce it before you, I ſhould be very ſilent about it.

Having diſmiſſed, I hope, from the cauſe theſe conſiderations, let us now recur to the defence that is ſet up by general *Moſtyn*. And, gentlemen, the defence ſet up by the general is, that Mr. *Fabrigas* is a man dangerous, ſeditious, and turbulent; that he was in the act of perpetrating ſedition in the garriſon of *Minorca*; that there was danger even of the loſs of *Minorca* itſelf; that it affected the commercial intereſts of this country; and, as well-wiſhers to this country and the commerce of it, you are called upon to give a verdict for the defendant, or to reduce the conſideration of damages ſo as to pronounce ſomething worſe for the plaintiff, if poſſible, than even a verdict for the defendant.---Gentlemen, their ſtate of it is, that this man, Mr. *Fabrigas*, being a factious, turbulent, and unquiet man, was purſuing general *Moſtyn* with an improper importunity; that he was endeavouring to ſpread ſedition, to raiſe diſcontents in the garriſon itſelf that affected the very ſafety of the government, and the iſland was in danger; that he uttered a threat that would have made general *Moſtyn* reſponſible with his head, if he had not prevented ſuch a ſcheme from being carried into execution; that he ſaid, if his petition was again rejected, that he would come at the head of 150 men, a menace repreſented as if it imported a threat that he would come at the head of an armed force: ſuch was the conſtruction his counſel put upon it, that he would appear in ſuch a way, as to make it neceſſary for the general to comply with his demands; that there was an end of all government and all order in the iſland of *Minorca*, and a valuable part of the *Britiſh* dominions lay then at the mercy of our enemies. Gentlemen, this is a well-drawn picture, and was very powerfully urged to you. It was ſomething over-painted, as I conceive you will judge. And the neceſſity of doing it is an obſervation that will not eſcape you; for leſs than this, I do conceive (I reſt myſelf ſatisfied in the general humanity that prevails in the breaſts of *Engliſhmen*, and inhabitants of the city of *London*) leſs than this could never have ſerved as any colourable juſtification for ſuch conduct as has been proved upon general *Moſtyn*: this therefore was neceſſary to be ſtated to you, that it was extorted, (contrary to the feelings of humanity which are ſaid to ſway and influence that gentleman in all his conduct) that this was extorted from neceſſity; that there was no time for conſideration; that it was an emergency he was required to decide on; it ſuperſeded therefore all forms; it was abſolutely neceſſary, for his government would not have exiſted if he had been at all induced to poſtpone it; and that poſſeſſion of which he was the guardian, and for which he is ſaid to be reſponſible with his head, was in danger of being for ever loſt to *Great Britain*. I can conceive a caſe like that, adding more circumſtances than even the ingenuity of the counſel furniſhed, which would not juſtify, though it might extenuate indeed, the conduct of the commander. But was there any thing like it in this caſe? This, I ſubmit to you, gentlemen, is a caſe that the counſel thought neceſſary to open; and leſs than this furniſhes no pretence or colour of juſtification for general *Moſtyn*. Gentlemen, when this cauſe was opened to you, and when the general's defence was ſtated to you, that the general was obliged to act in an emergency; bound by the moſt religious of all duties, to look with circumſpection to the care of the garriſon in inſtant danger, it was neceſſary to act as he did; it was an act therefore not of inclination nor of deliberation, it was an act of abſolute cogent irreſiſtible neceſſity, and which he had been unjuſtifiable if he had either omitted or deferred for a day. That is the nature, and that is the colour of the general's juſtification: but did the general know how different the caſe that would appear upon evidence would be from that which he had inſtructed his counſel to repreſent to you? It was neceſſary that the defence ſhould be guarded; and then there is a prefatory defence made, which, in my opinion, very much deſerves your conſideration. General *Moſtyn*, with the prudence that from this hour I ſhall think makes part of his character, choſe to decline the juriſdiction of an *Engliſh* jury. I don't wonder that he did; and I am not amazed that you are told that this is a matter extraneous to the juriſdiction of the courts of judicature in this country; that you, as a jury, are incompetent for its deciſion: it is of all caſes in the world that caſe which, as a defendant, general *Moſtyn* muſt be inclined to wiſh might never appear before an *Engliſh* jury. It is a tribunal that he muſt dread; it is a tribunal that he muſt ſhrink from; and he acts upon the ſoundeſt motives of policy and prudence when he endeavours to evade it.---If that ſhould prove inſufficient to him, the next reſort is in the general law and doctrine reſpecting the power of the governor in the iſland of *Minorca*; and you are repeatedly cautioned not to conſider yourſelves as adminiſtering juſtice by the laws of *England*. You are told, that you are deciding a queſtion of the laws of another country, far different indeed and materially oppoſite to thoſe of the laws of *England*: you are called upon therefore to judge this cauſe by another rule, and by another ſtandard, than that which you are in the habit of. Conſidering and trying cauſes by ſomething more than this muſt be deſired of you, before the ends of the defendant can be compleatly anſwered. You are deſired to diveſt yourſelves too of the feelings of humanity; and they are endeavoured to be ſuppreſſed by repreſenting to you circumſtances of horror and danger to the general trade of this country, in caſe you ſhould ſuffer even principles of law, of juſtice and humanity, to prevail in this cauſe. Gentlemen, it was ſtated to you, that in this iſland of *Minorca* there is no law whatſoever; that the form of government is deſpotiſm; that what may be called the law, is the will and pleaſure of the perſon that governs; that the king is abſolutely deſpotic; that he may change and alter the laws of this iſland as he pleaſes; and not only he himſelf can do it, but that he has delegated that power to his ſubſtitute; that he is ſent over to govern, not by any fixed invariable plan of laws, but ſuch as he thinks proper to make, ſuch as he thinks proper to preſcribe to the inhabitants, at any time that in his wiſdom it ſhall appear juſt and expedient that it ſhould be ſo. This is the ſtate of an *Engliſh* government, and this is the conſtruction put upon an *Engliſh* patent that paſſes the great ſeal of *Great Britain*. I will be bold to ſay, that if that conſtruction is ever attempted to be put, it muſt be put repugnant to the words of that patent. I will be bold to ſay, that if a patent paſſes the great ſeal containing ſuch words, there is not ſo feeble a judicature in this kingdom that would not dare to pronounce it void, and every act done under it illegal. And I will venture to ſay too, it is impoſſible that the great man that ſhould dare to put the great ſeal, and proſtitute public authority to a patent of that kind, but he muſt anſwer to public juſtice with his head.--And yet this has been contended to be the true genuine conſtruction of an *Engliſh* patent, the authority under which this ſame general *Moſtyn*, this governor of the iſland of *Minorca*, has preſumed to act. Gentlemen, having ſtated how repugnant it is to every idea and principle of law and juſtice, it gives me concern to hear in what habits, poſſeſſed with what ideas, men return from the iſland of *Minorca*. It has been contended to be right, becauſe it has been done before. If it has been done before, I ſay it is alarming, and it is time to put an end to it. You have had gentlemen with military commiſſions appearing here in red coats, to give you legiſlative conſtructions; to tell you, as lawyers, what is the law of the iſland of *Minorca*. You have had a gentleman who ſerved as a ſecretary to governor *Moſtyn*, who comes home and tells you, that the governor, with reſpect to the adminiſtration of laws that regard only queſtions of civil property, is limited by the laws of the country; but with regard to criminal juriſdiction, his power is uncircumſcribed, and totally unlimited; that by his proclamation he can change laws whenever he pleaſes, and the law of to-night is not the law of to-morrow, if that man thinks proper to iſſue his proclamation to repeal it; that the courts of juſtice are under a tye to reſpect theſe proclamations as laws; that the individuals of the iſland are all to be bound by it, and if theſe laws are iſſued but an hour before, they are as binding as if of long ſtanding in the iſland.

Theſe are the ideas of law that theſe gentlemen bring from the iſland of *Minorca*, under the government either of this general *Moſtyn*, or his lieutenant-general; and upon the authority of theſe gentlemen that have furniſhed themſelves with ſuch ideas of law and juſtice, you are at once to be prevailed upon to determine that the laws, liberties, and privileges of this kingdom in no reſpect extend there. It is ſomething ſhocking to *Engliſh* ears; a deſpotic, an arbitrary, an unlimited power! (for even the words have not been ſpared); and you are here, as an *Engliſh* jury, to pronounce that the king of *Great Britain*, and perſons acting under him, are to exerciſe this unlimited power within a part under the juriſdiction of the judges of *England*. If this is offered in extenuation of the conduct of general *Moſtyn*, added to the ſtrong irreſiſtible calls of juſtice and humanity that muſt preſs your minds more than words can, there muſt be added to it the moſt powerful political conſiderations; for you have been told in the courſe of this argument, that the iſland of *Minorca* is an inſecure poſſeſſion to the crown of *Great Britain*; that its inhabitants are in a great meaſure diſaffected. If they are, has not the cauſe of the diſaffection been very explicitly ſet forth to you? Is not the cure as evident? Correct theſe gentlemen, who think that their hands are not bound by law and juſtice that go over to exerciſe power over theſe helpleſs men. Teach the poor *Minorquins* that the *Engliſh* law will protect them; that their governors are bound by law and juſtice to teach them the bleſſings of an *Engliſh* government; you'll remove diſaffection; you'll get a ſtronger guard than all the caution and wiſdom of governor *Moſtyn*, his ſecretary and friends, powerful and titled as they are, and this fatal ſyſtem of military deſpotiſm; you will have the iſland to ſerve you, you will have the affections of the inhabitants to aſſiſt you, you may command them whenever you will. Yet, gentlemen, it has been dwelt upon as a topic, that this iſland is diſaffected; that their inclinations are againſt the *Engliſh* government. And who can wonder at it, if what Mr. *Blakeney* ſays he is clear in his recollection of? I hope he is not; I don't mean to derogate from his veracity; that a power like this has been uſed of arbitrarily ſending a man, a native, an inhabitant, from the iſland, his friends living there, his poſſeſſion there, for no offence committed, but at the abſolute will and pleaſure of the governor. You have heard a great deal of *Turkey*, you have heard ſomething of the laws of *Japan*, you have heard of other deſpotic powers, whoſe names I truſt are ſufficiently odious in the ears of all *Engliſh* hearers; and yet you are told that the governor of this iſland is equally deſpotic with any of theſe powers; that he has no limits but his will, no bounds but his pleaſure, no law but his inclinations; that the lives and perſons, if not the properties, of all the inhabitants of this iſland lie proſtrate before him, and they muſt depend upon his natural good inclination and humanity in what degree they are permitted to enjoy them.

This is the ſtate of this iſland; and I will be bold to ſay, it would be ſpeaking injuriouſly of the government of *Japan*,---it would be ſpeaking injuriouſly of the government of *Turkey*,---it would be ſpeaking injuriouſly of the emperor of *Morocco*'s government, to deſcribe that as the general ſtate of theſe ſubjects; it never was in the idea of even deſpotiſm itſelf till this very hour: it is violence and outrage, it is the law of robbery; it never obtained in any place where the idea and form of a civil government ever was allowed; becauſe, if the legiſlative power and the executive meet in one perſon, that diſtinguiſhes a deſpotic government from the happy ſtate that we enjoy in this kingdom. Our king can't preſcribe us laws, but he muſt adminiſter us juſtice by thoſe laws that our repreſentatives make for us. That is the ſtate of this country, happily diſtinguiſhed from the ſtate of deſpotic countries. But in no deſpotic country whatever did this idea ever obtain, that the prince, the deſpotic ſovereign, call him by what name you will, was to adminiſter juſtice by his incident pleaſure, will, and power. If he made laws, he made them, proclaimed and divulged them, and the ſubjects were governed by them, and their kings were ruled by thoſe laws. But here this gentleman, Mr. *Blakeney*, goes wide beyond his counſel, (his counſel would not ſtate any thing like this) but according to this gentleman, the inhabitants of this iſland, without the leaſt imputation of delinquency, without any mode or form of trial, were ſentenced, inſtantly tranſported, and removed from their friends and relations for ever, unleſs it is the good will and pleaſure of the governor ever to permit them to return. I ſay, it is the moſt ſhameful anecdote that ever was found of any government whatever; and a baſhaw of *Egypt* would merit the bow-ſtring for behaving in ſo illegal and ſo indecent a manner. The form, the appearance, the ſemblance of juſtice, are all of importance to be obſerved, and which the policy even of the lawleſs preſcribe; yet have our ears been tortured, and our patience and time been ſpent with doctrines of this ſort, by gentlemen who have enjoyed truſts in that iſland, and which have conſtantly been exerciſed by them. This is what general *Moſtyn* has ſet up in his defence.

His majeſty, it is ſaid, makes laws whenever he pleaſes; it is in his ſole will and power to impoſe what laws he pleaſes upon a conquered country. It is more than ever I heard. The prerogative goes further than any book, that ever I read, can juſtify me in allowing; becauſe, as I have underſtood it, if true, the ſtrongeſt authorities ſupport theſe prerogatives. One Chriſtian prince conquers a Chriſtian kingdom, that is governed by its own laws, unleſs it is the will of the conqueror to abrogate thoſe laws. The conqueſt of the iſland of *Minorca* was not made by queen *Ann* perſonally, but it was made by the ſubjects of *Great Britain*, and belongs to the ſupreme ſtate of *Great Britain*. But if you give the power to the ſovereign to make thoſe laws, allow them to be rightly exerciſed. Can you ſuppoſe that it belongs to the governor appointed, and that they are ſent out of this iſland not to be governed by any laws, any inſtructions that they ſhall receive, but to govern and adminiſter juſtice arbitrarily and incontroulably, according to their own will and pleaſure? For in order to furniſh the defendant with any colourable defence whatever, he is to be juſtified by precedents, which you muſt condemn as precedents of robbery and burglary, equal in point of violence to either of thoſe terms; or you muſt allow of ſuch a power which has hitherto been held not only incompatible with the law, the ſpirit, the genius, and the conſtitution of *Great Britain*, but with the idea of any law whatever that ever obtained in any ſtate or climate: both theſe you muſt ſubſcribe to before you can comply with the requeſt that is made you, and pronounce a verdict for general *Moſtyn*.---The gentlemen then having taken this broad and extenſive line of defence, which they thought would contain and embrace any defence that they thought proper to offer to you, they next proceed with their defence. And, gentlemen, you are told, that as it was the authority, ſo it was the duty of the general to proceed as he did; that he could have no perſonal malevolence to a man ſo remote from his ſituation, ſo unlikely to fall in with his connections; that the man was mutinous in the whole of his conduct; and that at laſt he committed that dangerous act of mutiny that made it an indiſpenſible act of juſtice in the governor to commit him, and to ſend him out of the iſland; that if he had not done it, and a conſequence had happened fatal to the iſland, the governor would have been reſponſible for it. Why, gentlemen, the ſtate of it ſo much exceeded the facts, it certainly was expected by the learned counſel who offered it to you that he ſhould prove ſomething leſs, and therefore ſomething that required bold and ſtrong poſitions to ſupport it; becauſe, if he could have proved this, though I ſhould conceive it would by no means have intitled the general to a verdict, yet ſuch conſiderations,---an act of abſolute neceſſity, the alternative of ſeeing ſuch a truſt as the iſland of *Minorca* loſt through his remiſſneſs, or the removing of this man out of the iſland--I ſhould have conceived might very well have furniſhed an excuſe for him in his conduct: I am ſure it would have taken off from any edge, any warmth, or keenneſs in which an action would have been ſupported that would have been brought againſt him. But, large as the ground was laid, it was to take in certainly another caſe than this. Nothing, as I conceive, and as I ſubmit to you, of this kind has been proved. Petitions, letters, meſſages, have been given in evidence before you, and comments are made upon the very petitions themſelves, as carrying with them ſtrong proofs of a mutinous inclination; and at laſt there is a broad fact aſſerted, that there was a downright threat of appearing in arms at the head of 150 men.

Now, gentlemen, give your attention to theſe letters, to theſe petitions that have been read. They are expreſſed, as I conceive, in decent and in reſpectful terms; and if it is an act of mutiny, I do conceive that it is impoſſible for any one man to complain that he has received wrong from another, either by word or letter, but he muſt be condemned as a mutineer in the iſland of *Minorca*; and the public faith, the national faith that is pledged for the protection and enjoyment of their property, is reduced to that ſtate---'You ſhall enjoy it, but if another preſumes to wrong you, you muſt not dare, upon the pain of tranſportation and long impriſonment, to utter a word of complaint; for it is judged dangerous, it is not conſiſtent with the wiſdom of government to permit it, and we are called upon to puniſh you moſt ſeverely.'---Gentlemen, the tranſaction appears to be this: that an officer in the iſland of *Minorca*, called a muſtaſtaph, was the man from whom the iſlanders were to receive what they call the afforation or the aſſize-price: this was the conception of Mr. *Fabrigas* the petitioner. Another notion prevailed, that the order of council received from the crown, which is conſiſtent with their capitulation and the rights ſtipulated to them, ought to be obſerved; by which order they were at liberty to ſell their wines after a certain price had by a public officer been once aſſized, which is called the afforation. But the muſtaſtaph of the iſland thought proper to ſay that the order of council was ſuperſeded by another order, which coming from the active perſon in the government, though not the principal at the time, muſt neceſſarily ſuperſede that order of council; and it was inſiſted upon that governor *Johnſton*'s order, judging of the inexpedience and impropriety of the former, muſt take place; and that Mr. *Fabrigas* was wrong in his conception of what ſhould be underſtood to be the law of *Minorca*. Upon his preſenting his complaint to Mr. *Moſtyn*, he received for anſwer, that Mr. *Moſtyn* would immediately call upon the muſtaſtaph for his anſwer. The anſwer is given; and in conſequence of it Mr. *Fabrigas* is told that his petition was groundleſs, for that the muſtaſtaph had moſt perfectly ſatisfied the governor. Mr. *Fabrigas* then deſires to ſee, for confident as he was that he was well grounded in his complaint, yet he deſires to ſee the reaſons that the muſtaſtaph had aſſigned. The ſight of theſe reaſons is denied him. In conſequence of that, he preſents another petition; which is, I think, referred to ſome of the law officers of the iſland for their conſideration. They run it over, and they report themſelves ſatisfied; and they inſert the anſwer of the muſtaſtaph, which anſwer the plaintiff Mr. *Fabrigas* is very deſirous of ſeeing and anſwering. The buſineſs then proceeds, as it is ſaid, in repeated petitions; Mr. *Fabrigas* conceiving that the governor is miſled, not that he wilfully denies him juſtice, but is miſled through the influence and miſrepreſentation of this muſtaſtaph; and that produces at laſt a convention of ſome of the iſland, in order to take their ſenſe of the matter. Here it is not clear what was the ſenſe of the majority; but here the muſtaſtaph had weight and intereſt enough to get that repreſented as by the majority, which he wiſhed to have received. This being on a *Sunday*, when many of the inhabitants were in the country following their diverſions, and Mr. *Fabrigas* thinking that the ſenſe of the people had not been properly taken, comes again to the governor with another petition, not cenſuring the governor, not upbraiding the governor, not intimating the leaſt diſapprobation of the governor's conduct, or jealouſy of his inclination, couched in terms of the utmoſt decency. The conſequence of it was an anſwer, which produced from Mr. *Fabrigas* that very anſwer upon which the defence of Mr. *Moſtyn* has been in ſo great a meaſure built; to which the gentlemen have applied that evidence which was produced by Mr. *Wright*, Mr. *Moſtyn*'s ſecretary. Mr. *Wright* ſays, that firſt of all the converſation was interpreted by a prieſt, and then by another interpreter; but he does not know who interpreted thoſe expreſſions which fell from Mr. *Fabrigas*, which he apprehended to be of a dangerous kind, and therefore diſcouraged, and adviſed him never to repeat again. He does not know, he ſays, whether the expreſſion was to this purpoſe, that he would come again if permitted, and that there ſhould be another petition backed with 150 men, or that he would come with 150 men to back his petition. I am ſorry for it. But here I can't forbear a comment; it would be betraying my cauſe and my own judgment if I did. This gentleman is very ſure that one or the other of theſe were the expreſſions. He profeſſed to refreſh his memory by a paper he had written down within an hour and a half of the tranſaction; and he thought proper to add, that it gave him an alarm, as if ſomething dangerous might follow.

Now, gentlemen, what are the words which he has written, from which he ſaid he made his communication to the governor, and which certainly contains the truth, as he recently wrote it down? Why, that Mr. *Fabrigas* ſaid he would come next day with a petition of the people concerned in grapes and wines, which they would ſign and come with to the number of 150! Theſe are the words wrote down by Mr. *Wright* himſelf. Why, gentlemen, I ſubmit it to you, whether in common ſenſe and plain honeſt interpretation there can be any miſtake about theſe words.

You hear, gentlemen, this was a conteſt between the muſtaſtaph and Mr. *Fabrigas*. The governor is appealed to as a judge expected to be, and who ought to be, impartial between them: he was appealed to with decency on one ſide, but leaned rather with friendſhip on the other; for the intereſt of the governor is not unconnected with the emoluments of the muſtaſtaph. On one ſide it is inſiſted that this was not the ſenſe of the majority of the inhabitants; on the other ſide, notwithſtanding what had appeared from the advantage taken upon a *Sunday*, when many could not appear, yet ſtill that the real ſenſe of the majority of the inhabitants was on the ſide of *Fabrigas*. Gentlemen, is not that the moſt natural key? does not that furniſh the moſt obvious interpretation to this? He would come with 150, in anſwer to what he had been told; for his petition had been rejected upon the ground that it was not conſonant to the wiſhes of the inhabitants, for they had been ſummoned, had declared and ſigned againſt it. He anſwers, that I will come the next day with a petition ſigned by 150 men. And who are theſe men to be? Why, he ſays, perſons concerned in grapes and wine. Can you conceive then that he threatened to bring an armed force, that he threatened danger to the garriſon? Was it not a natural anſwer in that diſpute that then ſubſiſted between him and the muſtaſtaph? Is it not clearly explained by the words, 'the perſons concerned in grapes and wines,' that he meant the miſtake ſhould be rectified the next day, and that it might appear from the number attending that petition, upon which ſide the majority of the iſlanders were? There was no man, that did not deſire to miſtake it, that could have miſtaken it: that is impoſſible. This I will be bold to ſay, that no man that wrote this paper would have given the evidence that Mr. *Wright* has given, and ſay he was in doubt only in the recollection of the particular words that were uſed, whether he would come with a petition backed with 150 men, or that he would come with 150 men to back his petition. I am perſuaded that no man who had wrote this, and which he tells you is the truth, could ever entertain that kind of doubt that Mr. *Wright* ſuggeſted to you. I am as confident that no man could have miſtaken this, that had not ſome purpoſes to anſwer by affecting to miſtake it. But what was Mr. *Wright*'s, what was the governor's conduct upon this occaſion? Did either of them enquire after theſe 150 men? If this was a matter that would give ſuch an alarm to a governor of a garriſon, was it proper to acquieſce in the removal of one only? Was there any enquiry made after the others? If it ſtruck Mr. *Wright* as dangerous, would it not have occurred to him, to ſtop Mr. *Fabrigas* upon the inſtant? Would he not have demanded the names of theſe 150 men? But Mr. *Moſtyn* at once abandons all his character, for the purpoſe of the cauſe; he is now no longer that faithful officer, that good and truſty ſoldier, that diligent and circumſpect governor, that you were before told he was. Is it not impoſſible but it ſhould have occurred to both, that the proper conduct was, if this was a juſt interpretation of the words that were uttered, to take that man up? not to ſtop there, but to have interrogated him, to diſcover his abettors and accomplices, to purſue the enquiry, and preſerve the ſafety of the garriſon, which they conceive to be ſo much in danger? It is moſt clear from all the circumſtances, that neither of them apprehended any danger whatſoever to the garriſon; they ſlept in quiet as before. There muſt be ſome other reaſon for their proceeding in the manner they have done againſt Mr. *Fabrigas*, beſides that which ariſes from the neceſſity and emergency which was repreſented to you, of the interpoſition that the governor was called upon by indiſpenſible duty to make, for the ſake of preſerving the garriſon from being thrown into confuſion, from falling into the enemy's hands. There muſt be, I ſay, ſome other reaſon for acting in this manner againſt Mr. *Fabrigas*. Mr. *Fabrigas* is ſuſpected, as they would have it, of a dangerous deſign; that a dangerous deſign was on foot; yet he is the only man that for ſix days remains in the iſland in cloſe impriſonment, and there is not any inquiry made after the perſons preſumed to be concerned with him in the buſineſs. If the governor had conceived that impreſſion, and wiſhed to be ſet right in his opinion, the appearance of the petition the next day would have anſwered it. When four poor *Minorquins*, (which for ſome purpoſe or other are deſcribed to be of the loweſt claſs of men, and which you will therefore preſume to be the moſt inoffenſive) when theſe four men alone came with the petition, did governor *Moſtyn* then continue in the opinion that this man was the framer and contriver of dangerous deſigns, to be backed and ſupported by multitudes? Muſt not he change his opinion then? Did the impriſonment end then? Were the ſufferings of this man then put an end to?---No, gentlemen; the man continues in priſon for ſix days, and is afterwards by an order extra-judicial, by an order of this governor *Moſtyn*, ſent into exile; which if it is law, any thing he thinks proper to do will be law; and I muſt then agree with Mr. *Wright*'s juridical opinion, that the power of the governor can have no bounds in criminal matters. If he can juſtify this, he might as well juſtify capital puniſhments; and if he had thought proper to have ordered him to immediate execution, he would have done an act full as juſtifiable, in my opinion ſomething more agreeable to humanity; for he ſends this man to rot in a dungeon, the place ordained for the vileſt and moſt deſperate malefactors, for capital offenders only, whether under ground or not is immaterial, but it was gloomy, damp, and uncomfortable; it has all the horrors of a dungeon belonging to it; and there this man is kept under a ſpecial extraordinary order, which our witneſſes, who were ſoldiers of the garriſon, who were attendants at the place, tell you, were unprecedented; no food ſuffered to be adminiſtered to him, his friends debarred from ſeeing him, his wife and children denied acceſs as often as they approached, and this in conſequence of orders which their humanity ſhuddered at, but which they dared not preſume to contradict. Singular and unexampled as was this cruelty even in the government of *Minorca*, which has the peculiar character of having a deſpotiſm belonging to it unknown in any other place upon the face of this globe; yet even there, though they may quote inſtances to juſtify ſome part of their behaviour, they never can pretend that a man ever was treated with the ſtudied circumſtances of rigour and cruelty contained in theſe orders: I mean, that no ſuch orders were ever iſſued out before. This, gentlemen, is the treatment Mr. *Fabrigas* has undergone, and this Mr. *Moſtyn* muſt juſtify. He muſt not only juſtify the removing this gentleman out of the way of doing miſchief, but he muſt ſay, that without hearing, without any proceeding, without the form of ſentence, without even ſo much as an intimation of the offence with which he is charged, that he has a right to inflict the greateſt of all puniſhments upon him. This Mr. *Moſtyn* muſt ſay: and you are to conclude, from the exceeding good character of Mr. *Moſtyn*, that all this proceeded from the pure benevolence of his heart, from the moſt upright and commendable of all motives. You are in your judgment to paſs an approbation of denying a man, untried and unconvicted, all food for ſix days but bread and water, of ſtripping him of all comfort, and of denying him even the accommodation of a bed. You muſt pronounce that there was nothing improper, nothing unlawful, nothing inhuman in ſeparating a man from his wife during this impriſonment, ſtripping him of the comfort of his infant children, and then tranſporting him into a foreign country, without giving him the opportunity of providing for his voyage, or receiving that ſmall aſſiſtance which you have been told his wife and ſon were ready on the ſpot to deliver to him. This you muſt pronounce to be legal and juſtifiable, and to be agreeable to humanity, to be neceſſarily incident to the office and duty of a governor of a garriſon. You are deſired, admitting for a moment that you can't juſtify the general in this conduct; admitting that ſome form of trial, that calling a man to anſwer, and ſignifying what he was charged with, were neceſſary forms to precede the infliction of any puniſhment whatever; (which admiſſion will be an affront to the judgment of the worthy gentleman his ſecretary, who inſiſts upon the general's will being the law) but laying that aſide for a moment, it is ſaid the governor's conduct ſtands ſo circumſtanced, that it is ſo mitigated, that you can never find it conſiſtent with your duty to give any conſiderable damages againſt him, at the complaint of this man. And to brand him with the moſt dangerous of all names, you are told that he is a patriot; that patriotiſm, however it may be introduced here, and may be ſerviceable in a commercial country, is of no uſe and benefit, but of the higheſt danger, in the iſland of *Minorca*; and the love of a man's country, which is called the firſt of virtues in other countries, becomes a mark, a dangerous offence in that country. At the inſtance therefore of ſuch a man as that, and againſt ſuch a man as Mr. *Moſtyn*, you are told, you can give no damages, for the great and the long impriſonment, for the cruel and afflicting injury done him, in ſending him into a foreign country from his wife and family. You cannot do it, becauſe it is ſaid Mr. *Moſtyn* has been in an error, and that the utmoſt extent of Mr. *Moſtyn*'s crimes amounts only to that of error. To ſupport this, the opinion of the military was aſked, and the opinion of thoſe wretched men called lawyers, who have ſtudied law in a country where law is not permitted to reſide, and where the will of the governor is the only law. Upon ſuch authorities it is ſaid Mr. *Moſtyn* could not heſitate. Clear as his judgment is, he is miſtaken; he is miſled by the firſt of authorities: he certainly meant well. Gentlemen, if Mr. *Moſtyn* had offended againſt any particular poſitive law of this country, or even *Minorca*, though clear to common underſtandings, yet that defence might be open to him; but it is not open to him in this caſe: for he has offended againſt the law of humanity, impreſſed upon every good mind; (no man that feels it can ever be miſtaken) and he has offended againſt the firſt principles of juſtice. But it is ſaid, he only erred in ſending a man to a dungeon, that probably might kill him; out of error too, he iſſues out orders to reſtrict him to bread and water for his ſuſtenance; out of error too, he prohibited the acceſs of his wife and children; out of error, he baniſhed him into a foreign country, ſtript of his property, and all the comfort he could be ſuppoſed to have in his baniſhment, not ſuffered to take that ſmall proviſion which his family had made for him: all theſe errors are incident. To whom? To the governor of *Minorca*. I truſt by your verdict that you will never ſuffer a man who has acted this part, to call it humanity, and go back to *Minorca* juſtified by your verdict, in ſaying, 'I committed 'theſe miſtakes, but they were all miſtakes of the heart.' I am ſure you will not give him the ſanction and authority of your verdict. But if theſe arguments prevail, you muſt do it; you muſt give the plaintiff ſmall damages, merely becauſe the defendant is miſtaken. Governor *Moſtyn*, bred too in *England*, lately gone over to that country, does not recollect that it is neceſſary that a man, before he is puniſhed, muſt be tried: you are to call that an error too. I do conceive, the loweſt wretch that walks the ſtreets of *London* is incapable of falling into that error: it muſt be an error produced by the place; it muſt be that very intoxication and drunkenneſs of power which you ought, by your verdict, to correct. It is impoſſible that any *Engliſhman*, or any man bred in a civilized country, could fall into ſuch an error. And give me leave here to remark one part of the caſe. Gentlemen are brought to tell you of reports conveyed to the governor. If Mr. *Wright* reported faithful, what he was authorized to report, the governor had little to build upon. Another gentleman adds, that there was a report of ſomebody; and it is ſaid it may juſtify the governor as a report. Now did they conſider how the governor is to be juſtified by a report? Does a report juſtify a man in proceeding to the very extremity of puniſhment inſtantly, without trial or examination? Does not every obſervation that can poſſibly be made turn againſt general *Moſtyn*? If you pronounce a verdict for him, muſt not you give a ſanction to that horrible and dangerous doctrine here advanced in his ſupport? Are not you called upon then by every conſideration that is dear to you, to give great and exemplary damages in this cauſe? If ever example required it, it does in this. If ever the ſuffering of a man required it, it does in this; for never was any man more clearly and unjuſtifiably wronged and injured. If you ſend Mr. *Fabrigas*, if he has courage to return to the iſland, with a verdict of a few hundred pounds, to give triumph to a man whoſe revenue is ſeven or eight thouſand pounds a-year, who does not regard what ſuch a man as this recovers; then the deſpicable doctrine of arbitrary power that the governor was ſo fond of, and thought ſo well eſtabliſhed in this iſland, will never again be diſturbed. Is it not eſſential to the very ſafety of the iſland, that the inhabitants may be aſſured that they are protected from ſuch a power, that they ſhall never be told that in a court of juſtice ſuch a power was ever inſiſted upon, and that the jury gave only a few hundred pounds damages, as a mark that they did not bear in their minds any great diſapprobation of it?

On the other hand, it is of no great conſequence whether Mr. *Moſtyn* ever returns to that country again. It is my, and I am ſure it is your wiſh, that he may never be permitted to return. I wiſh he may never ſee the face of Mr. *Fabrigas* again. I wiſh he may never ſee the face of Mr. *Fabrigas* again in that iſland. But it is of the greateſt concern to the peace and happineſs of that iſland, that they are ſafely protected from ſuch outrages, from ſuch rampant violence and capricious exerciſe of tyranny and deſpotiſm; that they ſhall never be diſturbed again by ſuch exertion of authority, much leſs that it ſhall ever be acknowledged as the claim of the governor of the iſland; but that they may quietly enjoy thoſe rights that as natural-born ſubjects of *Great Britain* they are entitled to, and which the national faith is pledged to make good to them. This will be the advantage that will follow the giving ample, conſiderable, and exemplary damages to the plaintiff; damages that I muſt ſay in this cauſe are called for from the very nature of the cauſe itſelf: for if there was not any weightier conſideration in it than for the ſufferings of the man, the damages muſt ſwell high indeed; but, added to that, you will produce this happy effect, that *Minorca*, which is ſaid to be a precarious poſſeſſion, will for ever be a permanent and ſecure poſſeſſion to the crown of *Great Britain*. I much fear, if this language receives countenance, it will be inſecure indeed; and much as I love the trade and commerce of this kingdom, I proteſt as a man of feeling, great and valuable as they are, I would not conſent that they ſhould be purchaſed, I cannot conſent that they ſhould be preſerved, at the expence of the moſt ſolemn rights of ſociety.

Mr. Juſtice GOULD.

Gentlemen of the jury, *Anthony Fabrigas* is plaintiff, and *John Moſtyn*, eſq. is the defendant. This, gentlemen, is an action of treſpaſs and falſe impriſonment, which the plaintiff declares in two counts.

The firſt is, that the defendant upon ſuch a day made an aſſault upon and impriſoned the plaintiff, without any reaſonable or probable cauſe, againſt the laws of this kingdom, and compelled him to depart from *Minorca*, where he was there dwelling and reſident; and carried or cauſed him to be carried from thence to *Carthagena*, the dominions of the king of *Spain*, againſt the plaintiff's will, whereby he was put to great expence and trouble, his goods were waſted and loſt, his family brought to great want and diſtreſs, and he was deprived of their comfort. That is the firſt count. The ſecond is, the general charge of falſe impriſonment, without alledging theſe circumſtances. To this the defendant has pleaded two pleas.

In the firſt place, the general iſſue, that he is not guilty.

In the ſecond place, he ſays, he is governor of the iſland of *Minorca*, and that he was intruſted with all the powers, privileges, and authorities, civil and military, belonging and relating to the government of the ſaid iſland in parts beyond the ſeas. Then he ſtates, that the plaintiff was guilty of a riot and diſturbance of the peace, order, and government of the iſland, and was endeavouring to create and raiſe a mutiny and ſedition amongſt the inhabitants of the ſaid iſland, in breach of the peace, in violation of the laws, and in ſubverſion of all order and government; whereupon the defendant, in order to preſerve the peace and government of the iſland, was obliged, and did then and there order the plaintiff to be baniſhed the ſaid iſland, and to leave and quit the iſland. And in order to carry this into execution, and to ſend him from and out of the iſland, he did (then come the words of form) gently lay hands upon him for that purpoſe; and accordingly did cauſe him to be kept in priſon for a reaſonable ſpace of time, until he could ſend him out of the iſland; and then at length he did ſend him on board a veſſel from the ſaid iſland to *Carthagena* in *Spain*, as it was lawful for him to do. The plaintiff has ſaid in anſwer to this, that he did it of his own wrong, and without any ſuch cauſe as he has alledged in his juſtification. Now whether this juſtification is good in point of law or not, is a matter, gentlemen, that I ſhall not enter into upon this occaſion. For it ſeems to me, that if what has been laid down by the gentlemen upon the part of the defendant is well founded in law, they ought to have pleaded that matter to the juriſdiction of the court. But they have not ſo done, but have pleaded a juſtification, which is denied by the plaintiff; and that iſſue coming here by the king's commiſſion of *niſi prius* to be tried by you and before me, we muſt therefore ſee whether he has made out that juſtification or not. And you will pleaſe to recollect he ſays in it, that the plaintiff was guilty of a riot and diſorder, and did endeavour to excite and ſtir up mutiny and ſo forth in the iſland. Thus much I think one may ſay, that where a conqueſt is made of a Chriſtian country (there is ſome ſtrange doctrine relative to infidel countries, as if infidels had no laws to be governed by, that I meddle not with; but as far as relates to the conqueſt of a Chriſtian country,) certainly it is ſaid, that until the crown does promulge laws among them, they are to be governed by their ancient laws. Indeed, common ſenſe ſpeaks it, becauſe otherwiſe they would have no laws nor government among them. However, thus far may be ſaid, to be ſure, under ſuch a conſtitution in which we live, that at leaſt natural equity muſt be the rule, if there is a power that is not circumſcribed by clear, poſitive, and preciſe rules. Yet both natural juſtice and equity are the principles that ought to govern ſuch a truſt. If any one was to write or ſpeak upon it, it is impoſſible but they muſt lay down that propoſition. Then that will be a conſideration for you to try upon this occaſion; conſidering this diſtinction, that we are not trying a cauſe now that does happen within the compaſs of this iſland, but we are trying a fact and a proceeding that happened in a garriſon beyond the ſeas, a place poſſeſſed by the crown of *Great-Britain* for the general benefit of this country and of its commerce.

In order to make out the plaintiff's caſe, in the firſt place they have called *Baſil Cunningham*, who was ſerjeant-major in the royal artillery at *Minorca* in 1771. He ſays, that the plaintiff was there at that time (it is agreed upon all hands that he is a native of the iſland of *Minorca)*. When the plaintiff was brought into priſon, an order was given out to put three additional men upon the guard to do duty over the priſoner *Fabrigas:* this was 24 hours after he had been in cuſtody. The priſon was called Number 1, and is a priſon where thoſe charged or guilty of capital crimes or for deſertion are generally put. He was brought there by a party of ſoldiers, and the witneſs thinks hand-cuffed. It was afterwards admitted that he was. He was confined there four or five days. The centinels informed the witneſs, that they had orders that he ſhould have no converſation with any but the prevoſt-marſhal, and that was put into the general orders: in fact, that no one did viſit him, as he knew of. The prevoſt-marſhal has the cuſtody of perſons accuſed of capital crimes, and keeps the key of the priſon. He ſays, that the plaintiff lived like a gentleman in the iſland. He ſays that he the witneſs was at St. *Phillip*'s, and that the plaintiff was not tried for any crime. This witneſs is croſs-examined, and ſays he has ſeen the plaintiff at different times for eight or nine years: he never heard but that he was a quiet inoffenſive ſubject: the plaintiff lived in St. *Phillip*'s, and was impriſoned in St. *Phillip*'s caſtle. This witneſs was there before Mr. *Moſtyn* became the governor: Mr. *Johnſton* was the governor when the witneſs came firſt to that iſland.

James Tweedy.---He was a corporal in the royal artillery in 1771, and was ſerjeant of the guard; and in the middle of *September* the plaintiff was delivered a priſoner by the ſoldiers of the 61ſt regiment. He ſays he was in priſon in Number 1.; that there were orders from the adjutant-lieutenant not to let any one converſe with him; he heard the adjutant read it: the adjutant's duty is to deliver the orders of the commander in chief. To relieve us from any farther examination relative to that, it was admitted by my brother *Davy* that it was done by the defendant's order. Then a book is produced to you, and the title of it is, ' orders delivered to the ' troops in *Minorca* for the year 1771.' ' 15th *Sept.* 1771. In order to re- ' lieve the main guard at St. *Phillip*'s, which now mounts a centinel extra- ' ordinary upon *Anthony Fabrigas*, confined in priſon Number 1, gene- ' ral *Moſtyn* orders, that three men be added to the artillery-guard in the ' *Caſtle-Square*, as they are moſt contiguous, and that duty taken by them. ' The centinel muſt be poſted night and day, and is to ſuffer no perſon what- ' ever to approach the grate in the door of the ſaid priſon, either to look in ' or have any communication with the priſoner, the prevoſt-marſhal ex- ' cepted, who is conſtantly to keep the key in his poſſeſſion.' Then the witneſs goes on, and ſays the plaintiff's wife and two children applied to ſee the plaintiff; that they were not permitted to come nearer than 30 yards of the priſon; that the plaintiff lay upon boards; he had no bed: his wife brought bedding, but was not permitted to carry it to him. He ſays the guard was ſure to be troubled if they had ſuffered any one to come to him, if they had been guilty of a breach of the order. He ſubſiſted upon bread and water: that when perſons are confined for capital offences, they have the proviſions of the iſland, bread and beef, brought them. He ſays that no one attempted to bring any to the plaintiff, becauſe the order was ſo ſtrict. There was an air-hole at the top of the priſon; a centinel was placed to keep any perſon from approaching it; and ſays that was not done in any inſtance before, even of deſerters. He ſays the plaintiff had a wife and five children. He never heard him ſpeak diſreſpectful of the governor, only he complained whilſt in priſon of his ſufferings.

William Johns was garriſon-gunner at *Minorca* in 71. He had been there nine years. He knew the plaintiff, who lived genteelly, as much ſo as any one in St. *Phillip*'s. He ſays the plaintiff was brought to priſon by a file of men. Then he was going on about hand-cuffing, and ſo on, which the defendant's counſel admitted, as deſcribed by the laſt witneſs; but he was not kept hand-cuffed in priſon. He ſays the priſon is a ground-floor, and is ſet apart for capital offenders. The firſt day he was in priſon, his ſon, a lad of fifteen, came to ſee him, and had proviſions in a baſket. He deſired the men upon duty to let him carry them to his father, and they refuſed him. You ſee, gentlemen, it is owing to thoſe ſtrict orders, that no man was to have acceſs to him.

John Craig is a matroſs. He ſays he was at *Minorca* in 1771. He had been there nine years. He knew the plaintiff to be in very good circumſtances; that is, he was ſo reckoned by people in the iſland. This witneſs ſays, that he did duty upon him when he was in priſon, and none were admitted to ſee him: that his wife and child were refuſed. He ſays, that after five or ſix days confinement, the witneſs was at the quay, and ſaw him put on board a veſſel that was under ſail. He ſays, this was done between three and four in the morning. He ſays his wife and child came down then to ſpeak to him, but the centinel would not let them come near him, nor let the witneſs ſpeak to him, though he wanted ſo to do. Then it is admitted that he was baniſhed, by Mr. *Moſtyn*'s order, to *Spain* for one year: he ordered him to be landed at *Carthagena*, and it was ſo done.

Colonel *James Bidulph* ſays, he has been at *Minorca*; that he knew the plaintiff in *June* 63. He ſtaid there, I think, till the year 71. He ſays the plaintiff appeared to him as one of the what he calls the ſecond ſort of people: he was reputed to have ſome houſes and vineyards: he had a father living. He ſays, that he was not received as one of the nobleſſe, but a sa gentleman. He ſays, ' I ſhould call him a kind of a gentleman farmer.' It was ſaid by the counſel, that the nobleſſe comprehends all the gentry; but upon my aſking the witneſs, he tells you, ' No: they make a very conſiderable diſtinction of the higher and inferior nobleſſe;' ſo that he is what you may call in *England* in the light of the middling claſs of men. He ſays, that as far as he obſerved, he behaved very well: and you ſee this gentleman ſpeaks from 63 to 71, that he behaved very well, and had a very good character. He ſays, that he often employed him to get wine and other things, and he diſpatched his commiſſion very well. He ſays he principally kept company at *Citadella* with a don *Vigo* and don *Sanchio*, who were two of the firſt rank there (that is I think, the capital of the iſland); that he always behaved with very great decency. And, gentlemen, you are told, that the defendant is a lieutenant-general, governor of the iſland of *Minorca*, and has a regiment of dragoons. This is the evidence in ſupport of this action by the plaintiff.

Why then, on behalf of the defendant, they tell you that they ſhall make out this juſtification; that they ſhall ſhew to you that this man behaved in a very turbulent and diſorderly ſort of way; that he behaved with ſuch earneſtneſs, and in ſuch a manner, under ſuch circumſtances, as tended to incite and to raiſe a ſedition. And certainly, gentlemen, if that is the caſe, it is a matter of very ſerious and momentous concern indeed. For the governor of a garriſon, without a poſſibility of calling in another armed force to ſuppreſs it, to quiet them if an inſurrection ſhould be ſtirred up and begin amongſt them, it is to be ſure of very great moment and importance. For a perſon intruſted in ſo high and important a ſtation, and of ſuch a delicate and ticklish ſort, as the government of the iſland, the governor ſhould be extremely vigilant to ſuppreſs the firſt ſeeds of mutiny and ſedition. This they ſay they ſhall be able to ſhew you. But, ſay they, if we ſhall not be able to make out this juſtification ſtrictly and duly, according to the way in which it is pleaded; yet, ſay they, we ſhall lay ſuch circumſtances before you, ſhewing that the general behaviour of the plaintiff was of that kind, and of that complexion, that it will weigh with you by no means to give large damages. This is what I think was pretty much the ſubſtance of what the gentlemen have inſiſted upon by way of opening the defendant's caſe.

Why then, in the firſt place, though it was read at the concluſion of the parole evidence, I may remind you of the ſeveral matters in writing that have been read; and I think it would be but miſpending your time for me to read them at large over again to you. For when I have ſo done, I am ſure I ſhall not be able to do it with more diſtinctneſs than the ingenious officer under me has done: and when I have finiſhed, they would juſt as much be out of your memory as they are now. But you will remember perfectly the nature of the proceedings. I purpoſe to collect them as well as I can into a focus; to bring the pith of them as well as I can to you. The true ground of the diſpute was this: This *Fabrigas* the plaintiff wanted, as you underſtand, the advantage of an order of his late majeſty in council, in the year 1752, by which, keeping under the afforation, not exceeding it, but keeping under it, every one was to have a right of ſelling wines, ſo as he did not exceed the afforation. Really, gentlemen, an exceeding good plan this is; and that is, a regulation of prices to keep people from impoſing in the moſt immoderate manner on the inhabitants. Very likely, a ſyſtem of ſomething of the like ſort would not be improper, but be of very conſiderable uſe even in this metropolis, for what I know. But then it ſeems that this order laſted only from the year 52, during the government of general *Blakeney*. When general *Johnſton* ſucceeded general *Blakeney* as governor of this iſland, he thought proper to make an alteration in that order; and the ſubſtance of the alteration which he made was, that for the future it ſhould not be in the ſuburbs of St. *Phillip*'s (you underſtand, gentlemen, this iſland is divided into, I think, four or five departments—four beſides this arraval, as it is called, of St. *Phillip*'s); and that for the future it ſhall not be ſold promiſcuouſly by every one when the afforation was made, but that for the future the four wards of the arraval of St. *Phillip*'s ſhould draw lots, and ſo take it in ſucceſſion: I ſuppoſe, ſell one after another till the wine is diſpoſed of. And it does ſeem to me by the evidence which has been given by one of the witneſſes, which you will hear more fully ſtated by and by, it ſeems better than when ſold helter ſkelter and promiſcuouſly. And this regulation was purſued with ſome advantage. Then you ſee the plaintiff wanted to go back to the firſt order of 52, which is the order of the king in council. From thence you ſee all this buſineſs ſprung, and from *Allimundo*'s ſelling wine. That is one grievance that was complained of, and which ſeemed to be pretty material, I confeſs, as it ſtrikes me; becauſe I recollect, that by one of the orders it is expreſsly forbid that the officers or judges, or any of them, ſhould have any intermeddling with trade or traffic. Now the complaint of the plaintiff againſt this *Allimundo* is, that he who had the check upon all the reſt, this muſtaſtaph, buys great quantities of grapes, and makes a vaſt quantity of wine himſelf. So while he kept the others under check, he ſells his own wine. Therefore that is another thing to be conſidered of. Therefore you ſee there are repeated petitions upon this occaſion. And I will only ſay this: that to be ſure it turns out at length to have been a miſtake in Mr. *Wright*'s evidence, that that number of 150 perſons that were mentioned by the defendant's counſel as people by him to be produced to back his petition, or people with which his petition ſhould be backed, that he conſidered as a mob, becauſe he takes it down in writing himſelf: and when it comes to be read, it does appear that the expreſſion of the plaintiff was, that he would bring 150 people with him, dealers in wine and grapes, in order to ſhew that his petition was exceedingly reaſonable, and would be agreeable to them. Now that you ſee is the ſubſtance of this writing, together with the ſeveral particulars, orders, and proceedings, which I dare ſay you have in your memory. I muſt obſerve this, to be ſure, theſe gentlemen are not bred in the train of the law, and in a courſe of legal proceedings; but general *Moſtyn* ſeems to me to be as inquiſitive as he poſſibly can to find out the bottom of this thing. It does not appear from the witneſſes that the general had the leaſt ſelf-intereſt to ſerve in this buſineſs of his own, no profit or advantage to himſelf; there is no evidence whatever, not a ſpark of that ſort that appears. He ſends to Dr. *Oliver* and Dr. *Markadal* to make enquiry into this matter. He ſends to them, and deſires to know their opinion. He convokes together a council of the field-officers: and then they are of opinion upon the whole of this buſineſs, whether right or wrong is not to the preſent queſtion: but it ſtrikes me upon this evidence, that this general *Moſtyn* does ſeem to me to be extremely ſolicitous and deſirous to inform himſelf as well as he can, what is to be done upon the occaſion: and at length it ends in a general anſwer, ſuch as it was, that it would be very right to baniſh this man. Now they proceed to call ſeveral witneſſes.

James Wright ſays, he reſided in *Minorca* from *January* 71 to the middle of the year 72, as ſecretary to the defendant Mr. *Moſtyn* the governor. He tells you that this iſland is divided into four diſtricts, excluſive of the arraval of St. *Phillip*'s, which the witneſs always underſtood to be ſeparate and diſtinct from the others, and under the immediate order of the governor (you will obſerve, that it is in that diſtrict that the fortification ſtands): ſo, ſays he, that no magiſtrate of *Mahon* could go there to exerciſe any function, without leave firſt obtained from the governor. The whole iſland, he ſays, is governed by the *Spaniſh* laws, ſubject to be varied by the governor; but not ſubject to that variation in reſpect to *meum* and *tuum* of property, but as to the internal police of the iſland. And he tells you, that his proclamation, with a penalty annexed, is of ſuch force, that where the penalty is annexed, if it is broken, the party is ſubject to it, and is liable to be impriſoned for non-payment. He ſays that the party is ſeized and brought into the court of the chief juſtice criminal.—I would aſk a queſtion of Mr. *Wright*. Has this juſtice criminal a commiſſion to try offences?

Mr. *Wright*. He has the king's commiſſion to try and to hear all cauſes when they come before him. He brings them to the governor, who ſigns them; and till the governor has ſigned them, they are not valid.

Q. But when the governor has once ſigned them, has this gentleman the juriſdiction to try offenders?

A. The aſſeſſeur criminal, and the officer fiſcal, who ſits as judge with him, bring their opinion to the governor, who hears and approves of their opinion, and ſigns it.

Q. Do you make any diſtinction between one part of the iſland and another?

A. The arraval of St. *Phillip*'s is ſo exempt from all kind of juriſdiction, (at leaſt was, when I was there) that it is a rule in the iſland, that if any body dies, comes by their death by any accident, drowned and fiſhed up, that the criminal aſſeſſeur, with I believe the fiſcal and his officers, goes to the dead body. They take the thumb, and ſay, Who killed you? This is a form they go through by way of bringing about a kind of inquiſition taken by a coroner. Whenever they have occaſion to go there, they aſk the governor leave, if within the arraval; and there is a particular inſtance of a ſoldier's wife being killed by her huſband.

Q. Suppoſe a perſon is guilty of a murder within the arraval, who is he tried by?

A. The aſſeſſeur criminal goes and takes inquiſition. That he does not do till he has the governor's leave.

Q. Suppoſe a perſon is murdered, and the murder is found out, to be ſure you don't let the murderer eſcape with impunity?—*A.* Yes.

Q. Now let me aſk you, within the arraval by whom is he tried?

A. The governor appoints, but he generally appoints the aſſeſſeur.

Q. Then the governor does not try him himſelf?

A. He never tries any thing of the ſort.

Q. Then he deputes ſomebody to try him?—*A.* Yes.

Q. Suppoſe in leſſer offences, of theft or riot, does he not appoint other people?

A. In ſmall offences, the muſtaſtaph.

Mr. Juſtice *Gould.* Gentlemen, there was, in conſequence of this affair, a proclamation, that no memorial, unleſs for mercy, could be preſented, unleſs it was firſt ſigned by an advocate, admitted in their courts. He ſays that the king in council iſſues, upon application, alterations, which are regiſtered in the court of royal government; which includes, as I underſtand him, both the civil and the criminal juriſdiction. He ſays that the defendant being much teazed by the plaintiff, by repeated applications, directed Mr. *Wright* to inquire what ſort of a man he was. He tells you, that the plaintiff's father has ſome ſmall vineyards; that the plaintiff is a lover of politics; that he ſpends five days in ſeven in talking of politics; that at that time he believes the plaintiff had no property at all. Then he ſpeaks as to the character of Mr. *Moſtyn.* It ſeems not to be diſputed at leaſt but he is an officer, and a man of as great humanity as poſſible: no one exiſting has tenderer feelings, and his conduct in general is in that manner. Then this gentleman goes through the whole detail of theſe ſeveral writings which have been read to you, which, as I ſaid before, I ſhall not take up your time, for the reaſons I have already given you, in repeating over again, for you have heard them all read. He tells you, amongſt other things, that the inhabitants of the arraval ſent a petition to Mr. *Moſtyn* that the regulation might continue, and not be altered, as the plaintiff deſired. He tells you that the plaintiff having been with the general's aid-de-camp, this witneſs met him, and civilly deſired him to point out what he wiſhed: that it ſhould be done. He ſays there was one Mr. *Vedall* that acted as an interpreter, and a prieſt, one *Seguy*, that joined with Mr. *Wright* to preſs the plaintiff to go home and mind his affairs, and not to bring himſelf into trouble. Then this gentleman ſwears, that Mr. *Vedall* ſaid from the plaintiff as interpreter, that he would come with 150 men to back his petition, or with a petition backed with 150 men. This gentleman ſays, he underſtood by that a mob. I ſhall preſently ſtate to you, as I have already hinted to you, the miſtake in that reſpect. He ſays there was a long converſation by *Vedall* with the plaintiff, as his interpreter, to deſire him to deſiſt: he ſtill repeated the ſame. Then he ſays that he informed the governor, that there were people that he underſtood that were to accompany this man as a mob the next day. That the general ſent for the officers to meet him the next morning. They accordingly came. A large number of people were expected, but only four people of the inferior order brought a petition. They were diſmiſſed to go home peaceably. That the reſult of the whole was, that the plaintiff was baniſhed from the iſland. He ſays, that the defendant ſent him the witneſs to the chief juſtice civil and criminal, who are both *Minorquins*, to aſk what was the governor's power in this caſe? They ſent word back, that his power extended over the man in any ſhape he pleaſed; and if he choſe to baniſh him, he might; they would anſwer it with their ears. He carried the anſwer to the defendant; but however, doubting himſelf of the law, the aſſeſſeur civil delivered him an order in writing, which was dated in 1590; and that imported, that though it was very fit for the governor to aſk the advice of the aſſeſſeurs civil, yet that the governor was not by any means bound to follow it; that it was not deciſive, as in matters of property. He ſays, that the aſſeſſeur civil, upon this occaſion, lent his officer, which he called his tipſtaff, to the governor, to apprehend the plaintiff, who accordingly was taken, was kept in priſon about five days, and then baniſhed.

Then he tells you, upon his croſs-examination, that *Allimundo* makes wine and ſells it in groſs, but not, as he believes, in retail. He ſays that the *Minorquin* language is very bad *Spaniſh.* Then he is deſired to look at the paper; for he had a paper, with which, in giving his evidence, he refreſhed his memory; but upon looking to the words in that paper relative to the 150 men, the words that he has ſet down are,

'The ſame day Mr. *Fabrigas* came for an anſwer to his petition, he 'told the governor's ſecretary, that he ſhould come the next day with a 'petition of people concerned in grapes and wine, which they would 'ſign and come with themſelves, to the number of 150.'

So that you ſee this gentleman ſays, as I apprehend him, (I don't know whether this paper that he has now produced is the original paper that he ſet down the minutes on for recollection and for remembrance at the time: I don't know whether that is ſo or not—however, it may be a copy of it) he ſaid he ſet it down upon looſe pieces of paper at firſt. If that be the caſe, the ſtrong probability is, that this entry that I have read to you muſt have been ſet down recently after the converſation. You ſee the words are, that it was to be 150 people concerned in grapes and wines. Then he tells you, that upon the 11th the governor and the field-officers met, and, as you heard upon his original examination, received a memorial by four men ſigned by blank perſons — you ſee the number is left blank. This gentleman ſays he cannot recollect the number. He ſays he was counting them, but he believes there were more than 40, between 41 and 47, he can't be exact; but the number of perſons by whom it is ſigned is in this copy blank. The purport of this memorial is to deſire that the old practice may be purſued. To which he anſwered by the officers, that they ſhould return home, and behave as good and peaceable ſubjects to his majeſty ought to do. I have anticipated it. I ſee he ſays, according to his memory, there were from 41 to 47 ſignatures. There were a great many marks, you underſtand, to this petition delivered by the four men. He can't ſay he counted it through, and can't affirm what the number was. He was further examined: and he ſays, that upon ſtrict enquiry it did not appear that above one in ten ſupported the plaintiff's deſire;

he is ſure he allows a greater proportion than the truth was: and he ſays he informed the defendant Mr. *Moſtyn* of that. He made the enquiry at the defendant's requeſt, in order to diſcover the ſenſe of the inhabitants.

John Pleydell, aid-de-camp to the governor, ſays, that on the 9th of *September* 71, the plaintiff aſked him to ſee the governor. He told him if he had any thing for the governor, he would deliver it. After a little heſitation the plaintiff delivered a memorial, and deſired him to tell the governor he ſhould come the next day accompanied by 200 or 250 inhabitants of St. *Phillip*'s. He ſays he carried the memorial to the governor, and told him what the plaintiff had ſaid; upon which he ſays, that the governor that day ſent to the commanding officers of the corps to meet at the governor's the next morning, to ſee how he ſhould receive the plaintiff, and the people that were to come with him. Now here you ſee in the evidence given by this Mr. *Pleydell*, there is not that explanation of the nature of the end and deſign of theſe 200 or 250 people being to come with him, as there is in that memorandum that Mr. *Wright* produced: for this is in general ſaid 200 or 250 people. And I can't help remarking to you, that it ſeemed to make an impreſſion on the governor, and to alarm him: for it was upon his delivering this meſſage to him that *Pleydell* ſays he did deſire the field and commanding officers of the corps to aſſemble the next morning, to ſee how he ſhould receive the plaintiff and the people that were to accompany him. But he ſays, inſtead of the plaintiff and ſuch a number of people, four men came the next day and brought a memorial. He believes all the commanding officers were there. He was told by the governor that the ſenſe of all the officers was, that the plaintiff ſhould be taken up as a dangerous and ſeditious perſon: he ſays he had conſulted the *Minorquin* judges, and their opinion was the ſame with the military officers. He ſays this gentleman is an inhabitant of the arraval, juſt by the glacis of the fort; and ſays that he kept his father's vineyard: and that the defendant, far from being a tyrannical over-bearing man, is one of much temper and humanity, and the witneſs ſerved under him the laſt war.

Upon his croſs-examination, he underſtood that by the plaintiff's ſaying he ſhould bring 200 or 250 men, that it was to enforce or give weight to his petition, to certify that that was their opinion; that is, that they concurred in the plaintiff's opinion: but, ſays he, ſo many people coming together is an act in itſelf of a tumultuous kind. He ſays the people in general wiſhed to have Mr. *Johnſton*'s regulation continued. As to the memorial that was brought by the four men, he did not read it, and had it not in his hand; but by juſt the ſuperficial glance he had of it, he thinks there might be 50 or 60 names to it.

Robert Hudſon, fort-adjutant, ſays, that upon the 10th or 11th of *September*, the muſtaſtaph of St. *Phillip*'s told him, that upon delivering out a proclamation (though I ought not to ſum that up, for what this *Allimundo* ſaid is no ſort of evidence)—but he ſays that having received this intelligence (ſo far it is material) he did give the governor an information of it: the governor was then in *Mahon*. He ſays, that before the plaintiff made this objection, he never heard any objections to Mr. *Johnſton*'s regulation; that it was to prevent the wine from turning ſour, by being ſold in that hurrying ſort of way; that great quantities of it produce fluxes and other diſeaſes among the garriſon, for there are few cellars it ſeems in the garriſon. He ſays after this regulation, in ſeveral years experience, none of the wine did turn ſour. Then there was a queſtion that occurred to me to aſk, whether the ſerving it out in this ſparing manner did not influence the price. They ſaid, no, becauſe the afforation fixed the price that it could not exceed it.

Colonel *Patrick Mackellar* ſays he knows the plaintiff; he was called *Red Toney*: I ſuppoſe he has red hair. He ſays he bore a very bad character; that he was a ſeditious, troubleſome, drunken, ſhuffling fellow; that he had many complaints againſt him from two muſtaſtaphs. He was in the iſland from 36 to 50, and again from *May* 60 to laſt *May*. He tells you the arraval of St. *Phillip*'s is ſurrounded by a lime-wall on one ſide, and the other ſide a ditch; that the arraval is a royalty, where the governor has a greater power than any where elſe; that the judges can't interfere but by the governor's conſent.—That correſponds exactly with the explanation that Mr. *Wright* gives.—He ſays, in other parts of the iſland there are jurats, but in the royalty there is only this muſtaſtaph, who is appointed by the governor or commander in chief, and is at pleaſure diſplaced by him. He takes care of weights, meaſures, and markets, and of all wine and the expenditure of it, and ſettles little diſputes between the inhabitants in the firſt inſtance. That the magiſtrates at *Mahon* put the afforation within their juriſdictions. This muſtaſtaph does not make any afforation himſelf, but acquieſces under that of *Mahon*: he only ſignifies the afforation that has been made at *Mahon*. The *Minorquins* are in general governed by the *Spaniſh* laws. When it ſerves their purpoſe, they plead the *Engliſh* laws. Some are well affected to our country; ſome are not. He attended the governor once or twice on account of the plaintiff; and he ſays that the general opinion of all the officers was, that the plaintiff was a dangerous perſon, and that it was proper to take him up and bring him to puniſhment; and were of opinion to baniſh him. He ſays the defendant is a good officer, a polite well-bred man, that he carried his command in the genteeleſt manner, and is a perſon of great humanity.

On his croſs-examination he ſays, that he and the other field-officers met by the defendant's deſire, to know what was their opinion upon this buſineſs. Two of the judges of the iſland thought it intirely in the governor's breaſt to do as he pleaſed; but there was no trial. He does not recollect whether major *Norton* was of that opinion: it was the opinion of the majority. He was aſked whether major *Rigby* was of that opinion or not? He ſays he can't ſay how that was, but does *not* remember that any one officer diſſented from that opinion.

Then *Edward Blakeney*, ſecretary to the governor of that name, is examined. He ſays that nothing can be executed in the arraval of St. *Phillip*'s but by the governor's permiſſion: it is a royalty; he has the abſolute government there. He ſays that gen. *Blakeney* a few months after his arrival in the year 48, baniſhed two *Franciſcan* friars into *Spain* or *Italy*: that was in time of peace. He ſays there was afterwards by a great deal of interpoſition leave given to thoſe people to return. He ſays that the power itſelf was never diſputed, and he took it to be handed down from the *Spaniards*, by whoſe laws, as you obſerve, the *Minorquins* are governed, and at their own requeſt. He ſays the judges have applied to the witneſs for the governor's leave to execute proceſſes in the arraval. He ſays the late king ſent four regiments to relieve the troops ſtationed there, (an order of humanity, like his majeſty) and to have all the wives and children brought home: however, a prieſt took a liking to one of the young women, and would not deliver her up. The prieſt was baniſhed; the conſequence of which was, the girl was delivered up, and the prieſt was brought back again. He gives theſe as three inſtances where people were baniſhed from the iſland. He ſays that theſe friars, two *Franciſcans*, were as he believes natives, *Minorquins*. This is the parole evidence that is given on the part of the defendant. I have already ſtated to you the ſubſtance of all that written evidence: you have heard it, and you are fully maſters of all the circumſtances attending this cauſe.

Now, gentlemen, it is for your conſideration, whether the defendant, general *Moſtyn*, has made out his juſtification; whether he has proved that the defendant was guilty of a riot, and of a diſturbance, and that he endeavoured to excite and to ſtir up a mutiny and a ſedition in the garriſon. If that is the caſe, I ſhould imagine, gentlemen, the plaintiff will appear to you as a perſon of a very dangerous diſpoſition; and that ſome very ſtrict methods muſt be neceſſary to be taken in ſuch a ſituation, in order to preſerve the garriſon, and to prevent an inſurrection. If it is inſinuated to the ſoldiers that they are abuſed by the officers under the governor, by the governor's connivance, or by his remiſſneſs; we will ſay, though he has no kind of intereſt in it, but by his groſs encouragement, they are oppreſſed and impoſed upon;—ſuppoſe ſuch a perſuaſion ſhould be infuſed into the people compoſing the garriſon, I think it is very clear, and I need not argue to you, to ſhew what dangerous conſequences may reſult from that. Then you will conſider how this caſe ſtands in that reſpect. You ſee that this perſon, after ſeveral years (a new regulation having been made by governor *Johnſton*) is for ſetting up again and reviving an old regulation made in 52; and that he could not prevail ſo to do.---Then the ſenſe of the iſland was to be taken. It is in the governor's power to reſcind this, as I apprehend, becauſe it is not diſputed but that by his commiſſion, according to his plea, he is intruſted with the whole civil and military government of the iſland: and I preſume, however, if he was to have made ſuch an alteration, he had authority to do it: the governor himſelf, in ſhort, is intruſted with it. Then this perſon wants to ſet that old buſineſs on foot again; and he does produce, (for ſo I muſt take it from the writing that that gentleman has produced) he does mean to ſhew to the governor, that there are a vaſt number of people of his ſenſe in the affair. The misfortune of it is, however, that this is not expreſly conveyed to the governor; becauſe, according to the whole belief of the agent, though he underſtood that it was meant to give weight to the petition, not to proceed to direct violence; for what I can find, that was not directly explained to general *Moſtyn*. Now you will conſider upon this evidence, whether you are ſatisfied that this was ſuch a behaviour in the plaintiff, as to afford a juſt concluſion, that he was a man that was about to ſtir up a ſedition and a mutiny in the garriſon; or whether he meant no more than earneſtly to preſs his ſuit, and to endeavour to obtain redreſs from what ſeemed to him to be a grievance. If you ſhall ſee it in that latter light, to be ſure there is no queſtion at all that he will be intitled to recover in this action. As for the damages, I ſhall not ſay a word upon that matter, becauſe it is your province to conſider on it upon all the circumſtances. Then there is another conſideration, which will be a legal conſideration: that ſuppoſing you ſhould be of opinion that this was really a ſeditious behaviour in this plaintiff, which you will conſider of, and alſo whether he acted in ſuch a manner as to ſtir up ſedition, you will be pleaſed to ſay That when you bring in your verdict. The next thing is, that ſuppoſing you ſee the plaintiff's conduct in that light as a mutinous purpoſe, whether the defendant could be warranted to proceed in that manner. That is, to be ſure, a matter of very great conſequence. It is not like perſons in this country, in *England*, where no freeman ſhall be baniſhed his country; which is carried to ſuch an extent, that lord *Coke* tells us, that it is not in the power of the king to ſend a man againſt his will even to be the lord-lieutenant of *Ireland* (I don't believe there are many gentlemen that would recoil at that): but it could not be done, becauſe it would be an exile: you drive a man againſt his will out of his native country. But however, this is a caſe you ſee in a conquered iſland, in a ceded iſland. And certainly I ſhould conceive myſelf, that if in a garriſon where it is abſolutely neceſſary to keep down all theſe mutinous ſpirits, from the apparent reaſon of danger, that it muſt certainly be lawful for the governor at leaſt to lay a man up in priſon that is turbulent. But I ſhould doubt a great deal myſelf; it will be a matter that you, gentlemen, will have an opportunity to conſider, if you pleaſe, if you ſhall be of opinion that the plaintiff's behaviour was ſeditious; and that is the reaſon that I deſire you to attend to that, and tell me when you give in your verdict. It would be carrying matters to a very great length indeed, in my apprehenſion, to ſay, that you ſhould exile and baniſh a man from his native country. I cannot, ſitting here and as at preſent adviſed, think that even in ſuch a ſituation that could be warranted. I cannot think but that a perſon might be ſecured and confined, in order to be brought to trial, and properly puniſhed for it. I leave it to you under theſe obſervations, and you will conſider upon the whole of it, what damages you ſhould pleaſe to give to the plaintiff. As to the defendant, you hear the character he bears from all the witneſſes: a man of great humanity, who has been guilty of an inordinate uſe of his power, but not with a malevolent, bad, and wicked deſign. To be ſure, you will not deal out the damages with the ſame view as you would againſt a man that acted clearly and demonſtrably with malice. It is your province, gentlemen, to conſider all the circumſtances, and to give in your verdict accordingly.

The jury withdrew, and in about an hour returned, and gave in their verdict for the plaintiff, with three thouſand pounds damages, and all coſts of ſuit.—And at the ſame time ſaid, that, in their opinion, the plaintiff was not guilty of mutiny or ſedition, or acted in any way tending thereto.

Further proceedings in this cauſe.

THE counſel for the defendant, while the jury withdrew to conſider their verdict, tendered to the judge minutes of a bill of exceptions; and on the fourth day of *Michaelmas-Term*, the court of *Common-Pleas* was moved for a new trial.

The defendant's counſel made his motion on two grounds.

Firſt, for exceſs of damages; alledging that the jury had proceeded on a miſtake, for they had found that the plaintiff was not guilty of mutiny or ſedition; whereas he inſiſted it was moſt plain from the written evidence, that the plaintiff had endeavoured to make the garriſon believe that he was their friend.

Secondly, that a new trial ought to be granted, becauſe this action could not be maintained, as the court had no juriſdiction.

The rule to ſhew cauſe was, of courſe, granted.

On the 25th of *November*, Mr. juſtice *Gould* reported the evidence, which agreed with the printed trial. On the 26th, it was ſolemnly argued on the firſt objection of exceſs of damages, the court not permitting the defendant's counſel to argue the ſecond objection, as they ſaid it would be introducing a new mode of practice, which might eventually be prejudicial to ſuitors; and as the bill of exceptions went with the record to the court of *King's Bench*, that was the proper court to determine on it.

Lord chief juſtice DE GREY *delivered his opinion to the following purport.*

I HAVE always conſidered this mode of application for a new trial, as very ſalutary to the ſuitors, who may be injured by miſtakes; and likewiſe to the jury, as it reforms their errors, if they commit any, and is a happy ſubſtitute for the much more grievous proceeding that the common law had directed. With regard to the interpoſition of the courts of juſtice on the *quantum* of damages, where the ſubject of the ſuit is contract, the court has an eaſy rule to go by in rectifying the miſtakes of the jury, becauſe there is a certain teſt and ſtandard. As for inſtance, if a man ſhould bring an action on a note for a hundred pounds, and the jury ſhould give for damages a thouſand pounds under the idea of intereſt, they would go upon a miſtaken principle, as it is certain the party could not have ſuſtained an injury adequate to that compenſation: the damages would be exceſſive, and the court would correct it. But in perſonal wrongs, it is much more difficult to draw a line. I do not go ſo far as to ſay, that in perſonal wrongs the court will never interpoſe, even upon the article of exceſſive damages, if they are outrageous, and appear ſo to the court; that is, as my brother *Gould* expreſſed it, if it appears, in giving the damages, that the jury did not act with deliberation, but with paſſion, partiality, or corruption. As for inſtance, if two ordinary men ſhould quarrel at an alehouſe, and one ſhould give the other a fillip upon the noſe, and a thouſand pounds ſhould be given for damages, which is ten times more than both the parties are worth, ſuch damages would be evidence that the jury had not acted with the deliberation that the adminiſtration of juſtice requires. It is a perſonal tort, but the damages are exceſſive. There are other circumſtances, where the court, even upon exceſſive damages, might interpoſe: and I think the counſel for governor *Moſtyn* have very wiſely endeavoured to ground themſelves upon ſuch a principle in this cauſe; which is, that the jury, in aſſeſſing the compenſation for the injury, have proceeded on a miſtake. It is poſſible that in many inſtances that miſtake may ariſe from the direction of the court; for the court may perhaps direct the jury to attend to a circumſtance, that in point of law is not proved, or is not the ſubject-matter for their conſideration: or it is poſſible that the jury may ſo miſtake the evidence, as to believe the fact to be true, when it is not ſo: then it comes to be a proper motion for a new trial, becauſe the verdict is contrary to evidence. Or the jury may give credit to ſuch circumſtances, which either have not been proved, or are not true, and they may aggravate the damages upon that account: they then act under a miſtake, which moſt certainly ought to be rectified. That is the ground upon which the preſent application is made. But if you conſider it in your own mind, it will neceſſarily reſult to this propoſition, that the jury have found a fact contrary to evidence. As my brother *Davy* was aware that there might be ſome difficulty in maintaining that propoſition, he put it into another ſhape, and ſaid it was a circumſtance that was proper for the jury to conſider as a ground for mitigating the damages; inſtead of which, they had from that circumſtance aggravated the damages. So that, upon the whole, it will ſtill recur to the ſame propoſition, that they have acted upon a miſtake, in giving aggravated damages upon a fact, which they have found contrary to evidence. For they were unanimouſly of opinion, that what the plaintiff did, was not done with any ſeditious view, or tending thereto, but was an earneſt preſſing of a ſuit to be relieved from a grievance ſuppoſed. That was the inquiry they were particularly ordered by my brother *Gould* to make; and that was the anſwer that they gave. Now, if in point of fact they were ſo miſtaken, as that they ought not to have been of opinion that the plaintiff did not act with a ſeditious view, but was only preſſing importunately a ſuit for relief from a ſuppoſed grievance, then they have given damages upon a falſe ſuppoſition; they have given ſuch as are not proportionate to the injury received. The argument then ſeems to me to come to this, that they have believed a fact which they ought not to have believed, becauſe the proof was againſt it. We are therefore to conſider, whether the damages ought to have been raiſed ſo high or not. And there are two caſes inſiſted upon. One is the behaviour of Mr. *Fabrigas*, as tending to raiſe diſorder and ſedition in the government. The other is the conduct of governor *Moſtyn*, in extenuation of damages, as acting under a miſtake, and having taken the beſt advice the nature of his ſituation would admit. In order to underſtand this, we muſt ſee for a moment the ſituation the government ſtood in.

This iſland was conquered in 1708. The conquerors (no matter in what mode) had a right to impoſe what laws they pleaſed. Upon the ceſſion of the iſland, by the eleventh article of the treaty of *Utrecht*; part of the right of the conqueror was given up; for it is ſtipulated, that the inhabitants ſhall enjoy their honours, eſtates, and religion. So far therefore the right of the conqueror is reſtrained; but with regard to their laws, there was no ſtipulation, nor was it ever underſtood ſo by ſober people. It is well known that the earl of *Stanhope* and the duke of *Argyle*, as plenipotentiaries upon this ſubject, and afterwards my lord *Bolingbroke*, did aſſure the inhabitants, that they ſhould enjoy their own rights and privileges, ſtill ſubject to the ſupreme dominion of the conqueror. Thoſe rights and privileges which they were to enjoy, were the eſtabliſhed municipal laws of the iſland, under ſuch regulations as the legiſlature of this country ſhould impoſe upon them. This aſſurance, made at that time, has been attended to by government ever ſince; for they have had the enjoyment of their privileges ſo aſſured to them, and have had ſuch regulations, as the government and the nature of affairs have from time to time required.

The king in council, in the year 1752, (upon ſeveral complaints having been made againſt general *Anſtruther*, who had been the governor) made the regulation, as it is called, of 1752; by which the king in council intended to provide againſt that oppreſſive power of the governor, which the inhabitants had complained of, and that the people of the iſland ſhould be at liberty to ſell their wines at the price fixed by the jurats of the different terminos.——Theſe powers were ſoon found, or thought, to be abuſed; which occaſioned a repreſentation to be made by the then governor to the king in council, which produced the new regulation of 1753, which leaned on the other ſide, as the natives ſaid: for as the former was ſuppoſed to give too much power to the magiſtrates of the iſland, making them independent of the governor; ſo this threw too much power into the hands of the governor, and laid them too much at his mercy.

There is one thing mentioned in my brother *Gould*'s report, which I think proper to take notice of, becauſe it ſhould not be ſo miſtaken. (a) one of the witneſſes in the cauſe repreſented to the jury, that in ſome particular caſes, eſpecially in criminal matters, the governor reſident upon the iſland does exerciſe a legiſlative power. It was groſs ignorance in that perſon to imagine ſuch a thing. I may ſay, *it was impoſſible, that a man who lived upon the iſland, in the ſtation he had done, ſhould not know better*, than to think that the governor had a civil and criminal power veſted in him. In the iſland, the governor is the king's ſervant: his commiſſion is from the king, and he is to execute the power he is inveſted with under that commiſſion, which is to execute the laws of *Minorca* under ſuch regulations as the king ſhall make in council. How does it ſtand after the conqueſt of this iſland in 1757, by the *French*, and the relinquiſhment of it upon the peace? When general *Johnſton* was ſent as deputy-governor, he thought fit to make a new regulation. Now, I conceive, it was a vain imagination in the witneſſes at the trial, (for we don't want to go to *Minorca* to underſtand the conſtitution of that iſland) it therefore was a vain imagination in the witneſſes to ſay, *that there were five terminos in the iſland of* Minorca. I have at various times ſeen a multitude of authentic documents and papers relative to that iſland, and I do not believe, in any one of them, that the idea of the arraval of St. *Phillip*'s being a diſtinct juriſdiction was ever ſtarted. *Mahon* is one of the four terminos: *St.* Philip'*s, and all the diſtrict about it, is comprehended within the termino of* Mahon. But, however, as it happens to lie near the glacis of the fortification, and the governor's power (I don't mean his legal authority) being there greater than it may be in more diſtant parts of the iſland, there has been a reſpect ſhewn him, a decency perhaps to the governor, which has prevented the magiſtrates interfering without his knowledge. *But to ſuppoſe that there is a diſtinct juriſdiction, ſeparate from the government of the iſland, is ridiculous and abſurd:* it is what I never did hear of, till it was mentioned in my brother *Gould*'s report. General *Johnſton* made an alteration in the arraval of St. *Phillip*'s, which is a diſtrict of a mile or two in circumference, with ſome few hundred inhabitants. He divided this into a ſubdiviſion of four other diſtricts, and annulled by his own authority the regulation of 1752, reſpecting the mode by which the wines were to be ſold. As far as appears in this cauſe, he did that without authority. If he had the ſanction of government, his inſtructions ſhould have appeared, if the defendant intended to avail himſelf of them. I only mean to be underſtood, that general *Johnſton* had no authority to ſuperſede the order of council by his own power; but at the ſame time it ſeems to be a very ſalutary proviſion; and if he had repreſented it to the king in council, no doubt but it would have been approved of. I may ſay that the inhabitants approved of it, becauſe from that time there never has been any complaint of it. A few years ago there were a multitude of complaints brought againſt the arbitrary acts, as they were called, and the oppreſſive conduct of this very general *Johnſton*. They were heard in a full council with a great deal of ſolemnity for a great number of days, and the council came into a reſolution upon them. This alteration of the order in 1752 was not one of their charges againſt him; therefore it is clear, that the inhabitants of the arraval did not at that time think it an oppreſſion.

We come now to the point of time, when Mr. *Fabrigas* complained of it. I will not condemn him for referring to the order of council. He had a right to know whether this alteration of governor *Johnſton* was made by authority, and whether it had the effect of the power of the king in council; therefore I do not condemn the thing itſelf. Mr. *Fabrigas* not having met with that ſucceſs which he expected, (though governor *Moſtyn*, I think, till the time of the arreſt and commitment, acted with a great deal of caution, judgment, and prudence, I can almoſt ſay impartiality) and not being ſatisfied with the opinion of the governor upon the repreſentation and defence of *Allimundo*, which he had never ſeen, deſires to ſee it. His petition is rejected. This produces a peeviſh application again and again to the governor, and from one complaint another ariſes. New grievances are ſuppoſed to be received, not only by Mr. *Fabrigas*, but by the inhabitants of the arraval at large: and I cannot ſay that I approve of the manner in which he did proſecute his claim: the effect of it is another thing. He certainly did not obſerve that decency and reſpect to the governor which he ought to have done. If the governor did not attend to his complaints, the king in council was open to him. We all know, that the way to the king in council has been purſued very often, where the governor has not attended to the complaints of the *Minorquins*. His expreſſions indeed have the appearance of humility and reſpect; but yet there is a petulance in the continuing his petitions, which might diſturb the governor. Thus the matter goes on; this man ſtill complaining, and earneſtly preſſing of his ſuit upon a grievance ſuppoſed, till the ſecretary informed the governor, that the plaintiff would come next day with his petition backed with 150 of the dealers in grapes and wine. This it is that is ſuppoſed to alarm the governor. Now I will not reflect ſo much upon the honour of any governor of the garriſon of fort St. *Phillip*'s, as to ſuppoſe, that he really thought his garriſon was in any more danger than this court is at the preſent moment; nor will I ſuppoſe, that if he did think his garriſon was in danger, that he would have taken ſuch feeble means to defend it. The governor was diſconcerted by the petulance of the man, and was off his guard; and though he took the advice of thoſe who were the proper perſons to adviſe him there, *yet he muſt have too much ſenſe to imagine, that the advice they gave him was ſuch as he could either in law or reaſon follow.* I am not ſpeaking now of the law of this iſland; but it is totally contrary to all principles, and to every idea of juſtice in any country. But the next day, this petition is preſented by four men only. Then there is an end of all danger to the garriſon and the government; and you plainly ſee no diſturbance was meant; nor is there any evidence of his ſoliciting the people, of his breeding cabals among them, or exciting any tumult or diſorder. The plaintiff had, to ſay the worſt, only behaved himſelf ill in the mode of his importunity; and when he was open to the laws of that country (for ſuch laws I preſume there muſt be) if he had offended, he might have been proſecuted in the courts of criminal juriſdiction. Whether he acted improperly, from not having ſucceeded in prevailing upon the majority of the people to think he was right in deſiring to inforce the order of 1752, is not the queſtion: the people ſeemed to be content with the variation, or deviation, made by general *Johnſton*. Now when all theſe matters are over, this man is committed to priſon; and there is the firſt complaint: and I muſt take it upon this motion, that it was a falſe impriſonment. If the governor had ſecured him, nay, if he had barely committed him, that he might have been amenable to juſtice; and if he had immediately ordered a proſecution upon any part of his conduct; it would have been another queſtion, and might have received a different conſideration. But he commits him to the worſt priſon in the iſland; and in a way *which I cannot conceive came from general* Moſtyn. What could induce him to uſe a man with ſuch hardſhip and inhumanity? Was not putting him into priſon ſufficient? Why was he to be deprived of the ſociety of his wife and children, without being allowed any thing for his ſuſtenance but bread and water, and to lie upon the floor? In this condition he remains for ſix days: then comes a ſecond impriſonment; for I take the whole year to be a continuation of the falſe impriſonment. He is then confined on board a ſhip, under the idea of a baniſhment to *Carthagena.* I do believe Mr. *Moſtyn* was led into this, under the old practice of the iſland of *Minorca*, by which it was uſual to baniſh: I ſuppoſe the old *Minorquins* thought fit to adviſe him to this meaſure. But the governor knew that he could no more impriſon him for a twelvemonth, than that he could inflict the torture; yet the torture, as well as baniſhment, was the old law of *Minorca*, which fell of courſe when it came into our poſſeſſion. Every *Engliſh* governor knew he could not inflict the torture; the conſtitution of this country put an end to that idea. This man is then dragged on board a ſhip, with ſuch circumſtances of inhumanity and hardſhip, *as I cannot believe of general* Moſtyn; and he is carried into a foreign country, and of all countries the worſt; for I believe there are directions given, that no perſons ſhould go to *Spain*, or be permitted to quit the port of *Carthagena.* All his continuance in *Spain*, I look upon as a continuance of the falſe impriſonment; becauſe every conſtraint upon perſonal liberty, without legal authority, is a falſe impriſonment: and if a captain leaves a ſailor upon a deſert iſland, though he is left at liberty there, yet the keeping him from that place to which he had a right by law to come, is an impriſonment.

(a) *Vide* Mr. *Wright*'s evidence, page 170.

If upon proper cauſe the courts of juſtice there had in a judicial way exerciſed any power which their laws would have ſupported; and which the laws of this country might not; what the effect of that would have been has nothing to do with this cauſe; for now we take it upon the general iſſue, *not guilty.* In this caſe, the man has been impriſoned under circumſtances of great hardſhip for twelve months, and kept from the communication of his family and his own concerns. In this ſituation he brings his action; and the jury have thought fit to give three thouſand pounds damages. To be ſure, three thouſand pounds is an immenſe ſum for a *Minorquin* to recover: my brother *Davy* thought proper to uſe the expreſſion of its being an outrageous ſum. To ſay what is the value of the liberty of a man's perſon, ſecluded from his family, under circumſtances of hardſhip, for twelve months, is a difficult matter. Men's minds will vary much about it: I ſhould think one thing, another would think another. In this caſe of perſonal wrongs, what has the law ſaid? The law has ſaid, that a jury of twelve men ſhall be the judges to determine and aſſeſs the compenſation for that perſonal wrong. We cannot but recollect what paſſed in thoſe unfortunate affairs that happened about the ſecretary of ſtate and a printer's boy. A ſervant is taken up under a miſtake, and carried to a better houſe than his own, is fed with better proviſions than he had of his own, and is treated better than he would have been treated when at home; yet he brings an action of falſe impriſonment, and has 300*l.* damages. It was more than he could earn for years. The court was applied to for a new trial, upon exceſſive damages. What did the court ſay? (and I never heard their judgment in that matter arraigned) ' We are not the judicature to determine upon the deliberative judgment ' of a jury, upon ſuch a ſubject as this. Have the jury exerciſed their ' judgment? or, is there any imputation upon their conduct except the ' idea of the compenſation not being proportioned? Not at all.' How can a court of juſtice, that is to determine upon law, ſet a value upon this, and ſay, it is wrong? What would be the conſequence of it? If we ſay this is wrong, we muſt ſay what is right. Then we are to tell the jury, 'You are not to find 3000*l.*' 'May we find 2000*l.* 1000*l.* 500*l.* or 100*l.*? Tell us where you think we ſhould be right?' 'We muſt not tell you; we have no authority to do that; but you muſt not give outrageous damages.' For tho' I may know in my own mind whereabouts I ſhould compenſate the injury, without ſaying whether it would be more or leſs than this, yet I cannot preſcribe to the jury what I think the value of perſonal liberty. But it is ſaid, that the governor did what he could in his ſituation; but was miſtaken. If he was miſtaken, it is a matter of mitigation before the jury, and it comes exactly to the ſame point. I preſume it was preſſed before the jury, and they paid ſuch attention to it as they thought proper; and therefore it would be totally evoking the cauſe from its proper determination to ſay, that the jury ought to give ſome other damages than they have. As to the ground on which the defendant's counſel have made this motion, it ariſes from an accident, and I think an accident which was very properly provided for: for had it not been, that the learned judge who tried the cauſe had particularly in terms recommended the conſideration of this point to the jury, and taken their anſwer, the defendant could not have had any ground to apply for a new trial. In my opinion, the learned judge did very right, and acted with great prudence and juſtice to the parties, and to the future queſtions that may ariſe in this cauſe; for it looks as if the parties from the beginning intended to apply either here or elſewhere. Now it is a very different queſtion, whether the governor of *Minorca*, finding a ſubject mutinous and ſeditious, and diſturbing his government, can arreſt and impriſon him? or, whether he can juſtify what he has done, the jury having found that he was neither mutinous nor ſeditious? Had they found the contrary, that fact might have been taken into conſideration in a court of juſtice; but as they have exerciſed that juriſdiction the conſtitution has given them, I think there ought not to be a new trial.

Mr. Juſtice *Gould* ſaid, that the court was not warranted in determining that the damages were exceſſive, without breaking in upon the fundamental principles of the conſtitution.

Mr. Juſtice *Blackſtone* obſerved, that theſe damages could not be called angry or vindictive damages, as the injury was as outrageous as the damages could be exceſſive.

Mr. Juſtice *Nares* declared, that Mr. *Fabrigas* had been impriſoned and treated in ſuch a manner that he did not care to repeat.

The whole bench were unanimous in refuſing a new trial, and the rule was conſequently diſcharged.

Farther Proceedings in the Cauſe of Fabrigas *and* Moſtyn.

THE court of *Common-Pleas* having refuſed governor *Moſtyn* a new trial, he reſorted to a writ of error, which was allowed on the 14th of *December* 1773.

On the 16th of *December* he was obliged to put in bail.

A rule was given to tranſcribe the record in *Hilary-Term*, 1774.

The firſt *ſcire facias* iſſued in *Eaſter-Term.*

The ſecond *ſcire facias* iſſued in the ſame term, on the 16th of *May*, returnable in *Trinity-Term.*

Mr. *Fabrigas*, the defendant in error, was ſerved with a ſummons on the 7th of *June*, that the plaintiff might have time to aſſign errors till judge *Gould* had put his ſeal to the bill of exceptions.

On the 8th of *June*, judge *Gould* came into the court of *King's Bench*, and acknowledged his ſeal.

The errors were aſſigned on the 16th of *June.*

The defendant pleaded in *nullo eſt erratum* on the 20th.

A *concilium* was moved for on the 21ſt of *June.*

It was ſet down for argument for the firſt *Friday* in *Michaelmas-Term.*

It was argued on *Tueſday* the 15th of *November* 1774; and the record is as follows.

The record of the proceedings in Fabrigas *and* Moſtyn.

The writ of error.

As *yet* of *Trinity-Term*, in the fourteenth year of the reign of king *George* the third.

Our lord the king ſent to his truſty and well-beloved ſir *William de Grey*, knight, his chief juſtice of the Bench, his cloſe writ, in theſe words; that is to ſay: *George* the third, by the grace of God, of *Great-Britain*, *France*, and *Ireland*, king, defender of the faith, *&c.* To our truſty and well-beloved ſir *William de Grey*, knight, our chief juſtice of the Bench, greeting. Foraſmuch as in the record and proceſs, as alſo in giving of judgment in a plaint which was in our court before you and your aſſociates, our juſtices of the Bench, by our writ between *Anthony Fabrigas* and *John Moſtyn*, eſq. of a plea of treſpaſs, aſſault, and falſe impriſonment, as it is ſaid, manifeſt error hath intervened, to the great damage of the ſaid *John*, as by his complaint we are informed: we, willing that the ſaid error (if any be) be duly amended, and full and ſpeedy juſtice done to the ſaid parties in this behalf, do command you, that if judgment be given thereupon, then you ſend to us diſtinctly and plainly, under your ſeal, the record and proceſs of the ſaid plaint, and all things touching the ſame and this writ; ſo that we may have them in fifteen days of St. *Hilary*, whereſoever we ſhall then be in *England*; that inſpecting the record and proceſs aforeſaid, we may cauſe further to be done thereupon for amending the ſaid error, as of right, and according to the law and cuſtom of *England*, ſhall be meet to be done. Witneſs ourſelf at *Weſtminſter*, the ſixth day of *December*, in the fourteenth year of our reign, *Hil. A. L.*

The return to the writ.

The anſwer of ſir *William de Grey*, knight, chief juſtice within-named.—The record and proceſs of the plaint within mentioned, with all things touching the ſame, I ſend before our lord the king, whereſoever, *&c.* at a day within contained, in a certain record to the writ annexed, as I am within commanded, *&c.* *William de Grey.*

Pleas. Inrolled at *Weſtminſter* before ſir *William de Grey*, knight, and his brethren, juſtices of his majeſty's court of *Common Bench*, of *Eaſter-Term*, in the thirteenth year of the reign of our ſovereign lord *George* the third, by the grace of God, of *Great-Britain*, *France*, and *Ireland*, king, defender of the faith, and ſo forth. Rolls 616 and 617.

The declaration.

In the Common-Pleas.
LONDON *to wit.* } JOHN MOSTYN, late of *Weſtminſter*, in the county of *Middleſex*, eſquire, was attached to anſwer *Anthony Fabrigas* of a plea, wherefore he with force and arms made an aſſault upon the ſaid *Anthony*, at *Minorca*, (to wit) at *London* aforeſaid, in the pariſh of Saint *Mary le Bow*, in the ward of *Cheap*, and beat, wounded, and ill-treated him, and there impriſoned him, and kept and detained him in priſon there for a long time without any reaſonable or probable cauſe, contrary to the laws and cuſtoms of this realm, againſt the will of the ſaid *Anthony*, and compelled the ſaid *Anthony* to depart from and leave *Minorca* aforeſaid, where the ſaid *Anthony* was dwelling and reſident, and carried and cauſed to be carried the ſaid *Anthony* from *Minorca* aforeſaid, to *Carthagena* in the dominions of the king of *Spain*, againſt the will of the ſaid *Anthony*; whereby the ſaid *Anthony* was put to great expence and trouble, and the goods and effects of the ſaid *Anthony* there were diminiſhed, loſt, ſpoiled, and conſumed, and the family of the ſaid *Anthony* were brought to great want and diſtreſs, and the ſaid *Anthony*, during all the ſaid time, was thereby deprived of the comfort of his ſaid family: and alſo wherefore the ſaid *John* with force and arms made another aſſault upon the ſaid *Anthony* at *Minorca*, (to wit) at *London* aforeſaid, in the pariſh and ward aforeſaid, and beat, wounded, and ill-treated him, and there impriſoned him, and kept and detained him there in priſon for a long time, without any reaſonable or probable cauſe, contrary to the laws and cuſtoms of this realm, againſt the will of the ſaid *Anthony*; and did other wrongs to him, to the great damage of the ſaid *Anthony*, and againſt the peace of our lord the now king: and thereupon the ſaid *Anthony*, by *Richard Gregory*, his attorney, complains, that the ſaid *John*, on the firſt day of *September*, in the year of our Lord 1771, with force and arms, (to wit) with ſwords, ſtaves, ſticks, and fiſts, made an aſſault upon the ſaid *Anthony*, at *Minorca*, (to wit) at *London* aforeſaid, in the pariſh of St. *Mary le Bow*, in the ward of *Cheap*, and beat, wounded, and ill-treated him, and then and there impriſoned him, and kept and detained him in priſon there for a long time, (to wit) for the ſpace of ten months, without any reaſonable or probable cauſe, contrary to the laws and cuſtoms of this realm, againſt the will of the ſaid *Anthony*, and compelled the ſaid *Anthony* to depart from and leave *Minorca* aforeſaid, where the ſaid *Anthony* was then dwelling and reſident, and carried and cauſed to be carried the ſaid *Anthony* from *Minorca* aforeſaid to *Carthagena*, in the dominions of the king of *Spain*, againſt the will of the ſaid *Anthony*; whereby the ſaid *Anthony* was then and there put to great expence and trouble, and the goods and effects of the ſaid *Anthony* there were diminiſhed, loſt, ſpoiled and conſumed, and the family of the ſaid *Anthony* were thereby brought to great want and diſtreſs, and the ſaid *Anthony* during all the ſaid time was deprived of the comfort of his ſaid family: and alſo, for that the ſaid *John* on the ſaid firſt day of *September*, in the year of our Lord 1771 aforeſaid, with force and arms, (to wit) with ſwords, ſtaves, ſticks, and fiſts, made another aſſault upon the ſaid *Anthony*, at *Minorca*, (to wit) at *London* aforeſaid, in the pariſh and ward aforeſaid, and then and there beat, wounded, and ill-treated him, and then and there impriſoned him, and kept and detained him there in priſon for a long time, (to wit) for the ſpace of other ten months, without any reaſonable or probable cauſe, contrary to the laws and cuſtoms of this realm, againſt the will of the ſaid *Anthony*; and then and there did other wrongs to him the ſaid *Anthony*, to the great damage of the ſaid *Anthony*, and againſt the peace of our ſaid lord the king: and thereupon the ſaid *Anthony* ſaith, that he is injured and hath ſuſtained damage to the value of 10,000*l.* And thereof he bringeth ſuit, *&c.*

The plea.

And the ſaid *John*, by *James Dagge* his attorney, comes and defends the force and injury, and ſays he is not guilty of the premiſes above laid to his charge in manner and form as the ſaid *Anthony* hath above complained thereof againſt him; and of this he puts himſelf upon the country, *&c.* and the ſaid *Anthony* doth ſo likewiſe. And for further plea in this behalf as to the making the ſaid aſſault upon the ſaid *Anthony* in the firſt count in the ſaid declaration mentioned, and beating and ill-treating him, and impriſoning him, and keeping and detaining him in priſon for the ſaid ſpace of time in the ſaid declaration mentioned, and compelling the ſaid *Anthony* to depart from and leave *Minorca* aforeſaid, and carrying and cauſing to be carried the ſaid *Anthony* from *Minorca* aforeſaid to *Carthagena*, in the dominions of the king of *Spain*, by the ſaid *John* above ſuppoſed to have been done; he the ſaid *John*, by leave of the court here for this purpoſe firſt had and obtained, according to the form of the ſtatute in that caſe made and provided, ſays, that the ſaid *Anthony* ought not to have or maintain his ſaid action thereof againſt him the ſaid *John*, becauſe he ſays that he the ſaid *John*, at the ſaid time, *&c.* and long before, was governor of the ſaid iſland of *Minorca*, and during all that time was inveſted with and did hold and exerciſe all the powers, privileges, and authorities, civil and military, belonging and relating to the government of the ſaid iſland of *Minorca*, in parts beyond the ſeas; and the ſaid *Anthony* before the ſaid time when, *&c.* (to wit) on the ſaid firſt day of *September*, in the year aforeſaid, at the ſaid iſland of *Minorca* aforeſaid, was guilty of a riot and diſturbance of the peace, order, and government of the ſaid iſland, and was endeavouring to create and raiſe a mutiny and ſedition among the inhabitants of the ſaid iſland, in breach of the peace, violation of the laws, and in ſubverſion of all order and government; whereupon the ſaid *John*, ſo being governor of the ſaid iſland of *Minorca* as aforeſaid, at the ſaid time when, *&c.* in order to preſerve the peace and government of the ſaid iſland, was obliged, and did then and there order the ſaid *Anthony* to be baniſhed from the ſaid iſland of *Minorca*, and to leave and quit the ſaid iſland. And in order to baniſh and ſend the ſaid *Anthony* from and out of the ſaid iſland, did then and there for that purpoſe gently lay hands upon the ſaid *Anthony*, and did then and there ſeize and arreſt him, and did keep and detain the ſaid *Anthony*, before he could be baniſhed and ſent from out of the ſaid iſland, for a ſhort ſpace of time, (to wit) for the ſpace of ſix days then next following; and afterwards, to wit, on the ſeventh day of *September*, in the year aforeſaid, at *Minorca* aforeſaid, did carry and cauſe to be carried the ſaid *Anthony*, on board a certain veſſel, from the iſland of *Minorca* aforeſaid to *Carthagena* aforeſaid, as it was lawful for him to do for the cauſe aforeſaid, which are the ſame, making the ſaid aſſault upon the ſaid *Anthony* in the firſt count of the ſaid declaration mentioned, and beating and ill-treating him, and impriſoning him, and keeping and detaining him in priſon for the ſaid ſpace of time in the ſaid firſt count of the ſaid declaration mentioned, and compelling the ſaid *Anthony* to depart from and leave *Minorca* aforeſaid, and carrying and cauſing to be carried the ſaid *Anthony* from *Minorca* to *Carthagena*, in the dominions of the king of *Spain*, whereof the ſaid *Anthony* hath above complained againſt him: and this he is ready to verify. Wherefore he prays judgment if the ſaid *Anthony* ought to have or maintain his ſaid action thereof againſt him, *&c.* without this that the ſaid *John* was guilty of the ſaid treſpaſs, aſſault, and impriſonment, at the pariſh of St. *Mary le Bow*, in the ward of *Cheap*, or elſewhere out of the ſaid iſland of *Minorca* aforeſaid.

Thomas Walker.

The replication.

And the ſaid *Anthony*, as to the ſaid plea of him the ſaid *John*, by him ſecondly above pleaded in bar, as to the ſaid aſſaulting the ſaid *Anthony* in the ſaid firſt count of the ſaid declaration mentioned, and beating and ill-treating him, and impriſoning him, and keeping and detaining him in priſon for the ſaid ſpace of time in the ſaid declaration mentioned; and compelling the ſaid *Anthony* to depart from and leave *Minorca* aforeſaid, and carrying and cauſing to be carried the ſaid *Anthony* from *Minorca* aforeſaid to *Carthagena*, in the dominions of the king of *Spain*, by the ſaid *John* above done, proteſting that the ſaid plea, and the matters therein contained are inſufficient in law to bar the ſaid *Anthony* from maintaining his ſaid action againſt the ſaid *John*. For replication in this behalf, he ſaith, that the ſaid *Anthony* ought not, by reaſon of any thing by the ſaid *John* above in pleading alledged, to be barred from having his ſaid action thereof maintained againſt him; becauſe, he ſaith, that the ſaid *John*, of his own wrong, and without ſuch cauſe as the ſaid *John* hath above in his ſaid plea alledged, on the ſame day and year aforeſaid, at *London* aforeſaid; in the pariſh and ward aforeſaid, aſſaulted the ſaid *Anthony*, and beat and ill-treated him, and impriſoned him; and kept and detained him in priſon for the ſaid ſpace of time in the ſaid declaration mentioned, and compelled the ſaid *Anthony* to depart from and leave *Minorca* aforeſaid, and carried and cauſed to be carried the ſaid *Anthony* from *Minorca* aforeſaid to *Carthagena*; in the dominions of the king of *Spain* aforeſaid; in manner and form as the ſaid *Anthony* hath above complained againſt him; and this he prays may be enquired of by the country. And the ſaid *John* doth ſo likewiſe.

John Glynn.

Award of the venire.

Therefore, as well to try this iſſue as the ſaid other iſſue between the ſaid parties above joined, it is commanded to the ſheriffs, that they cauſe to come here, in three weeks of the *Holy Trinity*, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c.

At which day the jury between the ſaid parties of the plea aforeſaid, was reſpited here until on the morrow of *All Souls* then next following, unleſs ſir *Henry Gould*, knight, one of the king's juſtices of the Bench here aſſigned by form of the ſtatute, &c. ſhould firſt come, on *Friday* the ſecond of *July* laſt paſt, at the *Guildhall* of the city of *London*. And now here at this day cometh the ſaid *Anthony*, by his ſaid attorney, and the ſaid juſtice, before whom, &c. hath ſent here his record in theſe words.

The poſtea.

That is to ſay, afterwards, on the day and in the year, and at the place within-mentioned, come as well the within-mentioned *Anthony Fabrigas* as the within-named *John Moſtyn*, by their attornies within-named, before ſir *Henry Gould*, knight, one of the juſtices of the Bench within-named, and certain of the jurors, whereof mention is within made, ſummoned to be upon that jury, (that is to ſay) *Thomas Zachary*, *Thomas Aſhby*, *David Powell*, and *Walter Ewer*, being required, come, and on that jury are ſworn; and becauſe the reſt of the jurors of the ſame jury do not appear, therefore eight other perſons of the by-ſtanders, being by the ſheriffs within-written hereunto elected, at the requeſt of the ſaid *Anthony*, and by the command of the ſaid ſir *Henry Gould*, are now newly ſet down, whoſe names are affiled in the within-written pannel, according to the form of the ſtatute, &c. which ſaid jurors ſo newly ſet down, (that is to ſay) *William Tomkyn*, *Gilbert Howard*, *Thomas Boulby*, and *John Newball*, *John King*, *James Smith*, *William Hurley*, and *James Selby*, being alſo required, come likewiſe, and, together with the ſaid other jurors before impannelled, are tried and ſworn to ſpeak the truth of the matters within contained; who upon their oath ſay, that as to the firſt iſſue within-joined, the ſaid *John Moſtyn* is guilty of the premiſes within laid to his charge, in manner and form as the ſaid *Anthony* hath within complained againſt him: and as to the other iſſue within joined, the ſaid jurors on their ſaid oath further ſay, that the ſaid *John Moſtyn*, of his own wrong, and without ſuch cauſe as he hath in pleading within alledged, on the day and in the year within mentioned, at *London*, in the pariſh and ward within mentioned, aſſaulted the ſaid *Anthony*, and beat and ill-treated him, and impriſoned him, and kept and detained him in priſon for the ſpace of time in the within declaration mentioned, and compelled him the ſaid *Anthony* to depart from and leave *Minorca* within-mentioned, and carried and cauſed to be carried the ſaid *Anthony* from *Minorca* aforeſaid to *Carthagena*, in the dominions of the king of *Spain* within mentioned, in manner and form as he the ſaid *Anthony* hath by his replication within alledged; and they aſſeſs the damages of the ſaid *Anthony*, by reaſon of the premiſes within ſpecified, beſides his coſts and charges by him laid out and expended about his ſuit in this behalf, to 3000*l.* and for his ſaid coſts and charges, to forty ſhillings. Therefore it is conſidered, that the ſaid *Anthony* recover againſt the ſaid *John* his damages aforeſaid, to three thouſand pounds, and two pounds by the jury aforeſaid, in form aforeſaid aſſeſſed, and 88*l.* to the ſaid *Anthony*, at his requeſt, for the coſts and charges aforeſaid, by the court here for increaſe adjudged; which ſaid damages in the whole amount to three thouſand and ninety pounds, &c. Afterwards (that is to ſay) before our lord the king at *Weſtminſter*, comes the ſaid *John Moſtyn*, in his proper perſon, and ſays, that at the trial of the ſaid cauſe before the ſaid ſir *Henry Gould*, knight, the counſel of him the ſaid *John Moſtyn* propoſed certain exceptions to the opinion of the ſaid ſir *Henry Gould*, which exceptions were written in a bill, and ſealed by the ſaid judge; which bill of exceptions the ſaid *John Moſtyn* now brings into this court, and prays a writ of our lord the king to the ſaid ſir *Henry Gould*, to confeſs or deny his ſeal ſo put to the ſaid bill of exceptions, according to the form of the ſtatute in ſuch caſes made and provided, which writ is granted to him returnable in fifteen days from the day of the *Holy Trinity*; at which day, before our lord the king at *Weſtminſter*, comes the ſaid *John Moſtyn* in his proper perſon; and the ſaid ſir *Henry Gould*, knight, likewiſe in his proper perſon, comes and acknowledges his ſeal put to the ſaid bill of exceptions, which bill of exceptions follows in theſe words.

The bill of exceptions.

That is to ſay, on the morrow of the *Holy Trinity*, 13 *Geo.* III. Be it remembered, that in the term of *Eaſter*, in the thirteenth year of the reign of our ſovereign lord *George* the third, now king of *Great Britain*, and ſo forth, came *Anthony Fabrigas*, by *Richard Gregory* his attorney, into the court of our ſaid lord the king of the Bench at *Weſtminſter*, and impleaded *John Moſtyn*, late of *Weſtminſter*, in the county of *Middleſex*, eſq. in a certain plea of treſpaſs on which the ſaid *Anthony* declared againſt him.

[*The declaration, plea, and replication, are here ſet out verbatim, which, to avoid repetition, are now omitted. After thoſe pleadings the bill of exceptions proceeds in theſe words.*]

And afterwards (to wit) at the ſittings of *niſi prius*, holden at the *Guildhall* of the city of *London* aforeſaid, in and for the ſaid city, before the hon. ſir *Henry Gould*, knight, one of the juſtices of our ſaid lord the king of the Bench, *Thomas Lloyd*, eſq. being aſſociated to him according to the form of the ſtatute in ſuch caſe made and provided, on *Monday* the 12th day of *July*, in the 13th year of the reign of our ſaid lord the now king, the aforeſaid iſſues ſo joined between the ſaid parties as aforeſaid, came on to be tried by a jury of the city of *London* aforeſaid, for that purpoſe duly impannelled; at which day came there as well the ſaid *Anthony Fabrigas* as the ſaid *John Moſtyn*, by their attornies aforeſaid. And the jurors of the jury aforeſaid, impannelled to try the ſaid iſſues, being called over, ſome of them, namely, *Thomas Zachary*, *Thomas Aſhby*, *David Powell*, and *Walter Ewer*, came and were then and there in due manner choſen and ſworn to try the ſame iſſues; and becauſe the reſt of the jurors of the ſame jury did not appear, therefore others of the by-ſtanders being choſen by the ſheriffs, at the requeſt of the ſaid *Anthony*, and by command of the ſaid juſtice, were appointed anew, whoſe names were affixed to the pannel of the ſaid jury, according to the form of the ſtatute in ſuch caſe made and provided; which ſaid jurors ſo appointed anew, (to wit) *William Tomkyn*, *Gilbert Howard*, *Thomas Boulby*, *John Newball*, *John King*, *James Smith*, *William Hurley*, and *James Selby*, being likewiſe called, came, and were then and there in due manner tried and ſworn to try the ſame iſſues. And upon the trial of the ſaid iſſues, the counſel learned in the law for the ſaid *Anthony Fabrigas*, to maintain and prove his ſaid declaration, on his part gave in evidence, that the ſaid *John*, at the iſland of *Minorca*, on the 17th day of *September*, in the year of our Lord 1771, ſeized and took the ſaid *Anthony*, and without any trial impriſoned him for the ſpace of ſix days, againſt his will, and baniſhed him for the ſpace of twelve months from the ſaid iſland of *Minorca*, and cauſed him to be put by ſoldiers on board a ſhip, and to be tranſported from the ſaid iſland of *Minorca* to *Carthagena* in *Spain*, for the ſaid ſpace of twelve months: whereupon the counſel for the ſaid *John Moſtyn* did then and there, on the part of the ſaid *John Moſtyn*, give in evidence, that the ſaid *Anthony* was a native of *Minorca*, and at the time of taking, ſeizing, and impriſoning him, and baniſhing him as aforeſaid, was reſiding in and an inhabitant of the arraval of St. *Phillip*'s in the ſaid iſland. And it was further given in evidence on the part of the ſaid defendant, that the ſaid iſland of *Minorca* was ceded to the crown of *Great-Britain* by the king of *Spain*, by the treaty of *Utrecht*, in the year of our Lord 1713; and that the article in the ſaid treaty, relative to the ſaid iſland, is as follows: *rex porro Catholicus, pro ſe, hæredibus et ſucceſſoribus ſuis, cedit pariter coronæ* Magnæ Britanniæ *totam inſulam* Minorcæ, *ad eamque transfert in perpetuum jus omne dominiumque pleniſſimum ſupradictam inſulam ſpeciatim, vero ſuper urbem arcem portum munitiones et ſinum* Minoriſenſis, *vulgo* Port Mahon, *unà cum aliis portubus locis oppidiſque in præfatâ inſulâ ſitis; proviſum tamen eſt ut in articulo ſupraſcripto quod nullum perfugium, neque receptaculum patebit* Maurorum *navibus bellicis quibuſcunque in* Portu Mahonis, *aut in alio quovis portu dictæ inſulæ* Minorcæ, *quo oræ* Hiſpaniæ *ipſorum excurſionibus infeſtæ reddantur. Quinimo commorandi ſolummodo cauſâ ſecundum pacta conventa* Mauris *eorumque navigiis introitus in inſulam præfatam permittetur. Promittat etiam ex ſuâ parte regina* Magnæ Britanniæ, *quod ſi quando inſulam* Minorcæ *et portus oppida locaque in eâdem ſita a coronâ regnorum ſuorum quovis modo alienari in poſterum contigerit, dabitur coronæ* Hiſpaniæ *ante nationem aliam quamcunque prima optio poſſeſſionem et proprietatem præmemoratæ inſulæ redimendi. Spondet inſuper regia ſua majeſtas* Magnæ Britanniæ, *ſe facturam ut incolæ omnes inſulæ præfatæ tam eccleſiaſtici quam ſeculares bonis ſuis univerſis, et honoribus tutò pacatèque fruantur. Atque religionis* Romanæ Catholicæ *liber uſus iis permittetur utque etiam ejuſmodi rationes meantur, ad tuendam religionem prædictam in eâdem inſulâ, quæ a gubernatione civili atque a legibus* Magnæ Britanniæ, *penitus abhorrere non videantur. Poterunt etiam ſuis honoribus et bonis frui, qui nunc ſuæ Catholicæ majeſtatis ſervitio addicti ſunt, etiamſi in eodem permanſerint; et liceat cuicunque, qui præfatam inſulam relinquere voluerit, bona ſua vendere et libere in* Hiſpaniam *tranſvehere.* And it was further given in evidence on the part of the ſaid defendant, that the *Minorquins* are in general governed by the *Spaniſh* laws, but, when it ſerves their purpoſe, plead the *Engliſh* laws. And it was further given in evidence on the behalf of the ſaid defendant, that there are certain magiſtrates, called the chief juſtice criminal, and the chief juſtice civil, in the ſaid iſland. And it was further given in evidence by *James Wright*, the ſecretary to the defendant, that the ſaid iſland is divided into four diſtricts, excluſive of the arraval of St. *Phillip*'s, which the witneſs always underſtood to be ſeparate and diſtinct from the others, and under the immediate order of the governor; ſo that no magiſtrate of *Mahon* could go there to exerciſe any function without leave firſt had from the governor. And it was further given in evidence on the part of the ſaid defendant, by colonel *Patrick Mackellar*, that the arraval of St. *Phillip*'s is ſurrounded by a line-wall on one ſide, and on the other by the ſea, and is called the royalty, where the governor has greater power than any where elſe in the iſland, and where the judges cannot interfere but by the governor's conſent. And it was further given in evidence by *Edward Blakeney*, who had been ſecretary to governor *Blakeney*, that nothing can be executed in the arraval but by the governor's leave; and the judges have applied to him the witneſs for the governor's leave to execute proceſs there. And it was further given in evidence by the ſaid *James Wright*, that for the trial of murder and other great offences committed within the ſaid arraval, upon application to the governor, he generally appoints the aſſeſſeur criminal of *Mahon*, and for leſſer offences the muſtaſtaph; and that the ſaid *John Moſtyn*, at the time of the ſeizing, taking, impriſoning, and baniſhing the ſaid *Anthony*, was the governor of the ſaid iſland of *Minorca*, under and by virtue of certain letters patent of his preſent majeſty, under the great ſeal of *Great-Britain*, bearing date the 2d day of *March*, in the eighth year of his reign, whereby his majeſty conſtituted and appointed the ſaid defendant to be captain-general and governor in chief in and over the ſaid iſland of *Minorca*, and the town and garriſon of *Port Mahon*, and the caſtles, forts, and other works and fortifications thereunto belonging, and all other towns and places within the ſaid iſland; and his majeſty did thereby give and grant unto the ſaid defendant *John Moſtyn*, or in his abſence to the lieutenant-governor, or commander in chief for the time being, all powers, privileges, and authorities, civil and military, unto the ſaid office belonging, to have, hold, and exerciſe the ſaid office, powers, privileges, and authorities, during his majeſty's will and pleaſure; and the ſaid defendant *John Moſtyn*, or in his abſence the lieutenant-governor, or commander in chief for the time being, are to obſerve and obey all the orders and inſtructions therewith given to him, and all ſuch further and other orders and inſtructions as ſhall be from time to time given to him under his majeſty's royal ſign manual or ſignet, or by his majeſty's order in privy-council; and his ſaid majeſty did thereby ſtrictly charge and command all his officers, miniſters, magiſtrates, civil and military, whatſoever, and ſoldiers, and all others his loving ſubjects, inhabiting or being in the ſaid iſland, to obey him the ſaid *John Moſtyn*, as captain-general and chief governor thereof; and that the defendant, being ſo governor of the ſaid iſland, cauſed the ſaid *Anthony* to be ſeized, taken, impriſoned, and baniſhed as aforeſaid, without any reaſonable or probable cauſe, or any other matter alledged in the defendant's plea, or any act tending thereto. But nevertheleſs the ſaid counſel for the ſaid *John Moſtyn* did then and there inſiſt before the ſaid juſtice, on the behalf of the ſaid *John Moſtyn*, that the ſaid ſeveral matters ſo produced and given in evidence on the part of the ſaid *John Moſtyn* as aforeſaid, were ſufficient and ought to be admitted and allowed as deciſive evidence to entitle the ſaid *John Moſtyn* to a verdict, and to bar the ſaid *Anthony* of his aforeſaid action; and the ſaid counſel for the ſaid *John Moſtyn* did then and there pray the ſaid juſtice to admit and allow the ſaid matters ſo produced and given in evidence for the ſaid *John Moſtyn*, to be concluſive evidence in favour of the ſaid *John Moſtyn*, to entitle him to a verdict in this cauſe, and to bar the ſaid *Anthony* of his action aforeſaid. But to this the counſel learned in the law of the ſaid *Anthony*, did then and there inſiſt before the ſaid juſtice, that the ſame were not ſufficient nor ought to be admitted or allowed to entitle the ſaid *John Moſtyn* to a verdict, or to bar the ſaid *Anthony* of his action aforeſaid. And the ſaid juſtice did then and there declare and deliver his opinion to the jury aforeſaid, that the ſaid ſeveral matters ſo produced and given in evidence on the part of the ſaid *John Moſtyn*, were not ſufficient to bar the ſaid *Anthony* of his action aforeſaid, and with that direction left the ſame to the ſaid jury; and the jury aforeſaid then and there gave their verdict for the ſaid *Anthony*, and 3000*l.* damages. Whereupon the ſaid counſel for the ſaid *John Moſtyn* did then and there, on the behalf of the ſaid *John Moſtyn*, except to the aforeſaid opinion of the ſaid juſtice, and inſiſted on the ſaid ſeveral matters as an abſolute bar to the ſaid action. And inaſmuch as the ſaid ſeveral matters ſo produced and given in evidence on the part of the ſaid *John Moſtyn*, and by his counſel aforeſaid objected and inſiſted on as a bar to the action aforeſaid, do not appear by the record of the verdict aforeſaid, the ſaid counſel for the ſaid *John Moſtyn* did then and there propoſe their aforeſaid exceptions to the opinion of the ſaid juſtice, and requeſted the ſaid juſtice to put his ſeal to this bill of exception, containing the ſaid ſeveral matters ſo produced and given in evidence on the part of the ſaid *John Moſtyn* as aforeſaid, according to the form of the ſtatute in ſuch caſe made and provided. And thereupon the ſaid juſtice, at the requeſt of the ſaid counſel for the ſaid *John Moſtyn*, did put his ſeal to this bill of exceptions, purſuant to the aforeſaid ſtatute in ſuch caſe made and provided, on the ſaid 12th day of *July*, in the 13th year of the reign of his preſent majeſty.

Aſſignment of errors.

And hereupon the ſaid *John Moſtyn* ſays, that in the record and proceedings aforeſaid, and alſo in the matters recited contained in the ſaid bill of exceptions, and alſo in giving the verdict upon the ſaid iſſues between the parties aforeſaid joined, and alſo in giving the judgment aforeſaid, there is a manifeſt error in this, that the juſtice before whom, *&c.* had no power, authority, or juriſdiction to try the ſaid iſſues, or either of them, at the time when the ſame was tried, as in the record mentioned; nor had the ſaid juſtice any power or authority to take or ſwear the ſaid jury thereon. There is alſo error in this, that the ſaid juſtice before whom, *&c.* at and upon the trial of the ſaid iſſues between the parties aforeſaid joined, did declare and deliver his opinion to the jury aforeſaid, that the ſaid ſeveral matters mentioned in the ſaid bill of exceptions, and ſo as aforeſaid produced and proved on the part of the ſaid *John Moſtyn*, were not upon the whole of the caſe ſufficient to bar the ſaid *Anthony Fabrigas* of his ſaid action againſt him, and with that opinion left the ſame to the jury; whereas the ſame were ſufficient to bar the ſaid *Anthony* of his ſaid action. There is alſo error in this, that by the record aforeſaid it appears, that the verdict aforeſaid was given upon the ſaid iſſues between the ſaid parties joined, for the ſaid *Anthony Fabrigas*; whereas by the law of the land, the verdict on the ſaid iſſues ought to have been given for the ſaid *John Moſtyn*, againſt the ſaid *Anthony Fabrigas*. There is alſo error in this, that it appears by the record aforeſaid, that judgment, in form aforeſaid given, was given for the ſaid *Anthony Fabrigas* againſt him the ſaid *John Moſtyn*; whereas by the law of the land, judgment ought to have been given for the ſaid *John Moſtyn* againſt the ſaid *Anthony Fabrigas*. And the ſaid *John Moſtyn* prays, that the judgment aforeſaid, for the errors aforeſaid, and others in the record and proceedings aforeſaid, may be reverſed, annulled, and altogether had for nothing; and that he the ſaid *John Moſtyn* may be reſtored to all which he has loſt by occaſion of the judgment aforeſaid, *&c.*

In nullo eſt erratum.

And the ſaid *Anthony* hereupon voluntarily comes in his own proper perſon into court here, and ſays, that neither in the record or proceedings aforeſaid, nor in the matter recited and contained in the ſaid bill of exceptions, nor in giving the verdict upon the ſaid iſſues between the parties aforeſaid joined, nor in the giving the judgment aforeſaid, is there any error; and that the ſaid *Anthony* prays, that the court of our lord the king now here will proceed to the examination, as well of the record and proceedings aforeſaid, as of the matters recited and contained in the ſaid bill of exceptions and of the matters aforeſaid above-aſſigned for error, and that the ſaid judgment may be in all things affirmed. But becauſe the court of our lord the king now here is not yet adviſed to give their judgment of and concerning the premiſes, a day is therefore given to the parties aforeſaid, to be before our lord the king, until on the morrow of *All Souls* now next enſuing, whereſoever, *&c.* to hear judgment of and upon the premiſes; for that the court of our ſaid lord the king now here, is not yet adviſed thereof, *&c.*

Mr. BULLER.

My lord, there are ſome ſtrange blunders upon this record, which though I might make objections to, I will not miſpend the time of the court in ſtating them, becauſe I can eaſily conceive myſelf that they will admit of a very ſhort anſwer; and therefore, waving all objections to the formal part of the record, the general queſtion upon this record will be, whether an action can be maintained in this country againſt a governor of *Minorca*, for an impriſonment committed by him there in his character and office of governor, upon the perſon of a *Minorquin*, even though the governor ſhould have erred in his judgment, and have been miſtaken in the neceſſity which he conceived demanded an immediate and reſolute exerciſe of the powers of his office? My lord, though this be the general queſtion, I ſhall beg leave in the argument to divide it into two: firſt, whether in any caſe an action can be maintained in the courts at *Weſtminſter*, for an impriſonment committed at *Minorca* upon a native of that place: and ſecondly, if it ſhould be admitted that an action will lie againſt any other perſon, yet whether ſuch action can be maintained againſt a governor, acting as ſuch within the peculiar diſtrict of the arraval of St. *Phillip*'s? My lord, in the conſideration of both theſe queſtions, it may be material to attend a little particularly to the ſituation and conſtitution of the iſland of *Minorca*, and arraval of St. *Phillip*'s, within which this tranſaction aroſe. As to that, the court will be much relieved by the contents of this record; for it is there ſtated, that this iſland, till the year 1713, was a part of the dominions of the kingdom of *Spain*, and then it was ceded to the crown of *Great-Britain*, reſerving to the inhabitants their property, their religion, and the laws neceſſary for the preſervation of their religion. It is further ſtated in the record, that the iſland is not governed by the laws of *England*, but by the laws of *Spain*; and that the arraval of St. *Phillip*'s is ſubject only to the controul and government of the governor himſelf, for in that there is no regular law-officer; there is no power to which the ſubject can apply for juſtice but to the governor himſelf; he is therefore the ſole and abſolute judge within the arraval; his will is the law there, and that diſtrict at leaſt is a deſpotic government. Whatever may be the caſe in colonies and new-diſcovered countries, I fancy it will not now be denied, that, even in countries obtained by conqueſt, the old laws of the place continue in force till they are changed or altered by the conquerors; much leſs can it be contended, that in a country ceded as this was, the laws of the place receive any alteration till a change is declared by the new ſovereign. In the preſent caſe, there has been no new code of laws eſtabliſhed in this iſland; and therefore, independent of the particular facts which are ſtated as proved in this cauſe, I think I may ſafely aſſert it as an undeniable propoſition, that this iſland is now governed by the ſame laws as it was before the year 1713.

It is ſtated in the record, that the diſtrict where the preſent cauſe of action aroſe is ſubject only to the immediate order of the governor; and ſo much ſo, that no judge of the iſland can exerciſe any function there, without the particular leave of the governor for that purpoſe. If the laws of the country where the offence is committed are different from the laws of this kingdom, it ſeems to me to make no difference with reſpect to the propriety of an action, whether ſuch country is ſubject to the crown of *Great-Britain*, or to any other ſtate; for whether the fact be an offence or not, muſt be decided by the particular laws of the place where it was committed, and not by the laws of this country. This is a caſe where the law of the place is different from the law of this country; and therefore the queſtion might have been taken much larger than I have done it: namely, whether the ſubject of a foreign power, who rules by laws different from ours, can, for an act done in his own country, ſeek redreſs in the courts of *England*. I believe there are no authorities in ſupport of ſuch a poſition; and whatever may be the caſe, where the laws of different countries agree, and where the tranſaction has been between *Britiſh* ſubjects, with a view to the laws of *England*, (which was the caſe of *Robinſon* and *Bland*), that can be of no avail in the preſent inſtance: for I take it in this caſe, if the action can be maintained at all, it muſt be governed by the laws of *Minorca*, and not by the laws of *England*. It is ſaid in the caſe of *Robinſon* and *Bland*, that the laws of the place where the thing happened does not always prevail; and there an inſtance is put by Mr. Juſtice *Wilmot*, that in many countries an action may be maintained by a courteſan for the price of her proſtitution, but that no ſuch action can be allowed in this country. That is undoubtedly true; for wherever the foreign law is contrary to the law of God, to the law of nature, or *contra bonos mores*, this court will recognize it; but neither of theſe are the preſent caſe. My lord, beſides, there is a great difference between entertaining a ſuit, and giving a remedy upon an immoral tranſaction, and puniſhing a man for an act, which, if done here, would be deemed a crime, but, in the country where it is committed, is eſteemed none. In ſuch a caſe as that, the law of this country can never be the rule by which this court will govern themſelves, nor could they with propriety give a judgment contrary to the known law of this land; and therefore, I ſhould apprehend, that in ſuch caſe they would refuſe to hold plea at all. That ſeems to have been the opinion of lord chief juſtice *Pratt*, in a caſe that came before him in the year 1765: that was the caſe of *Pons* againſt *Johnſon*, and a like caſe of *Balliſter* againſt *Johnſon*. Thoſe were two actions tried at the ſittings after *Trinity-Term* 1765; an action of treſpaſs and falſe impriſonment, brought by the plaintiff, a native of *Minorca*, againſt the defendant, who was governor. The facts were, that in *Minorca* there is a court called *Tribunal of Royal Government:* the governor is preſident, the aſſeſſor is judge: the fiſcal is in nature of attorney-general, during the pendency of a cauſe, but, when ſentence is to be paſſed, he has a voice as well as the aſſeſſor. If they agree, the governor is bound to confirm: if they diſagree, the governor has the caſting voice. It was proved, that this is the only court of criminal juriſdiction, and that ſlanders are conſidered as criminal ſuits; that the defendant wrote a letter to the aſſeſſor and fiſcal, complaining that the plaintiff had ſpread reports injurious to him, and deſiring them to enquire into it, and act as they thought juſt and fit. Upon this letter, the fiſcal directed an enquiry, and the aſſeſſor ordered plaintiff to be impriſoned: that he applied to defendant *Johnſon* to be bailed, who refuſed to bail him; but it appeared that the aſſeſſor was the perſon whoſe buſineſs it was to bail, though orders, as well for impriſoning as bailing, often paſſed in the name of the court. Upon this evidence it was objected, firſt, that by the treaty of *Utrecht*, the inhabitants have their own laws preſerved to them, and are not to be ſued here, and therefore have no right to ſue here: ſecondly, admitting them to have a right to ſue here, the action is miſconceived, *&c.* Lord chief juſtice *Pratt* ſaid, ‘ I think it very improper ſuch action ſhould be brought here, where foreign law is to be brought into queſtion: the inconvenience appears here, where all the evidence we have had is the teſtimony of one witneſs; and I ſhould think if I were under the neceſſity of pronouncing upon the point, that parole evidence ought not to be ſufficient, but a commiſſion ſhould go, and the law be certified.’ As to the queſtion of juriſdiction, his lordſhip ſaid, ‘ It is certain there are many caſes of tranſitory actions between ſubject and ſubject, where, though the cauſe ariſes in a foreign country, the action may be brought here; ſuch as contract, treſpaſs, or even falſe impriſonment of ſome kinds: and the rule that ſhould govern ſeems to be, where the ſubject matter is of that kind, that the law of nature ſhould govern all over the world. And I think, that a perſon who is an alien ſhould have a right to ſue here in caſes of that kind: but I think this is not to be extended to tranſitory actions of every kind, where the *lex loci* is ſo intermixed with the caſe as to alter the caſe, and vary the legality of the tranſaction.’ His lordſhip then expreſſed ſome doubts on the form of the plea; and finally nonſuited the plaintiffs on another point. My lord, I cite this caſe for the ſake of the reaſoning contained in it; and there was the opinion of a very learned judge, that an action in this country was improper, where it was ſo intermixed and blended with the law of another country, as to vary or change the legality of the tranſaction. My lord, another thing which appears by that caſe is, that though lord *Camden* ſeems to think an action may in ſome caſes lie on a foreign tranſaction, yet he confines it to caſes where the tranſaction happened between ſubject and ſubject. This is not a tranſaction which happened between ſubject and ſubject, (ſpeaking as of the realm of *England)* nor is it a caſe where the ſame law governs all over the world; but it is that particular caſe pointed out by lord *Camden*, ſo mixed with the *lex loci*, that it alters the caſe, and varies the legality of the tranſaction. In criminal caſes I take it to be clear, that an offence committed in foreign parts cannot, unleſs under particular ſtatutes, be tried in this country; and of that opinion was the court of *Exchequer* in a caſe reported in 1ſt *Vezey*, 246. The *Eaſt-India* company againſt *Campbell*, 7th of *June*, 1749: an information was brought in the name of the attorney-general, that the defendant might diſcover how he came by the poſſeſſion of certain goods, whether it was not by fraud, violence, contrivance, or other means; and whether they were not the property of the *Indians*, from whom they were ſo taken by the defendant and others. The court there ſay the rule is, that this court ſhall not oblige one to diſcover that, which, if he anſwers in the affirmative, will ſubject him to the puniſhment of a crime; for it is not material, that if he anſwers in the negative, it will be no harm: and that he is puniſhable, appears from the caſe of *Omichund* v. *Barker*, as a juriſdiction is erected in *Calcutta* for criminal facts, where he may be ſent by government and tried, though not puniſhable here: like the caſe of one who was concerned in a rape in *Ireland*, and ſent over there by the government to be tried, although the court of *B. R.* here refuſed to do it. My lord, here is a poſitive opinion, that in criminal caſes ariſing abroad there is no juriſdiction in the common law courts in *England*. The only thing to be done is to ſend the party to the country where the offence was committed; but it ſhall not be tried here. If a man were to marry two wives in a country where bigamy is allowed, it can never be contended in ſuch a caſe, if the man came into *England* he ſhould be liable to be hanged here, becauſe it is an offence in this country, though none where it was committed. If a crime committed abroad cannot be tried here, upon what ground ſhall a civil perſonal injury, done out of the kingdom, be tried here? There are many reaſons why a crime committed abroad might be tried here, and a civil injury not; but no reaſon occurs to me why a civil injury ſhould, and a crime not. Civil injuries depend much upon the police and conſtitution of the country where they occur, and the ſame conduct may be actionable in one country which is juſtifiable in another: but in crimes, as murder, perjury, and many other offences, the laws of moſt countries take for their baſis the law of God and the law of nature; and therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of diſtributing equal juſtice in ſuch caſes, than in civil actions. The caſe mentioned in *Keilwey*, 402, and confirmed in the 4th Inſtitute, 283 and 4, is alſo an authority in my favour. It firſt of all gives a hiſtory of Sir *John Stanley*'s family, and there five points were reſolved: firſt, that the iſle of *Man* was an ancient kingdom of itſelf, and no part of the kingdom of *England*; ſecondly, they affirmed the caſe reported by *Keilwey*, *anno* the 14th *Henry* the VIIIth, to be law; namely, *Michaelmas* the 14th, *Henry* VIIIth, an office was found, that *Thomas* earl of *Derby*, at the time of his death, was ſeiſed of the iſle of *Man* in fee; whereupon the counteſs his wife, by her counſel, moved to have her dower in the *Chancery*; but it was reſolved by *Brudnell*, *Brook*, and *Fitzherbert*, juſtices, and all the king's counſel, that the office was merely void, becauſe the iſle of *Man* was no part of the realm of *England*, nor was governed by the laws of this land; but was like to *Tournay* in *Normandy*, or *Gaſcoign* in *France*, when they were in the king of *England*'s hands, which were merely out of the power of the *Chancery*, which was the place to endow the widow of the king, *&c.* Then it goes on, and ſays, it was reſolved by them, that neither the ſtatute of *William* the IId, *de donis conditionalibus*, nor of the 27th of *Henry* the VIIIth, of wills, nor any other general act of parliament, did extend to the iſle of *Man*, for the cauſe aforeſaid. So there it is held, that for a right in the iſle of *Man*, though it was part of the territorial dominions of the crown of *England*, yet that no ſuit would lie in the court of *Chancery*; and that this ſuit inſtituted by the widow for her dower there was improper, and they could not entertain it. The caſes where the courts of *Weſtminſter* have taken cognizance of tranſactions ariſing abroad, and entertained actions founded on them, ſeem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of *England*, and between *Engliſh* ſubjects: and even there it is done by a quaint legal fiction; namely, by ſuppoſing, under the ſanction of a *videlicet*, that the cauſe of action did ariſe within this country, and that the place abroad lay either in *London* or in *Iſlington*. But where the contrary has appeared, namely, that the place where the tranſaction did ariſe was not in *London* or *Iſlington*, there the courts have ſaid ſuch matters were not triable here. There is a pretty ſtrong caſe ariſing upon a demurrer in *Lutwyche*, 946, *Davis* againſt *Yale*. That was an action for falſe impriſonment of the plaintiff in Fort St. *George*, in the *Eaſt-Indies*, in parts beyond the ſeas, *videlicet*, in *London*, in the pariſh of St. *Mary-le-Bow*, in the ward of *Cheap*. It was reſolved by the whole court, that the declaration was ill, becauſe the treſpaſs is ſuppoſed to be committed at Fort St. *George*, in parts beyond the ſeas, *videlicet*, in *London*, which is repugnant and abſurd: and it was ſaid by the chief juſtice, that if a bond bore date at *Paris*, in the kingdom of *France*, it is not triable here; ſo that judgment was given upon the ground, that it appearing upon the face of the record to be in foreign parts, the ſuppoſition that it was in *England* was abſurd and repugnant.

In *Ward*'s caſe, in *Latch* 4. in debt, the plaintiff declares upon a bill, bearing date in the pariſh of St. *Mary-le-Bow*, *London*; and upon oyer of the deed, it bore date at *Hamburgh*, and the writ was in *detinet* only. Serjeant *Bridgman* objected, that although it was uſual to lay ſuch actions in any place, to wit, in *Kent*, *London*, *&c.* yet, as this caſe is, that cannot be; becauſe when any place is named, it ſhall be underſtood *primâ facie*, that the place named is a town, and not a particular place, as a houſe, as appears by 3 *Ed.* III. 68, *et breve.* 638: from whence it followed, that *Hamburgh* here ſhould be underſtood to be a town, which cannot be in *London*; and therefore the declaration was faulty, for not laying *Hamburgh* within *London*. But it was argued on the other ſide by *Barners*, who took this difference in pleading: ‘ I confeſs that a place named ſhall be underſtood to be a city or town, as the ſerjeant has ſaid, but nevertheleſs the date of the deed ſhall be underſtood to be a particular place or a houſe; and therefore, if an obligation bears date at *Antwerp*, or *Callis-Sands*, it ſhall be underſtood to be of thoſe taverns in *London*, and not of thoſe places beyond the ſeas,’ 21 *Ed.* IV. 26. And *in the caſe of one* Highans *and* Flowers, 3 Jac. B. R. *the date of an obligation was at* Athlone *in* Ireland, and therefore the action could not be laid here, inaſmuch as *Ireland* cannot be in *England:* but if it had been in *Athlone* only, then it was agreed that it could be ſued here, becauſe *Athlone* might be alledged to be in *England*. So here in our caſe, if the date had been at *Hamburgh*, *in partibus tranſmarinis*, it could not be ſued here, inaſmuch as it could not be in *London*; but bearing date at *Hamburgh* only, it may be underſtood to be in *England*. *Whitlock* agreed with him: *Brook ſuits*, 9. and ſo have been all deeds by experience. 10 *Jac.* an obligation dated at *Elvin* was ſued in this court, and the action laid in *Kent* and allowed; and yet *Elvin* is in *Poland*. *Dodderidge* ſaid, ‘ I agree alſo, if the deed bears date in *Little Britain* or in *Scotland*, it ſhall be underſtood to be dated at thoſe places; ſo here being named in *London*, we, as judges, ought to maintain the juriſdiction of our court, *if the caſe is not plainly and evidently out of our juriſdiction:* and for this reaſon we ought to underſtand *Hamburgh* to be in *London*, to maintain the action, *becauſe otherwiſe it would be out of our juriſdiction.* And if in truth we ſhould know the date to be at *Hamburgh ouſter le mere*, yet, as judges, we ſhould not take notice that it is *ouſter le mere.*’ In this caſe it does appear upon the record, that the offence complained of was committed in parts beyond the ſeas, and not in *England*. My lord, the plea ſtates, that it was committed in the iſland of *Minorca*, in parts beyond the ſeas; theſe are the words of the plea; and the defendant has concluded his plea with a traverſe, that he was not guilty in *London*, in the pariſh of St. *Mary-le-Bow*, or elſewhere, out of the iſland of *Minorca*. Now, my lord, this ſtands admitted by the plaintiff, becauſe if he had thought fit to have denied the place mentioned in the plea, and which was abſolutely eſſential for the defendant to mention, becauſe his juſtification was a local one, (and tho' the cauſe of action be tranſitory in its nature, yet, if the defence be local, the defendant has a right to ſtate it ſo in his plea, and by that means make that local which before was tranſitory) he ſhould have made a new aſſignment, or have taken iſſue on the place.

It was incumbent upon the defendant to aver, that what he had done was within the arraval, becauſe his authority was confined to that particular place; and therefore, however unjuſtifiable he might be elſewhere, he was juſtified there. That part of his allegation ſtands admitted by the plaintiff; therefore it does appear from the record, that the cauſe of action did ariſe out of the kingdom, and conſequently, as *Dodderidge* ſays in *Latch*, it does ariſe out of the juriſdiction of this court: and where it ſo appears, the judges cannot help taking notice of it; for, as *Lutwyche* ſays, as I mentioned before, it is not triable here. Even in caſes the moſt tranſitory, before the ſtatute of *Jeofails*, if an action was brought in *London*, and there was a local juſtification at *Oxford*, the cauſe could not have been tried in *London*. That was the caſe in 1ſt *Saunders*, 247, an action for words laid in *London*, charging him with having ſtolen plate out of *Wadham-College*, *viz.* in *London*. The defendant juſtifies ſpeaking the words, becauſe the plaintiff ſtole plate out of *Wadham-College* in *Oxford*. It was admitted in that caſe, that it would have been a fatal error, had it not been for the ſtatute of *Jeofails*. Now the ſtatute of *Jeofails* does not extend to *Minorca*; therefore this caſe will ſtand entirely upon the common law; and by that the trial is bad, and the verdict void: for ſuppoſing that this or any court at *Weſtminſter* could hold cognizance of any cauſe that ariſes abroad, yet it ſhould not have been tried in *London*, but ſhould have been tried in the next *Engliſh* county to *Minorca*. If the law in criminal caſes be as I conceive it is, that for a murder committed by a foreigner in another country the criminal could not be puniſhed here, I am at a loſs for a reaſon why he ſhould be puniſhed here for a treſpaſs committed under like circumſtances. In order to ſupport that doctrine, this abſurdity muſt be contended for: if Mr. *Moſtyn*, who ſtood there in the capacity of a governor, and had the ſole direction and government of this place, had thought *Fabrigas* guilty of an offence which forfeited his life, and had puniſhed him accordingly, he could not have been puniſhed; but becauſe he has proceeded in a milder way, and has impriſoned and baniſhed him, therefore he ſhall be puniſhed. The inconveniences of entertaining ſuch an action in this country are many, and ſome of them would certainly be intolerable; but the inconveniences that would enſue from rejecting the action would be very ſlight, if any: and the argument *ab inconvenienti*, lord *Coke* ſays, has been ever allowed to be very forcible in our law. Now if the action be maintained here, it muſt be determined by the law of this country, or by the law of the place where the offence was committed. If it be determined by our law, that would be unjuſt indeed; for then a man, who is compelled to regulate his conduct by one law, would be condemned by another, which is totally oppoſite. And yet the law of this country is the law the plaintiff has thought fit to put this cauſe upon; and I doubt not but he hopes, under the idea of *Engliſh* liberty, totally to deſtroy the *Minorquin* conſtitution. His declaration is founded on the law of *England*. The impriſonment is laid in the declaration to be contrary to the law and cuſtoms of this realm; ſo that the law of *England* is the law to which he appeals, and by which he deſires his caſe may be determined. If an impriſonment is committed there agreeable to the laws of that place, but not conſonant to the laws of this realm, is that a ground for puniſhment in this country? If it is not, the plaintiff cannot ſupport his caſe upon the law of *England* in the manner he now attempts to do. If the cauſe is to be tried here by the law of *Minorca*, how is that law to be proved? There is no legal mode of certifying the law, and till the trial it may not be known what points of law it may be requiſite to inquire into: witneſſes cannot be compelled to attend, nor can this court by any means oblige them to anſwer here; ſo the defendant would ſtand in the ſituation of being called upon to make his defence, without the power of proving either the law or the facts of his caſe. If this action ſucceeds, every *Frenchman* that is confined in the *Baſtile*, and has the good fortune afterwards to eſcape to this country, would be bringing actions againſt the officers that confined him; every ſoldier, who in time of war thinks himſelf ill uſed by his commander, when he returns home will harraſs the commander with a law-ſuit for any confinement or correction that he may have ſuffered abroad; and in the end it would be nothing leſs than that a *German* army would be governed by an *Engliſh* jury. It would be neceſſary for every general officer to have a lawyer always at his elbow; and even that, as Mr. *Moſtyn* has found by fatal experience, would not be ſufficient to ſecure him from cenſure and puniſhment: for in this cauſe it was proved, that Mr. *Moſtyn* had conſulted all the lawyers, and all the military gentlemen in the iſland, on the expediency and neceſſity of the meaſure he took, before he did what is now complained of, and that they were all unanimous in their ideas of the abſolute neceſſity of the buſineſs. Some of them openly profeſſed their opinions, and the reſt acquieſced by their ſilence. The lawyers went further, and undertook to anſwer for the legality of the meaſure, even at the peril of their heads. In the ſecond place, ſuppoſing an action could be maintained here at all for a thing done in *Minorca*, I ſhall beg leave to ſubmit to your lordſhip, that whatever might be the caſe of other perſons, though they might be liable to an action here for things done in foreign parts; yet that the governor or general officer, who has the immediate command and abſolute direction of the place, ſhall not be called upon in an action here to anſwer for his conduct in that character. *Minorca* is an abſolute government. The governor for the time being is the immediate repreſentative of the king there; and he, at leaſt within the arraval of St. *Phillip*'s, whatever may be the caſe in the reſt of the iſland, as all abſolute ſovereigns do, governs as he thinks convenient, without being tied up to any fixed rules, which it is not lawful for him to deviate from.

There is no government wherein the power over the lives, as well as the liberties and properties of the ſubject, is not veſted in the ſupreme power; and whether that power be lodged in a ſingle perſon, as a monarch, or many, as a parliament or an ariſtocracy, whatever that ſupreme power does, it is accountable for to none but God; and the deputy of that power is anſwerable only to God and his principal. That a judge cannot be puniſhed for any thing he does in his capacity as a judge will not, I believe, be diſputed; if it be, there are the ſtrongeſt authorities upon that point. The ſtrongeſt perhaps in *Salkeld*, 396, and 2 *Mod.* 218; in the latter of which caſes, the judge had been guilty of the moſt unconſtitutional conduct. My lord, that in *Salkeld* is *Groenvelt* againſt *Burwell* and others. The caſe was this: the cenſors of the *College of Phyſicians* in *London* are empowered to inſpect, govern, and cenſure all practiſers of phyſic in the city of *London*, and ſeven miles round, ſo as to puniſh by fine, amerciament, and impriſonment. They convicted Dr. *Groenvelt* of adminiſtering *inſalubres pillulas & noxia medicamenta*, and fined him 20*l.* and twelve months impriſonment. Accordingly, the doctor was taken in execution upon this ſentence, and brought treſpaſs againſt the officers and the cenſors. And it was holden by *Holt*, chief juſtice, firſt, that the cenſors had a judicial power; for a power to examine, convict, and puniſh, is judicial, and they are judges of record, becauſe they can fine and impriſon: ſecondly, that being judges of the matter, what they have adjudged is not traverſable; and the plaintiff cannot be admitted to gainſay what the cenſors have ſaid by their judgment, which is, that they were *inſalubres pillulas & noxia medicamenta*, 43*d Eliz.* 3, 17, 9*th E.* 4, 3, 12 *Co.* 24, 25: thirdly, that tho' the pills and medicines were really wholeſome pills and good medicines, that yet no action lies againſt the cenſors, becauſe it is a wrong judgment in a matter within the limits of their juriſdiction; and a judge is not anſwerable either to the king or the party for the miſtakes or errors of his judgment, in a matter of which he has juriſdiction. It would expoſe the juſtice of the nation, and no man would execute the office, at the peril of being arraigned by action or indictment for every judgment he pronounces. The other caſe, which is in 2d *Modern*, 218. is as ſtrong a caſe, if an action could be maintained againſt a judge at all, as any that can exiſt; that is, an action for falſe impriſonment. The defendant pleaded ſpecially, that there was a commiſſion of *oyer* and *terminer* directed to him amongſt others, *&c.* and that before him and the other commiſſioners, Mr. *Penn* and Mr. *Mead*, two preachers, were indicted for being at a conventicle, to which indictment they pleaded not guilty; and this was to be tried by a jury whereof the plaintiff was one; and that after the witneſſes were ſworn and examined in the cauſe, he and his fellows found the priſoners, *Penn* and *Mead*, not guilty, whereby they were acquitted; and *quia* the plaintiff *male ſe geſſerit* in acquitting them both againſt the direction of the court in matter of law, and againſt plain evidence, the defendant and the other commiſſioners then upon the bench fined the jury forty marks a-piece, and for non-payment committed them to *Newgate*. This was a caſe where a judge had taken upon himſelf to fine a juryman, becauſe he did not find agreeable to his direction, and had committed him to *Newgate*. Serjeant *Goodfellow*, who argued for the defendant, ſaid, he would not offer to ſpeak to that point, whether a judge can fine a jury for giving a verdict contrary to evidence, ſince the caſe was ſo lately and ſolemnly reſolved by all the judges of *England* in *Buſhell*'s caſe, that he could not fine a jury for ſo doing. But, ſays he, admit a judge cannot fine a jury, yet, if he doth, no action will lie againſt him for ſo doing, becauſe it is done as a judge: but the court told him he need not labour that point, but deſired to hear the argument on the other ſide. In this manner the court would not ſuffer the queſtion to be argued, whether an action would lie or not againſt a judge for that which was done by him in that character. On the other ſide it was urged, that what was done was not warranted by the commiſſion: but at laſt the whole court ſay, that the bringing this action was a greater offence than fining of the plaintiff, and committing him for non-payment; and that it was a bold attempt both againſt the government and juſtice in general. Lord *Coke* in his 12th *Report*, 25, ſays, that the reaſon and cauſe why a judge, for any thing done by him as a judge, by the authority which the king has committed to him, and as ſitting in the ſeat of the king, concerning his juſtice, ſhall not be drawn in queſtion before any other judge for any ſurmiſe of corruption, except before the king himſelf, is for this: the king himſelf is *de jure* to deliver juſtice to all his ſubjects; and for this, that he himſelf cannot do it to all perſons, he delegates his power to his judges, who have the cuſtody and guard of the king's oath. And foraſmuch as this concerns the honour and conſcience of the king, there is great reaſon that the king himſelf ſhall take account of it, and no other. My lord, within the arraval of St. *Phillip*'s, general *Moſtyn* was *quatenus* judge; there was no magiſtrate within the place but himſelf; he might appoint another, or might preſide himſelf, to decide upon offences committed within that diſtrict. It was ſo ſtated in the record, that it was ſubject to the immediate order of the governor, and no judge could interfere there unleſs particularly deputed by him; ſo that the abſolute government of that part at leaſt of the iſland reſted ſolely in his hands. He acted there under an authority committed to him by the king, and there (which is the reaſon in the 12th *Report* why an action will not lie againſt a judge) he had the cuſtody and guard of the king's oath; and therefore, as lord *Coke* ſays, if he acts improperly in the diſcharge of the functions of his office, he is accountable to the king only, and no other. My lord, there is another caſe in the law-books, upon which I ſhall beg leave to lay great ſtreſs; and at preſent I am not aware how that caſe will be diſtinguiſhed, ſo as to make it inapplicable to the preſent: but I can find many circumſtances even in that, which are much ſtronger againſt the determination there, than any that exiſt in this caſe againſt any determination on the part of the defendant. The caſe I allude to is that of *Dutton* againſt *Howell*, in *Shower*'s parliament caſes, 24; that is a writ of error upon a judgment given in the *King's Bench*. The caſe from the record is this: the plaintiff declared againſt *Dutton*, for that he with ſeveral others aſſaulted, beat, wounded, and impriſoned him, and took and ſeized his goods, and impriſoned the plaintiff for three months. There is a plea as to part not guilty, and as to the reſt there is a juſtification, that the defendant at this time was governor of *Barbadoes*, and ſets out the patent conſtituting him governor; that after the making this patent, and before the time of the aſſault, the defendant arrived at *Barbadoes*, and did take upon him and exerciſe the government of that and the other iſlands in the patents mentioned, till the firſt of *May*, when he had licence to return to *England*; that before his departure he conſtituted the plaintiff to be his deputy-governor, and that the firſt of *Auguſt* following the defendant arrived at *London*, in *England*; that the 4th of *May*, after defendant's departure, the plaintiff took upon himſelf the adminiſtration of the government of the iſland of *Barbadoes*, and did unlawfully and arbitrarily execute that government and office, to the oppreſſion of the king's ſubjects; that after the return of the defendant, the plaintiff at a council was charged with miſbehaviour in the adminiſtration of his office, in not taking the oath of office, not obſerving the act of navigation, aſſuming the title of lieutenant-governor, and altering decrees in *Chancery*; that it was then ordered by the defendant and council, that the plaintiff ſhould be committed. To this there is a demurrer. In this court judgment was given for the plaintiff; on which a writ of error was brought in the houſe of lords; and tho' the particular reaſons of the judgment in the houſe of lords do not appear further than can be collected from the argument, yet there are ſeveral things in the argument from whence it may be collected upon what grounds the judgment of the houſe of lords went. It was argued upon the part of the plaintiff in error, that this action did not lie againſt him, becauſe it was brought againſt him for that which he did as a judge; that the rule ſeems to be the ſame for one ſort of a judge as another, and that this perſon was lawfully made a governor, and ſo had all the powers of a governor. As to the plea, it was admitted there were ſeveral informalities in that. It was ſaid it might be much ſhorter than it was; but that it ſufficiently ſhewed what the plaintiff in error's authority was. That this action cannot lie, becauſe the fact is not triable here; the laws there may be different from ours. Beſides, no action lies, unleſs it were a malicious commitment as well as cauſeleſs; and that no man will pretend that an action can lie againſt the chief governor or lieutenant of *Ireland* or *Scotland*; and by the ſame reaſon it ought not in this caſe. He had a power to make judges, and therefore was more than a judge. Other reaſons alledged againſt the action lying here are, firſt, that all the records and evidence are there: ſecondly, the laws there differ from what they are here; and governments would be very weak, and the perſons intruſted with them very uneaſy, if they are ſubject to be charged with actions here for what they do in thoſe countries. In the argument on the part of the defendant in error, much pains are taken to ſhew, and it is inſiſted, that the law of *Barbadoes* is the ſame as the law of *England.* Another thing that is there relied on is, that this was an action between two *Engliſhmen*, for an injury done by one *Engliſhman* againſt another. Theſe grounds are ſtrongly relied upon on the part of the then defendant in error; and they ſhew at leaſt that his counſel thought theſe diſtinctions very neceſſary and material in order to ſupport the action at all: for though it is denied on one part that the laws of *Barbadoes* were the ſame as in *England*, yet on the other ſide it is inſiſted they were, and that this action aroſe between *Engliſhman* and *Engliſhman*, and that therefore the action ought to be maintained in this court. The houſe of lords finally determined that the action could not lie here, and the judgment was given for the plaintiff in error. As to the form of the plea, it was impoſſible for any one to ſay a word in vindication of that, or to ſay that the judgment could go upon any other ground than that of the defendant's being governor, and the offence complained of committed by him in that character. That was the ſubſtance of the caſe, and upon that the judgment of the houſe of lords was founded; for as to the plea, it is admitted by the counſel for the defendant, that in other reſpects it was bad upon the face of it. In that caſe, one argument relied on is, that it was an injury committed by one *Engliſhman* againſt another. Now that is not the caſe here; for the plaintiff himſelf was a *Minorquin*; he was ſo by birth, and had always lived in that country. My lord, in this caſe the argument cannot hold, that the action ſhall lie becauſe *Minorca* is governed by the ſame laws as *England*; for it is otherwiſe, and it is ſtated to be governed by the law of *Spain.* The acts upon which the commitment was founded, in the caſe of *Dutton* and *Howell*, were done by the plaintiff in the character of governor of the place, which is an objection againſt that caſe that will not hold in the preſent; for that is not this caſe. Mr. *Fabrigas* never ſtood in the character that the plaintiff in that action did, for there the acts complained of were done by him in the character of governor; and that was urged as one ground why it ſhould not be canvaſſed here. But neither of theſe diſtinctions will hold in the preſent caſe; but all the inconveniences pointed out againſt the action in that caſe will hold very ſtrongly in the preſent. This is an action brought againſt the defendant for what he did as judge; he had a power in that caſe to make judges there, and therefore he was ſomething more than a judge; all the records and evidence which relate to the tranſaction are there, and cannot be brought here; the laws there are different from what they are in this country; and, as it is ſaid in the concluſion of that argument, government muſt be very weak indeed, and the perſons intruſted with them very uneaſy, if they are ſubject to be charged with actions here for what they do in that character in thoſe countries. My lord, unleſs that caſe can be materially diſtinguiſhed from the preſent, it will be an authority, and the higheſt authority that can be adduced, to ſhew that this action cannot be maintained, and will be a ſufficient authority to entitle the plaintiff in error in this cauſe to your lordſhip's judgment. What anſwer may be given to that caſe, or diſtinctions made between that caſe and the caſe now before the court, I cannot at preſent foreſee; but if any are attempted, when I hear them, I ſhall be at liberty to give ſuch anſwers to thoſe arguments as may occur to me by way of reply.

Mr. PECKHAM.

My lord, as the moderation and mildneſs of governor *Moſtyn*'s proceedings have been inſiſted on by Mr. *Buller*, I truſt it will not be thought irrelative to the preſent queſtion, if I ſhortly ſtate to your lordſhips the nature of thoſe injuries which gave birth to the action.

It appeared in evidence on the trial, that Mr. *Fabrigas* was a natural-born ſubject, being born in *Minorca* ſubſequent to the ceſſion by the *Spaniards* at the treaty of *Utrecht*, and prior to the capture by the *French* in the year 1758; that he was a man of irreproachable character and good property; not of the firſt claſs of nobility, but, to borrow an expreſſion from colonel *Bidulph*, 'what we ſhould call in *England* a gentleman farmer;' that he lived in friendſhip with the firſt nobleſſe in the iſland; and that he had a father living, and a wife and five children.

Thus circumſtanced and thus ſituated, he was at the expreſs command of the governor taken from his houſe by a party of ſoldiers, and dragged at noon-day through the ſtreets of *Mahon* as a criminal, and thrown into a dungeon appropriated ſolely to capital offenders.

It appeared likewiſe in evidence, that he was confined ſix days in this dungeon, with nothing but the boards to lie on, and with no other ſuſtenance than bread and water, though felons under ſentence of death were allowed the common food of the iſland; that he was refuſed the conſolation of his friends, and denied all intercourſe with his family; that on the ſeventh morning he was hurried aboard a ſhip, without being permitted to take leave of his children, to ſee his wife, or to be accommodated with money or other neceſſaries for his ſubſiſtence; that during this whole time he had heard of no charge againſt him, he had been confronted with no accuſer, he had not even ſeen his judge: yet he was to be baniſhed to *Carthagena* in *Spain* for the ſpace of twelve months. The ſentence was faithfully executed; and Mr. *Fabrigas*, having experienced that diſtreſs which a moneyleſs ſtranger muſt neceſſarily be reduced to in a country whoſe language he did not underſtand, as fortunately for himſelf as unexpectedly to governor *Moſtyn*, eſcaped from the *Spaniards*: I ſay unexpectedly, my lord, becauſe he little thought that Mr. *Fabrigas* would live to tell an *Engliſh* jury of his ſufferings and the governor's oppreſſion.

I thought it neceſſary to ſtate theſe facts to your lordſhips, that you might judge of the mildneſs of that treatment which Mr. *Buller* deemed it prudent to expatiate on.

It now becomes requiſite for me to ſtate the conduct of the governor through the ſubſequent ſtages of his very extraordinary defence; and that I muſt do with ſome preciſion, as I mean to contend, that the plaintiff in error by that defence is eſtopped from agitating the queſtion of juriſdiction.

The declaration was delivered in *Hilary-Term*, 1773; a rule to plead was given, and a plea demanded. Had the governor then pleaded to the juriſdiction, the queſtion would have come before the court on a demurrer; and if that had been determined in our favour, a writ of inquiry would have been executed, and Mr. *Fabrigas* would in a ſhort ſpace of time, at a little expence, have received a ſatisfaction adequate to the injury, and would have been enabled to return to his friends and to his family. But that would not have anſwered the purpoſe of the governor, as Mr. *Fabrigas* would not then have been delayed in *England*, nor have been harraſſed with this expenſive litigation.

Had the governor at the expiration of the four days pleaded in chief, he might then have had the appearance of an argument in his application to your lordſhips; for it then would have been competent for him to have ſaid, 'I was hurried into this plea before I had time to adviſe with my counſel, and conſult upon the propriety of admitting the juriſdiction.' But he has debarred himſelf even of this ſhadow of an argument; for inſtead of pleading at the uſual time, he applied to the court of *Common-Pleas* for ſix weeks time to plead. Here then was an admiſſion of the juriſdiction; for he could not apply for time to plead, unleſs the court had cognizance of the matter.

I ſhall preſently ſtate to your lordſhips ſome caſes, whoſe authority cannot be ſhaken, to prove, that even after imparlance the queſtion of juriſdiction cannot be gone into.

But this was not the only ſubmiſſion to the juriſdiction of the court; for he then applied to put off the trial till after *Eaſter-Term.* It would have been nugatory, it would have been abſurd, to have prayed the court to put off that trial, which they had no power to try at all. When *Eaſter-Term* arrived, the governor made a ſecond attempt to poſtpone the trial; but the court ſaw through his deſign, and, ſatisfied that he did it only for the purpoſe of delay, they tied him down by the rule to try it peremptorily in *Trinity-Term*, and that he ſhould not bring a writ of error for delay.

When he ſaw the court of *Common-Pleas* would not lend him their power for ſo baſe a purpoſe, he next made application to the court of *Exchequer* for an injunction to ſtay proceedings, and a bill was filed in *Trinity-Term* to effectuate that intention; but the bill was diſmiſſed on argument, and the governor was at length driven in the ſubſequent ſittings to trial. When the cauſe came on, the defendant's counſel did not object to the juriſdiction, they did not requeſt the learned judge to nonſuit the plaintiff; but they ſuffered us to go into our caſe, they croſs-examined our witneſſes, and finding that we had made good our declaration by evidence irrefragable, they then went into their juſtification, and called many witneſſes in ſupport of it. But a verdict being found for the plaintiff, they tendered a bill of exceptions; and in laſt *Michaelmas-Term*, they applied to the court of *Common-Pleas* for a new trial; firſt, for exceſs of damages; ſecondly, becauſe the court had no juriſdiction—the moſt extraordinary reaſon perhaps that ever was given; to deſire a ſecond trial, becauſe the court had no juriſdiction to try it at all.

Governor *Moſtyn* having in ſo many inſtances admitted the juriſdiction of the court, I muſt beg leave to ſtate ſome authorities to your lordſhip, which prove that he is now too late to take any advantage of a defect of juriſdiction.

The firſt caſe I ſhall mention to your lordſhips is to be found in the *Year-Books*, in the 22d *H.* 6. *fo.* 7. where there was a ſpecial imparlance, *ſalvis omnibus allegationibus & exceptionibus, tam ad breve quam ad narratio-*

nem; and the court would not allow the defendant's privilege, becauſe, ſays the caſe, ‘ by imparling he has admitted the juriſdiction of the court.’ This doctrine is confirmed by lord *Coke*, in his comment on the 195th ſection of *Littleton*, where ſpeaking of a perſonal action he ſays, three parts are to be conſidered; firſt, when the defendant defends the wrong and force, he maketh himſelf a party to the matter; ſecondly, by the defence of the damages he affirmeth, *that the plaintiff is able to ſue and to recover damages* upon juſt cauſe; and by the laſt part, *viz.* ‘ all that which he ought to defend when and where he ought,’ *he affirmeth the juriſdiction* of the court.

The caſe of *Barrington* and *Venables*, 13 *C.* 2. reported in ſir *Thomas Raymond*, 34, is very clear on this head. The defendant after imparlance pleaded to the juriſdiction; the plaintiff demurred: the judgment was, that he ſhould anſwer over, for ſuch plea cannot be pleaded after imparlance.

The next caſe in order of time is reported in 1 *Modern*, 81, *Cox* and St. *Alban*'s, 22 *C.* 2. A prohibition was prayed for the city of *London*, becauſe the defendant had offered a plea to the juriſdiction which had been refuſed. Lord chief juſtice *Hale* ſaid, ‘ in *tranſitory actions*, if they will plead a matter that ariſeth out of the juriſdiction, and ſwear it before imparlance, and it be refuſed, a prohibition will go.’ There was a caſe, ſaid his lordſhip, in which it was adjudged that the juriſdiction muſt be pleaded and the plea ſworn, and it muſt come in before imparlance. It was alſo agreed in that caſe, ‘ *that the party ſhould never be received to aſſign for error, that it was out of the juriſdiction, but it muſt be pleaded.*’ I have in vain endeavoured to find this caſe; but it is ſufficient for my purpoſe to obſerve, that lord chief juſtice *Hale* would not have cited it unleſs it had been law. If therefore the opinion of that great man, ſolemnly given in the court of *King's Bench*, is authority, I am bold to ſay, that governor *Moſtyn*, not having pleaded to the juriſdiction, cannot now aſſign it for error.

In a few years after, lord chief juſtice *Hale* was again called upon to conſider this queſtion in the caſe of *Mandyke* and *Stint*, 2 *Modern*, 273, 22 *C.* 2. There was a prohibition to the ſheriff's court of *London*: the ſuggeſtion was, that the contract was made in *Middleſex*, therefore the cauſe of action did not ariſe within their juriſdiction. The chief juſtice and juſtice *Wyndham* were of opinion, ‘ that after the defendant had admitted the juriſdiction by pleading to the action, eſpecially *if verdict and judgment* paſs, the court will not examine whether the cauſe of action did ariſe out of the juriſdiction or not;’ on which a prohibition was denied, and judgment was given for the plaintiff. I cannot diſtinguiſh this from the preſent caſe; for as the court will not examine whether the cauſe of action did ariſe out of the juriſdiction, there can be no difference whether it was in *Middleſex* or in *Minorca*; and that queſtion cannot now be aſked, becauſe verdict and judgment have paſſed.

Lord chief juſtice *Holt*, in the caſe of *Andrews* and *Holt*, 2 Lord *Raymond*, 884, ſaid, that he was counſel in the caſe of *Denning* and *Norris* (reported in 2 *Levintz*, 243) and that the court held there, ‘ that ſince the defendant had admitted the judge to be a judge *by a plea to the action*, he was eſtopped to ſay, that he was not a judge afterwards.’ If then a defendant, by having ſubmitted the deciſion of his cauſe to a judge, precluded himſelf from objecting to him afterwards, how much ſtronger is the preſent caſe, where the defendant has ſubmitted his cauſe to the determination of a court which has cognizance over all tranſitory actions. It is again laid down by lord chief juſtice *Holt*, ‘ that there ought to be no plea to the juriſdiction after imparlance, and that a ſpecial imparlance admits the juriſdiction.’ *Holt's Reports*, *Eaſt. T.* 5 *W.* and *M.*"

I muſt trouble your lordſhips with the caſe of *Trelawny* and *Williams*, to ſhew, that there has been but one opinion on both ſides of the Hall reſpecting a plea to the juriſdiction; and that equity and common law have united in ſaying, that if the juriſdiction is not pleaded to, it muſt be afterwards admitted. This caſe is reported in 2 *Vernon* 483, *Hil. T.* 1704. The plaintiff prayed an account relative to a tin-ſet: the defendant inſiſted that he ought to have been ſued in the *Stannary-Court*. The lord-keeper decreed an account; and as to the objection that the plaintiff ought to have ſued in the *Stannary-Court*, he ſaid, ‘ to ouſt this court of its juriſdiction, the defendant muſt plead to the juriſdiction, and not object to it at the hearing.’

There are a great variety of caſes tending to eſtabliſh this poſition, that when a defendant has once ſubmitted to the juriſdiction, he has for ever precluded himſelf from objecting to it. To ſtate them all, after the great authorities I have mentioned, would be to multiply the witneſſes without ſtrengthening the teſtimony: I ſhall therefore only cite a few paſſages from lord chief baron *Gilbert*'s Hiſtory of the *Common-Pleas*, which are deciſive upon this part of the argument. In page 40, ſpeaking of the order of pleading, he ſays, ‘ the defendant firſt pleads to the juriſdiction of the court; ſecondly, to the perſon of the plaintiff; and thirdly, to the count or declaration. By this order of pleading each ſubſequent plea admits the former. As, when he pleads to the perſon of the plaintiff, he admits the juriſdiction of the court; for it would be nugatory to plead any thing in that court which has no juriſdiction in the caſe. *When he pleads to the count or declaration, he allows that the plaintiff is able to come into that court to implead him, and he may be there properly impleaded.*’ He lays it down in a ſubſequent part of his treatiſe (*p.* 148.) as a poſitive rule of law, that ‘ if a defendant pleads to the juriſdiction of the court, he muſt do it *inſtanter* on his appearance; for if he *imparls*, he owns the juriſdiction of the court, by craving leave of the court for time to plead in, and *the court ſhall never be ouſted of its juriſdiction after imparlance.*’ When I find this doctrine in our old law-books, when I ſee it ratified in modern times, and ſtamped with the authorities of *Coke*, *Hale*, *Holt*, and *Gilbert*, I am warranted in ſaying, that governor *Moſtyn* cannot now agitate the queſtion of juriſdiction; and if he cannot, the judgment muſt be affirmed.

Notwithſtanding which, I have no objection to follow Mr. *Buller* through the grounds of argument that he has adopted; and I ſhall endeavour to prove,

That an action of treſpaſs can be brought in *England* for an injury done abroad:

That Mr. *Fabrigas* is capable of bringing ſuch action:

And, that governor *Moſtyn* may be the ſubject of it.

It cannot be contended, but that an action of treſpaſs is a tranſitory action, and may be brought any where: ‘ all perſonal actions, ſays lord *Coke*, may be brought in any county, and laid any where.’ *C. L.* 282.

In the earl of *Derby*'s caſe, 12 *Coke*, the chancellor, the chief juſtice, the maſter of the rolls, and juſtices *Dodderidge* and *Winch*, reſolved, ‘ that for *things tranſitory*, altho' that in truth they be within the county palatine, the plaintiff may by law alledge them to be done in any place within *England*; and the defendant may not plead to the juriſdiction of the court, that they were done within the county palatine.’ This doctrine is not confined to counties palatine; for lord *Coke*, in his comment on *Littleton*, 261, ſays, ‘ that an obligation made beyond the ſeas at *Bourdeaux*, in *France*, may be ſued here in *England* in what place the plaintiff will.’ Captain *Parker* brought an action of treſpaſs and falſe impriſonment againſt lord *Clive*, for injuries received in *India*, and it was never doubted but that the action did lie. Even at this moment there is an action depending between *Gregory Cojimaul*, an *Armenian* merchant, and governor *Verelſt*, in which the cauſe of action aroſe in *Bengal*. A bill was filed by the governor in the *Exchequer* for an injunction, which was granted; but on appeal to the houſe of lords, the injunction was diſſolved. The ſupreme court of judicature, by diſſolving the injunction, acknowledged that an action of treſpaſs could be maintained in *England*, though the cauſe of action aroſe in *India*.

The next point to be conſidered is, whether there is any diſability attending the perſon of Mr. *Fabrigas*, that incapacitates him from bringing this action. But it will be requiſite for me firſt to ſtate, that governor *Moſtyn* pleaded not guilty, and then juſtified what he had done by alledging, that the plaintiff had endeavoured to create mutiny among the troops; therefore he, as governor, had a right to impriſon and baniſh him. Your lordſhip obſerves, that, according to his own plea, he does not pretend to juſtify what he has done as governor merely from the plenitude of his power, but from the neceſſity of the act, becauſe the plaintiff had endeavoured to create mutiny and ſedition. The learned judge who tried the cauſe, foreſeeing the importance of this juſtification, requeſted the jury, at the ſame time they brought in their verdict, to find whether the governor's juſtification had been proved. The jury found a verdict for the plaintiff, with 3000*l.* damages, and, *that the plaintiff had not endeavoured to create mutiny or deſertion, or had acted in any way tending thereto.*

In conſequence of that deciſion, the queſtion now is, whether Mr. *Fabrigas*, a man perfectly innocent, can bring an action againſt governor *Moſtyn* for this wanton and unparalleled injury?

As the law grants redreſs for all injuries, ſo it is open to all perſons, and none are excluded from bringing an action, except on account of their crimes or their country. *Littleton* ſays, there are ſix manner of perſons who cannot bring actions: Mr. *Fabrigas* is not included in either of thoſe deſcriptions. The only perſon that can bear the leaſt reſemblance to him is an alien, who, *Littleton* ſays, to be incapacitated from bringing an action, muſt be *born out of the ligeance of the king*. Lord *Coke*, in his comment on that paſſage, obſerves, that ‘ *Littleton* ſaith not, out of the realm, but out of the ligeance; for he may be born, ſays *Coke*, out of the realm of *England*, yet within the ligeance, and ſhall be called the king's liege-man, for *ligeus is ever taken for a natural-born ſubject.*’ *C. L.* 129.

Mr. *Fabrigas* was born in *Minorca* ſubſequent to the ceſſion of *Spain*, conſequently he is a natural-born ſubject; every natural-born ſubject, according to lord *Coke*, owes allegiance to the king; allegiance implies protection, the one is a neceſſary conſequence of the other; the king of *England* can protect only by his laws; by the laws of *England* there is no injury without a remedy; the remedy for falſe impriſonment and baniſhment is an action of treſpaſs, which is a tranſitory action, and may be brought any where, therefore rightly brought in the city of *London*, where this action was actually tried, and Mr. *Fabrigas* recovered 3000*l.* damages. I hope your lordſhips will juſtify me in ſaying, that this is a fair deduction from eſtabliſhed principles.

Lord *Coke* (*C. L.* 130.) mentions three things whereby every ſubject is protected, *rex, lex, et reſcripta regis*; and he adds, ‘ that he that is out of the *protection of the king*, cannot be aided or protected by the king's law, or by the king's writ.’ The natural inference to be drawn from thence is, that he who is under the king's protection may be aided by the king's law. Mr. *Fabrigas* is under the king's protection, becauſe he owes him allegiance, therefore he may be aided by the king's laws; conſequently is warranted in bringing this action, the only aid the laws of *England* can afford him for that injury.

Mr. *Buller* has mentioned the caſe of *Pons* and *Johnſon*, lieutenant-governor of *Minorca*, and ſeems to rely on what was ſaid by lord *Camden* on that occaſion. If my memory does not miſlead me, the plaintiff could not make good his caſe, being unable to prove Mr. *Johnſon*'s hand-writing to the order for the fiſcal to commit him, and the queſtion of juriſdiction was not agitated; but if it had, however reſpectable lord *Camden*'s opinion ever will be, yet it was only the opinion of a judge at *niſi prius.* And according to Mr. *Buller*'s own ſtate of the caſe, he makes lord *Camden* confeſs, that an action might lie in a tranſaction *between ſubject and ſubject.* That conceſſion is ſufficient for me; for I have your lordſhip's own words to prove, that Mr. *Fabrigas*, being born in a conquered country, is a ſubject.

In the king and *Cowle*, 2 *Burrows*, 858, your lordſhip, ſpeaking of *Calvin*'s caſe, ſaid, ‘ the queſtion was, whether the plaintiff *Calvin*, born in *Scotland* after the deſcent of the crown of *England* to king *James* the firſt, was an alien born, and conſequently diſabled to bring any real or perſonal action for any lands within the realm of *England*;’ and your lordſhip added, ‘ but it never was a doubt whether a perſon born in the conquered dominions of a country is ſubject to the king of the con-

‘ quering country.’ From this two points are gained: firſt, that *Calvin*, though born in *Scotland*, was not an alien, and might bring a real action; and that *there never was a doubt, but that a perſon born in a conquered country was ſubject to the conqueror.* As therefore the twelve judges determined that *Calvin* could bring a *real* action, becauſe he was not an alien; certainly *Fabrigas* may bring a *tranſitory* action, as he is a ſubject, being born in a country that was conquered by the ſtate of *Great-Britain.*

There is an anonymous caſe in 1 *Salkeld*, 404, 4 *Ann.* A bill was brought in *Chancery* to forecloſe a mortgage of the iſland of *Sarke*: the defendants pleaded to the juriſdiction of the court, *viz.* that the iſland of *Sarke* was governed by the laws of *Normandy*; and it was objected, that the party ought to ſue in the courts of the iſland, and appeal. On the other ſide, it was ſaid, that if the perſon be here, he may be ſued in *Chancery*, though the lands lie in a county palatine, or in another kingdom, as *Ireland*, or *Barbadoes*. Lord-keeper *Wright* over-ruled the plea, ſaying, ‘ that ‘ the court acted againſt the perſon of the party and his conſcience, and ‘ there might be a failure of juſtice if the *Chancery* would not hold plea ‘ in ſuch a caſe, *the party being here.*’ How much ſtronger then is the preſent caſe? for this is a tranſitory action that may be brought any where; Mr. *Fabrigas* on the ſpot to bring it, and governor *Moſtyn* in *England* to defend it.

The caſe Mr. *Buller* has cited, of the *Eaſt-India* Company and *Campbell*, admits of a ſhort anſwer; for had the defendant confeſſed the matter charged, he would have confeſſed himſelf to be guilty of a felony; and the humanity of the laws of *England* will not oblige a man to accuſe himſelf: but this is not a public crime, but a civil injury. As Mr. *Buller* has gone to the *Eaſt-Indies* for a caſe, I ſhall be excuſed mentioning the caſe of *Ramkiſſenſeat* and *Barker*, 1 *Atkyns* 51, where the plaintiff filed a bill againſt the repreſentatives of the governor of *Patna*, for money due to him as his banyan. The defendants pleaded, that the plaintiff was an alien born, and an alien infidel, and therefore could have no ſuit here: but lord *Hardwicke* ſaid, as the plaintiff's was a mere perſonal demand, it was extremely clear that he might bring a bill in this court; and he over-ruled the defendant's plea without hearing one counſel of either ſide. As therefore lord *Hardwicke* was of opinion, that by the laws of *England* an alien infidel, a *Gentoo* merchant, the ſubject of the great mogul, could claim the benefit of the *Engliſh* laws againſt an *Engliſh* governor for a tranſaction in a foreign country; I truſt that your lordſhips will determine, that Mr. *Fabrigas*, who is neither an infidel nor an alien, but a ſubject of *Great-Britain*, may bring his action here for an injury received in *Minorca.*

The caſe of the counteſs of *Derby* does not affect the preſent queſtion; for that was a claim of dower, which is a local action, and cannot, as a tranſitory action, be tried any where. The other caſes, mentioned by Mr. *Buller*, from *Latch* and *Lutwich*, were either local actions, or queſtions upon demurrer, therefore not applicable to the caſe before the court; for a party may avail himſelf of many things upon a demurrer, which he cannot by a writ of error.

Mr. *Buller*'s endeavouring to confound tranſitory with local actions, muſt be my apology for mentioning another caſe in ſupport of the diſtinction. The caſe I allude to is Mr. *Skinner*'s, which was preferred to the twelve judges from the council-board. In the year 1657, when trade was open to the *Eaſt-Indies*, he poſſeſſed himſelf of a houſe and warehouſe, which he filled with goods at *Jamby*; and he purchaſed of the king of *Great Jamby* the iſlands of *Baretha*. The agents of the *Eaſt-India* Company aſſaulted his perſon, ſeized his warehouſe, carried away his goods, and took and poſſeſſed themſelves of the iſlands of *Baretha*. Upon this caſe, it was propounded to the judges, by an order from the king in council, dated the 12th *April* 1665, whether Mr. *Skinner* could have a full relief in any ordinary court of law? Their opinion was, ‘ that his ma‘ jeſty's ordinary courts of juſtice at *Weſtminſter* can give relief for taking ‘ away and ſpoiling his ſhip, goods, and papers, and aſſaulting and ‘ wounding his perſon, *notwithſtanding the ſame was done beyond the ſeas*: ‘ but that as to the detaining and poſſeſſing of the houſe and iſlands, in the ‘ caſe mentioned, he is not relievable in any ordinary court of juſtice.’

Your lordſhips will collect from this caſe, that the twelve judges held that an action might be maintained here for ſpoiling his goods, and ſeizing his perſon, becauſe an action of treſpaſs is a tranſitory action; but an action could not be maintained for poſſeſſing the houſe and land, becauſe it is a local action.

I truſt I have proved that an action of treſpaſs may be brought here for an injury received in *Minorca*; and that Mr. *Fabrigas*, a natural-born ſubject, is capable of bringing ſuch action. The only remaining queſtion is, whether Mr. *Moſtyn*, as governor, can tyrannize over the innocent inhabitants within his government, in violation of law, juſtice, and humanity, and not be reſponſible in our courts to repair by a ſatisfaction in damages the injury he has done? Mr. *Buller* has contended, that general *Moſtyn* governs as all abſolute ſovereigns do, and that *ſtet pro ratione voluntas* is the only rule of his conduct. I did not expect to hear ſuch an aſſertion advanced in this court. From whom does the governor derive this deſpotiſm? Can the king delegate abſolute power to another, which he has not in himſelf? Can ſuch a monſter exiſt in the *Britiſh* dominions as tyranny uncontrouled by law? Mr. *Buller* aſſerts, that the governor is accountable to God alone; but this court I hope will teach him, that he is accountable to his country here, as he muſt be to his God hereafter, for this wanton outrage on an unoffending ſubject. Many caſes have been cited, and much argument adduced, to prove that a man is not reſponſible in an action for what he has done as a judge. I neither deny the doctrine, nor ſhall endeavour to impeach the caſes; but I muſt obſerve, that they do not affect the preſent queſtion. Did governor *Moſtyn* ſit in judgment? Did he hear any accuſation? Did he examine a witneſs? Did he even ſee the priſoner? Did he follow any rule of law in any country? *Stet pro ratione voluntas* was his law, and his mercy was twelve months baniſhment, to an innocent individual.

As Mr. *Buller* has dwelt ſo much upon the caſe of *Dutton* and *Howell*, it will be expected that I take ſome notice of it. I need not go over the caſe again, as it has been already very accurately ſtated; but I muſt beg leave to read the reaſons which were given with the printed caſe to the lords, before it came on to be argued in the houſe of peers. It is ſtated, that ſir *Richard Dutton* ought to have the judgment that was obtained againſt him below, reverſed; for

1ſt, That what he did, he did as chief governor, and *in a council of ſtate*, for which he ought not to be charged with an action. If he ſhall, it may be not only the caſe of ſir *Richard Dutton*, but of any other chief governor or privy-counſellor in *Scotland*, *Ireland*, or elſewhere.

2. What was done, was in order to bring a delinquent to juſtice, who was tried in *Barbadoes* and found guilty; and if for this he ſhall be charged with an action, it would be a diſcouragement to juſtice.

3. What was done, was done in court; for ſo is a council of ſtate, to receive complaints againſt ſtate delinquents, and direct their trials in proper courts. What a judge acts in court, as ſir *Richard Dutton* did, no action lies againſt him for it.

4. There never was ſuch an action as this maintained againſt a governor for *what he did in council*; and if this be made a precedent, it will render all governments unſafe.

5. If a governor of a plantation beyond the ſeas ſhall be charged with actions here, for what he did there, it will be impoſſible for him to defend himſelf: firſt, for that all records and evidences are there: ſecondly, the laws there differ in many things from what they are here.

Though the firſt part of this reaſon ſeems to operate in favour of governor *Moſtyn*, yet it goes no farther than this; that if an action is brought here, it will be *impoſſible for him to defend himſelf.* The latter part ſhews the meaning of the whole; that is, if an action is brought here againſt the governor for any thing done by him in his *judicial capacity*, then he will not be able to defend himſelf, becauſe all the records and evidences are there. This clearly proves, that it refers to what he did as judge, otherwiſe there could have been no occaſion to have mentioned the records being there.

Theſe reaſons muſt have been the ground of the counſel's argument, and the whole is bottomed in ſir *Richard Dutton*'s having acted with his council in a judicial capacity. I take no notice of the arguments of counſel, as reported by *Shower*, becauſe it can be no authority for this court. I ſhall only obſerve, that in reſpect to the juriſdiction, which was but ſlightly touched on, that the aſſertion of the counſel for the defendant in error, affirming the juriſdiction, is as good authority for me, as the denial of it by ſir *Richard Dutton*'s counſel is for Mr. *Buller*. The report is ſilent as to the grounds of the judgment: it only ſays, ‘ that the action ‘ was reverſed;’ but not one word that the action could not be maintained. But I venture to affirm, that this caſe has not the leaſt reſemblance to the preſent. My duty calls on me to draw the invidious parallel.

Governor *Dutton* ſat with his council, to hear and enquire in the ſupreme court of judicature in *Barbadoes*:

Governor *Moſtyn* ſat neither as a military nor a civil judge.

Mr. *Fabrigas* was not brought before him, neither was he accuſed by any man:

Sir *John Witham* was publicly accuſed before the governor and council of ſtate.

Mr. *Fabrigas* was thrown into a dungeon, and treated with the moſt unheard-of ſeverity:

Sir *John Witham* was only confined for the purpoſe of ſecuring his perſon.

Fabrigas was baniſhed for twelve months to the *Spaniſh* dominions:

Sir *John* was kept in cuſtody for fourteen days, till he could be brought to his trial.

Mr. *Fabrigas*, on the governor's juſtification, was found to be innocent:

Sir *John Witham*, when brought before the court of general ſeſſions, was found guilty, and recommitted.

The governor of *Barbadoes* followed the laws of *Barbadoes*:

The governor of *Minorca* acted in diametrical oppoſition to all laws, and in violation of the natural dictates of humanity.

Sir *Richard Dutton* let the law take its courſe againſt a criminal:

But governor *Moſtyn* went out of his way to perſecute the innocent.

Having ſhewn the difference between the two caſes, permit me to mention an obſervation of lord chief juſtice *de Grey*, in his opinion on the motion for a new trial. ‘ If the governor had ſecured him, ſaid his lord‘ ſhip, nay, if he had barely committed him, that he might have been ‘ amenable to juſtice, and if he had immediately ordered a proſecution upon ‘ any part of his conduct, it would have been another queſtion: but the ‘ governor knew he could no more impriſon him for a twelvemonth, (and ‘ the baniſhment for a year is a continuation of the original impriſonment) ‘ than that he could inflict the torture.’

Lord chief juſtice *de Grey* then undoubtedly thought that governor *Moſtyn* had acted illegally: if ſo, I hope I ſhall be able to ſhew, that he is amenable to the courts of law in *England.*

Lord *Bellamont*'s caſe, in 2 *Salkeld* 625, 12 *W.* 3. *B. R. Eaſt. T.* evinces, that a governor abroad is reſponſible here. ‘ The attorney-general ‘ moved for a trial at bar the laſt paper-day in the term, in an action againſt ‘ the governor of *New-York*, for matter done by him as governor, and ‘ granted, becauſe the king defended it.’ I collect from this caſe, that the attorney-general knew the court had juriſdiction, or he would not have made the motion; and the court would not have granted it, if they had not been legally impowered to try it. The legiſlature, in the ſame year (12 *W.* 3. *cap.* 12.) enacted, that governors beyond the ſea ſhould be tried in the *King's Bench*, or in ſuch county as ſhall be aſſigned by his majeſty, by good and lawful men, for offences committed in their governments abroad againſt the king's ſubjects there; as, by the common law, an indictment could be preferred only in that county where the offence was committed. Governors abroad were not criminally amenable till this act had paſſed. When the legiſlature ſo carefully provided to bring governors to juſtice for the offences they might commit in their governments, they would indiſputably, by the ſame law, have protected the ſubjects from civil injuries, had they not known that ſuch proviſion was unneceſſary, and that, by the common law, all perſonal actions might be brought in *England*; of which lord *Bellamont*'s caſe was a recent inſtance.

In *Michaelmas-Term*, 11 *Geo.* II. 1737, *Stephen Conner* brought an action againſt *Joſeph Sabine*, governor of *Gibraltar*: and he ſtated in his declaration, that he was a maſter carpenter of the office of ordnance at *Gibraltar*; that governor *Sabine* tried him by a court-martial; to which he was not ſubject; and that he underwent the ſentence of receiving 500 laſhes, and that he was compelled to depart from *Gibraltar*, which he laid to his damage of 10,000 *l.* The defendant pleaded not guilty, and juſtified by trying him by a court-martial. There was a verdict for the plaintiff, with 700 *l.* damages. A writ of error was brought, and the judgment affirmed. No diſtinction can be made between the governor of *Gibraltar* and the governor of *Minorca*; except only, that the one tried *Conner* by a court-martial, and puniſhed him by military law; while the other, without any trial, baniſhed Mr. *Fabrigas*, contrary to all ideas of juſtice and of law.

I muſt now beg leave to advert to the bill of exceptions; in which it is alledged, that '*Minorca* is divided into four diſtricts, excluſive of the 'arraval, which the witneſſes always underſtood to be diſtinct from the 'others, and under the immediate order of the governor.'

I am well aware, that I am not at liberty to go out of the record; if I was, the fact warrants me in ſaying, that the evidence is moſt untrue.

It is notorious that *Minorca* is divided into four terminos only; *Cieutadella*, *Alayor*, *Marcadel*, and *Mahon*, which latter includes the arraval of St. *Phillip*'s. This is known to every man who has been at *Minorca*, and to every man who has read *Armſtrong*'s hiſtory of that iſland. That the governor has a legiſlative authority within the arraval, is too abſurd to dwell on. By what law, by what proviſion, does he claim that power? When proceſs is executed within St. *Phillip*'s, or its environs, the civil magiſtrate uſually pays the governor the compliment of acquainting him with it; but the ſame compliment is paid to the commanding officer at *Cieutadella*, where an excluſive juriſdiction is not even pretended. In fact, it is a matter of civility merely, but never was a claim of right.

Lord chief juſtice *de Grey*, in the ſolemn opinion which he gave upon the motion for a new trial, has been explicit on theſe two heads. 'One 'of the witneſſes in the cauſe (ſaid his lordſhip) repreſented to the jury, 'that in ſome particular caſes, eſpecially in criminal matters, the governor 'reſident upon the iſland does exerciſe a legiſlative power. It was groſs ig'norance in that perſon to imagine ſuch a thing: I may ſay, it was impoſ'ſible, that a man who lived upon the iſland, in the ſtation he had done, 'ſhould not know better, than to think that the governor had a civil and 'criminal power in him. The governor is the king's ſervant; his commiſſion 'is from him, and he is to execute the power he is inveſted with under that 'commiſſion, which is to execute the laws of *Minorca*, under ſuch regula'tions as the king ſhall make in council. It was a vain imagination in the 'witneſſes to ſay, that there were five terminos in the iſland of *Minorca*. I 'have at various times ſeen a multitude of authentic documents and papers 'relative to that iſland; and I do not believe, that, in any one of them, the idea 'of the arraval of St. *Phillip*'s being a diſtinct juriſdiction was ever ſtarted. '*Mahon* is one of the four terminos, and St. *Phillip*'s, and all the diſtrict 'about it, is comprehended within that termino: but to ſuppoſe, that there 'is a diſtinct juriſdiction, ſeparate from the government of the iſland, is 'ridiculous and abſurd.'

Theſe were the words of lord chief juſtice *de Grey*; to which, I am confident, this court will pay a proper attention.

The bill of exceptions then ſtates, that general *Moſtyn* was appointed governor by the king's commiſſion, which gives him *all the powers belonging to the ſaid office*. I wiſh to aſk Mr. *Buller*, whether to perſecute the innocent, and to baniſh thoſe ſubjects committed to his care, is a power incident to or ſpringing out of the office of governor? If it is not, the governor cannot juſtify himſelf under his commiſſion.

It is then ſtated, that the king ordered 'all his loving ſubjects in the 'ſaid iſland to obey him, the ſaid *John Moſtyn*;' but nothing in particular is mentioned of the arraval. Had it been a peculiar diſtrict, under the deſpotic will of the governor, there muſt have been ſome notice taken of it, either in the commiſſion, or in his majeſty's orders. The governor then confeſſes in his bill of exceptions, 'that he baniſhed Mr. '*Fabrigas* without any reaſonable or probable cauſe, or any other mat'ter alledged in his plea, or any act tending thereto.' Notwithſtanding which admiſſion, in the very next ſentence, he inſiſts that the plaintiff ought to be barred his ſaid action, although it is ſtated in the bill of exceptions, that 'the *Minorquins* plead ſometimes the *Engliſh* laws.'

Were the bill of exceptions leſs abſurd than it is, yet I ſhould contend, that the governor, by pleading in chief, and ſubmitting his cauſe to the deciſion of an *Engliſh* jury, has precluded this court from enquiring into the original juriſdiction. Were it poſſible that this ground ſhould fail me, when ſupported by ſo many great authorities, yet I ſhould be very eaſy about the event; for, as an action of treſpaſs can be brought in *England* for injuries abroad, and as every ſubject can bring that action, and as governor *Moſtyn* (being a ſubject) muſt anſwer to it, I have no doubt but the judgment will be affirmed. Should it be reverſed, I fear the publick, with too much truth, will apply the lines of the *Roman* ſatyriſt on the drunken *Marius* to the preſent occaſion; and they will ſay of governor *Moſtyn*, as was formerly ſaid of him,

Hic eſt damnatus inani judicio;

and to the *Minorquins*, if Mr. *Fabrigas* ſhould be deprived of that ſatiſfaction in damages which the jury gave him,

At tu victrix provincia ploras.

Mr. BULLER's *reply.*

Mr. *Buller*. I beg leave to trouble the court with a few words by way of reply: and though Mr. *Peckham* has thought fit to declaim ſo much upon the particular facts of this cauſe, yet I was confident at firſt, and do not now find I was deceived in thinking, I ſhould not be contradicted in what I ſaid about the propriety of governor *Moſtyn*'s conduct; that he had taken every precaution that a man in his ſituation could do, had conſulted many perſons there, civil and military, and that they were all unanimous in adviſing the governor to do what was done.

The firſt objection made by Mr. *Peckham* has been, that Mr. *Moſtyn* ſhould be precluded from contending, that this court hath not a juriſdiction, becauſe he has ſubmitted to the juriſdiction of the court in ſo many inſtances during the whole of theſe proceedings. He has ſtated the whole proceedings during the ſtages of this cauſe, by which he ſuppoſes Mr. *Moſtyn* hath done ſuch acts as ſhall be conſtrued into a ſubmiſſion to the juriſdiction of the court, and is therefore now precluded from entering into the queſtion. Further, Mr. *Peckham* has inſiſted upon it, that at the trial we did wrong in making a defence; becauſe, if we meant to go into the queſtion, whether the court has juriſdiction or not, we ſhould have then inſiſted upon a non-ſuit, and not gone into the merits of the cauſe. I do not apprehend any of the caſes he has cited will come up to the preſent: and as to the different periods of the cauſe, where he ſuppoſes we have ſubmitted to the juriſdiction of the court, if this court hath no juriſdiction at all, I do not know how it can then be ſaid we have ſubmitted to it. Saying, that at the trial we ſhould have inſiſted upon a non-ſuit, is ſaying we ſhould have inſiſted upon what we could not demand; for it is at all times at the option of the plaintiff, whether he will ſubmit to a non-ſuit or not. If the defendant can avail himſelf of the objection at all, it muſt be by intitling himſelf by that means to a verdict; for it is in the power of the plaintiff to get up and ſay, I will not be non-ſuited. It was impoſſible for us to inſiſt upon the objection in any other way than it is now done: the objection ariſes out of the facts of the caſe, and what was proved at the trial. It was there proved, that Mr. *Moſtyn* was the governor; that what he did was in that character; and therefore, ſays he, theſe facts being proved, I inſiſt I am not anſwerable in a court of juſtice in *England*, for what I have done in this character: therefore the objection would have been improper, if it had come at any other time; it could only come when theſe facts appeared in evidence upon which his objection was founded. As to the many caſes that have been cited, I believe I may ſafely give this general anſwer to them all: they are caſes where an action has been brought in a court in *England*, for a tranſaction ariſing in *England*, but, on account of a charter or ſtatute, the juriſdiction of the ſuperior court has been excluded. Where that is ſo, and this court has a general ſuperintendent juriſdiction, but it is taken away by a particular law, in ſuch caſe it is neceſſary to plead to the juriſdiction: but when the queſtion ariſes upon a tranſaction happening in foreign parts, and where the courts of *England* cannot have any controul whatſoever, (ſuppoſe, for inſtance, in *France*, where the king or parliament of *England* can make no laws to bind the inhabitants) it is juſt the ſame as a court of inferior record in *England*, where it holds plea of a thing done out of their juriſdiction. In that caſe, if it appears upon the proceedings, that the cauſe of action aroſe out of the juriſdictions, the whole proceedings are void; they are *coram non judice*; and an action will lie againſt the party, the officers, and the judges, for what is done under them.

In this caſe, as I ſubmit to your lordſhip, the queſtion is the ſame; becauſe it is not on a tranſaction happening within the limits, or within the country where this court reſides or has a juriſdiction, but on a tranſaction ariſing in foreign dominions. I beg leave to mention too, that if theſe caſes were ſo very general as Mr. *Peckham* wiſhes to have them underſtood, it is not poſſible that the caſe in *Latch*, or the caſe in *Lutwyche*, ever could have exiſted; becauſe, if it was to hold as a general rule, that where the cauſe of action ariſes out of the kingdom you muſt plead to the juriſdiction, it would have been a ſufficient anſwer in thoſe caſes to ſay, it was not ſo pleaded. In the caſe in *Lutwyche*, there was a plea in bar, and demurrer to that plea; but it appearing, that the cauſe of action did not ariſe in this kingdom, but in foreign parts, the court agreed, that the ſuppoſition and quaint legal fiction, which otherwiſe would avail, that it was in *London* or *England*, was abſurd, and the plaintiff could not ſupport his action. It was the ſame in the caſe in *Latch*; for that was not on a plea to the juriſdiction, but the objection aroſe long after, and in a ſubſequent period of the cauſe: the judges there agreed, that if it appeared on the record, that the caſe was plainly and evidently out of their juriſdiction, they were bound to take notice of it.

Mr. *Peckham* has divided his argument into three heads: firſt, whether a tranſitory action is capable of being brought in *England*, if the cauſe of that action ariſe beyond the ſeas: ſecondly, whether the plaintiff is capable of bringing ſuch action: and, in the third place, whether the defendant is a proper object of it. On the firſt of theſe queſtions it has been inſiſted, that an action of falſe impriſonment is a tranſitory action; and ſome caſes cited, where tranſitory actions, ariſing abroad, are holden to be maintainable here. An action of falſe impriſonment certainly is a tranſitory action: but, my lord, the caſes cited from 12th *Co.* and *Co. Lit.* were not caſes of action for falſe impriſonment, but debt upon bond. Theſe caſes were where the law, in the different countries, was the ſame; and they therefore come within the diſtinction laid down in the caſe before lord *Camden*. For, where the law of the different countries is the ſame, this court may hold plea; it may do as much juſtice as the foreign courts, and can be involved in no difficulty with reſpect to the rules by which they are to decide. But in the caſe of tranſactions ariſing in foreign dominions, where the law of the foreign country is different from the law of this kingdom, this court has no way of informing themſelves what the foreign law is, nor can they know what rules to decide by; and therefore every inconvenience ariſes againſt their entertaining ſuch a ſuit. Mr. *Peckham* then cited the caſe of *Parker* againſt lord *Clive*, in this court, and obſerved, that there never was any objection taken there, that the action would not lie. That caſe is different from the preſent. That was a caſe between *Engliſh* ſubjects, and a caſe that was to be determined, not by the law of the *Eaſt-Indies*, (for that was not ſet up as a defence, or at all intermixed with the caſe) but by the law of *England*; and therefore is ſtill within the diſtinction I have laid down, and endeavoured to ſupport. Then the ſecond queſtion Mr. *Peckham* has made is, whether the plaintiff can maintain this action? The plaintiff, he ſays, is not an alien, but a natural-born ſubject, and as ſuch he owes allegiance, and is intitled to protection; and that the king of *England* can protect only by the laws of *England*, and therefore this man has a right to bring his action here. The propoſition will itſelf ſhew how enormous it would be, if it were to hold in this caſe. How is the king to rule by the laws of *England?* Is it meant that this caſe is to be determined by the laws of *England?* If ſo, that would be injuſtice in the moſt glaring light; becauſe it would be condemning the defendant by one law, when he was bound to regulate his conduct by a different. But it is not true that the king of *England* can protect by the laws of *England* only; for, in other places, a tranſaction muſt be tried by the laws of that place where it ariſes; and the king can, in other places, govern by other laws than thoſe of *England:* and I contend, this queſtion muſt be determined by ſuch laws, and not by the laws of this country. Mr. *Peckham* has then inſiſted, that this is a caſe between ſubject and ſubject. If he means it is between ſubject and ſubject, ſpeaking of the king of *England*, it is true; but *Fabrigas* is not a ſubject of this realm, nor ſubject to be governed by the laws of this country, and therefore ſhall not avail himſelf of the laws of this country. The caſe in *Salkeld*, 404, was then cited, where the court of *Chancery* proceeded againſt a foreigner; and the reaſon there given for ſo doing is, becauſe that court acts *in perſonam*. But, my lord, that caſe does not appear to be at all blended with foreign law; nor is any thing there ſtated, which called on the court to determine that caſe by any other law than the known laws of this country, and the rules of their own court. The caſe in the 4th Inſtitute was then endeavoured to be diſtinguiſhed from the preſent, by inſiſting, that the ſubject-matter of that caſe was local: but that anſwer cannot hold. If it had been an action in a court of law, the anſwer would have been a good one; becauſe an action of dower is local, and can only be tried in the county where the land lies: but that was a ſuit in *Chancery*, and not an action; and, as is ſaid in the caſe cited from *Salkeld*, the court of *Chancery* don't proceed againſt the thing, but againſt the perſon.

Then the laſt queſtion that has been made is, whether the defendant in this caſe is the proper ſubject of an action? My lord, Mr. *Peckham* has obſerved, I ſaid the governor was abſolute; but that he inſiſts is impoſſible, becauſe there is no perſon who could delegate ſuch an authority to him; that if he derived ſuch authority from any one, it muſt be from the king; but the king, not being abſolute himſelf, could not grant ſuch authority to Mr. *Moſtyn*. If it be meant only, that the king is not abſolute in this country, I moſt readily accede to the propoſition; but what the conſtitution of this country is, can be no argument to prove what is the ſtate or conſtitution of *Minorca*. That *Minorca* is of a different conſtitution, and is governed by different laws from what prevail in this country, is ſtated in the record; which record is deciſive upon that point, for the court cannot depart from it. It is there ſtated, that the arraval of St. *Phillip*'s is ſubject to the immediate order of the governor, and to his order and direction only; for no judge, either criminal or civil, can interfere, or has any juriſdiction there, unleſs under his expreſs leave: therefore the argument, as to the authority or power of the king here, is totally foreign to the ſituation of the governor of *Minorca*, or the power or juriſdiction he has there. Then it is ſaid, it does not appear on the record, that the defendant did act as judge. This alſo muſt be decided by the record; and it is there ſtated, that the defendant was governor, and ſo being governor he cauſed the plaintiff to be taken, impriſoned, *&c.* The caſe of *Dutton v. Howell* has been much obſerved upon, and the printed reaſons given in that caſe particularly ſtated; but I do not perceive that caſe has been diſtinguiſhed from the preſent. Some of the reaſons alledged for the defendant there, are equally ſtrong in favour of the preſent defendant. It is ſaid, there never was ſuch an action maintained before; and if a governor beyond ſea be charged here, he cannot defend himſelf, becauſe all the records and evidence are there. Mr. *Peckham* has not been able to produce one caſe, in which ſuch an action as this has been maintained before. But then another diſtinction he endeavoured to avail himſelf of is, that, in the caſe of *Dutton* and *Howell*, the action was for an act done in council, and therefore varied from this caſe, becauſe here there was no council at all. I cannot ſee how that difference will at all avail Mr. *Peckham*'s client. In the firſt place, in *Barbadoes*, there was a council, and the governor had no power without the council: but is that the caſe here? In *Minorca*, there is no council at all; and therefore, in this caſe, the governor ſtands in the ſame ſituation as the governor and council of *Barbadoes*. As to the neceſſity of pleading in abatement to the juriſdiction, it is very obſervable, that in the caſe of *Dutton v. Howell*, the counſel who argued in that caſe do not venture to rely upon that objection. But they inſiſt further, that the juriſdiction cannot be examined in the *Exchequer-Chamber*, becauſe both the ſtatute and writ of error expreſsly provide againſt it; and therefore, ſay they, it is queſtionable, whether it can be inſiſted upon in the houſe of lords: and it is admitted by them, that a queſtion might have been made on the trial of an iſſue, if one had been joined. However, that queſtion was gone into in the houſe of lords, and the final deciſion of the cauſe appears from the book; namely, that the judgment in that caſe was for the defendant, and that the action could not be maintained. Then the words of lord chief juſtice *de Grey*, in this preſent cauſe, upon a motion for a new trial, have been much relied upon; and his lordſhip is made to ſay, that if the governor had ſecured the preſent plaintiff, merely for the ſake of a trial, it would be a different affair. In this caſe, I apprehend it would be quite ſufficient for me, if the governor had a power of committing at all; for if he had, that is ſufficient to prevent the defendant's being a treſpaſſer by ſuch commitment: and the reaſonableneſs of the time for which he was committed, would be a very different queſtion; for, if the governor had a power of committing, he has purſued that power, and then this action cannot be maintained. The next caſe that has been cited, is lord *Bellamont*'s caſe in 2d *Salkeld*, which was an action againſt a governor for what he did in that character: but that is ſimply a motion for a trial at bar. The merits of the caſe, or the propriety of the action, were not before the court, or at all entered into; nor was any objection made to the juriſdiction of the court; and where a thing is not objected to, the caſe can never be an authority on the point: there is not one ſyllable ſaid about it; and therefore that caſe cannot have the leaſt weight whatſoever reſpecting this queſtion. Then Mr. *Peckham* cited the ſtatute of the 12th of *William* the third: but that was admitted by him to extend only to criminal proſecutions at the king's ſuit, and therefore can have nothing to do with the preſent queſtion. The caſe of *Conner* againſt *Sabine* is as different from this caſe, as any one caſe can be from another. There the defence was put upon the ground, that the plaintiff was amenable to a court-martial. The fact turned out otherwiſe: they ſtated a limited juriſdiction, and it appeared the plaintiff was not the object of that juriſdiction. Then it is ſaid, that *Minorca* is not a military camp, but that there are judges both criminal and civil. Here again I muſt have recourſe to the record itſelf; for there it is ſtated, that within the arraval of St. *Phillip*'s, where this tranſaction occurred, there is no judge either criminal or civil; there is no power but that of the governor. Mr. *Peckham* obſerved, that it is ſtated in the record, that the inhabitants ſometimes claim protection from the law of *England*, as well as the law of *Spain*. It is ſo ſtated; but what is ſaid further? Not that they ever have it allowed to them, or that they are governed by it; but it is expreſsly ſtated, that they are in general governed by the law of *Spain:* therefore the record does not prove, that the people in *Minorca* are governed by the ſame laws as the people here; but it does prove, that they are governed by laws which are totally different, and that within the arraval of St. *Phillip*'s, the will of the governor is the law. Mr. *Peckham* then attacks the veracity of the record with reſpect to the different diſtricts which there are within the iſland; and has inſiſted, that though in the execution of proceſs, *&c.* the law-officers may conſult the governor, or inform him what they are going to do, yet that they are not bound by law to do ſo. My lord, the record muſt, in theſe reſpects, alſo decide for us. It is there ſtated what the diſtricts are; that the arraval of St. *Phillip*'s is diſtinct from the others; and that no magiſtrates can come there, nor can any proceſs be executed there, without the governor's particular leave. Mr. *Peckham* aſks, where is the authority that enables a governor to baniſh an innocent man? In the firſt place, as to his being an innocent man, it is not competent to this court to enquire whether he was innocent or not, or whether the governor was ſtrictly juſtifiable or not; but it is ſufficient to prove, that the governor had an authority to impriſon. That authority appears upon the face of the record; for it is there ſtated that he was governor, and had every power, civil and military, and that all he did was in the character of a governor. Theſe facts being proved, I ſubmit are a ſufficient bar to this action, and the court cannot go into the queſtion, whether the plaintiff was innocent or guilty. The laſt argument that has been relied upon by Mr. *Peckham* is, ſome other expreſſions of lord chief juſtice *de Grey*, in the courſe of this cauſe; in which his lordſhip ſaid, that the witneſſes muſt have been miſtaken in the account they gave of the conſtitution and law of the iſland. Here it is impoſſible for the court to go out of the record: but theſe obſervations of lord chief juſtice *de Grey* go certainly a great way towards proving the impropriety of maintaining ſuch an action here as the preſent. If the account given by lord chief juſtice *de Grey* of the iſland be true, and I make no doubt it is, the conſequence is this: that even tho' all the evidence was obtained in this cauſe that could be had; though perſons were called as witneſſes, who, from their ſituation, and the departments they had officiated in, were moſt likely to be converſant with the law and conſtitution of the iſland; yet that all the accounts that have been given are imperfect, erroneous, and unworthy of credit. That is the ſtrongeſt evidence of the impropriety of maintaining ſuch an action as this in *England*. For if, as lord chief juſtice *de Grey* ſays, the evidence that has been given of the foreign law in this caſe is not to be relied upon, but is all a miſtake; it may happen, and it muſt naturally be expected, that in every caſe which is brought here from foreign dominions, where the cauſe of action ariſes abroad, all the evidence is abroad, and the court can get no other evidence of the law of the place than the looſe opinions of thoſe who have occaſionally been there; and the courts here having no eſtabliſhed legal mode of obtaining certificates from ſuch country, properly authenticated, to ſay what the law there is, the ſame miſtakes and inconvenience will ariſe.

Therefore, on the whole, I truſt the court will be of opinion, that this action is improper, and ought not to be maintained here.

Lord MANSFIELD.

Let it ſtand for another argument. It has been extremely well argued on both ſides.

On *Friday* the 27th *January*, 1775, it was very ably argued by Mr. Serjeant *Glynn*, on the part of Mr. *Fabrigas*, and by Mr. Serjeant *Walker*, on behalf of governor *Moſtyn:* but as no new caſes were cited, we ſhall proceed to give the judgment of the court of *King's Bench*, which was in ſubſtance as follows.

Lord MANSFIELD.

This was an action for an aſſault and falſe impriſonment by the defendant upon the plaintiff. And part of the complaint being for baniſhing him from the iſland of *Minorca* to *Carthagena*, in *Spain*, it was neceſſary for the plaintiff to take notice in the declaration of the real place where the cauſe of complaint aroſe; which he has ſtated to be at *Minorca*, with a *videlicet* in *London*, at St. *Mary-le-Bow*. Had it not been for that particularity, he might have ſtated it to have been in the county of *Middleſex*; but part of the complaint making the locality, where the cauſe of action aroſe, neceſſary to be ſtated, being a baniſhment from *Minorca* to *Carthagena*, he ſtates it with this *videlicet*. To this declaration the defendant put in two pleas; firſt, *not guilty*; and then he pleads, that he was governor of *Minorca*, by letters patent from the crown, and that the defendant was raiſing ſedition and mutiny; in conſequence of which he did impriſon him and ſend him out of the iſland, which he alledges he had an authority to do, for that ſedition and mutiny that he then was raiſing. To this plea the plaintiff does not demur, nor does he deny that it would be a juſtification, in caſe it was true; but he denies the truth of the fact, and puts in iſſue whether the fact of the plea was true. The plea avers, that the aſſault for which the action was brought aroſe in the iſland of *Minorca*, out of the realm of *England*, and no where elſe. To this the plaintiff has made no new aſſignment, and therefore by his replication he admits the locality of the cauſe of action. Thus then it ſtood upon the pleadings. When the trial came on, the plaintiff went into the evidence of his caſe, and the defendant went likewiſe into his evidence. But, upon the part of the defendant, evidence different from any fact alledged in his plea of juſtification was given; and witneſſes were called to prove that the diſtrict in *Minorca* called the arraval, where the injury complained of was done, was not within either of the four precincts, but that it is in the nature of a peculiar liberty, more immediately under the power of the governor, and that no judge of the iſland can exerciſe juriſdiction there without an appointment from him. That is the ſubſtance of their evidence.

The judge left it to the jury upon the facts of the caſe; and they found for the plaintiff. The defendant then tendered a bill of exceptions, upon which bill of exceptions it comes before us. And the great difficulty I have had upon both theſe arguments is, to be able clearly to comprehend what queſtion it is that is meant ſeriouſly to be brought before the court for their judgment. If I underſtand the counſel for governor *Moſtyn* right, what they ſay is this: the plea of *not guilty* is totally immaterial, and the plea of juſtification is totally immaterial, for it appears on the plaintiff's own ſhewing that this matter aroſe in *Minorca*; and the replication to the plea admits it: and it likewiſe appears that the defendant was governor of *Minorca*; and as the impriſonment aroſe in *Minorca* by the authority of the defendant, the judge ought to have ſtopped all evidence whatſoever, and have directed the jury immediately to have found for the defendant. Why? There are three reaſons given. One of them inſiſted upon in the firſt argument (but abandoned to-day) is, that the plaintiff is a *Minorquin*, born in the iſland of *Minorca*. To diſpoſe of that objection at once, I ſhall only ſay that it is wiſely abandoned to-day. A *Minorquin*; what then? Has not a ſubject of the king, born at *Minorca*, as good a right to apply to the king's courts of juſtice, as a perſon born within the ſound of *Bow*-bell, in *Cheapſide*? If there is no other objection to him, would that make any? To be ſure not. But it is abandoned, ſo I ſhall lay it out of the caſe.

The other two grounds which are enforced to-day are, if I take them right—but I am under ſome difficulties, becauſe they are ſuch propoſitions that you may argue as well whether there is ſuch a court exiſting as this which I am now ſitting in—the firſt is, that he was governor of *Minorca*, and therefore for no injury whatſoever that is done by him, right or wrong, can any evidence be heard, and that no action can lie againſt him; the next is, that the injury was done out of the realm: I think theſe are the whole amount of the queſtions that have been laid before the court. Now as to the firſt, there is nothing ſo clear as that in an action of this kind, which is for an aſſault and falſe impriſonment, the defendant, if he has any juſtification, muſt plead it; and there is nothing more clear than that, if the court has not a general juriſdiction of the matter, he muſt plead to that juriſdiction, and he cannot take advantage of it upon the general iſſue: I therefore, upon that ground, at once lay out of the caſe every thing relative to the arraval; for if he acted as a judge, it is ſynonimous to a court of record: and tho' it ariſes in a foreign country, where the technical diſtinction of a court of record does not exiſt, yet if he ſat in a court of juſtice, and ſubject to a ſuperior review, it is within the reaſon of the law of *England*, which ſays, that ſhall be a juſtification; and he would, if he had acted according to the law of the land, be entitled to a juſtification in the fact that is complained of; but that muſt be pleaded. If an action is brought againſt a perſon who is a judge of record, he muſt lay it before the court, by way of plea and juſtification, that he was a judge. I don't lay a ſtreſs upon the word record, but there is no colour upon the evidence that he acted as a judge of a court of juſtice; therefore every thing ſtated relative to the arraval, which is ſtated in the bill of exceptions, is nothing at all to the purpoſe. The firſt point that I ſhall begin with is the ſacredneſs of the perſon of the governor. Why, if that was true, and if the law was ſo, he muſt plead it. This is an action of falſe impriſonment: *primâ facie*, the court has juriſdiction. If he was guilty of the fact, he muſt ſhew a ſpecial matter that he did this by a proper authority. What is his proper authority? The king's commiſſion to make him governor. Why then, he certainly muſt plead it: but, however, I will not reſt the anſwer upon that. It has been ſingled out, that in a colony that is beyond the ſeas, but part of the dominions of the crown of *England*, though actions would lie for injuries committed by other perſons, yet it ſhall not lie againſt the governor. Now I ſay, for many reaſons, if it did not lie againſt any other man, it ſhall moſt emphatically lie againſt the governor. In every plea to the juriſdiction, you muſt ſtate a juriſdiction; for if there is no other method of trial, that alone will give the king's courts juriſdiction. If an action is brought here for a matter ariſing in *Wales*, you muſt ſhew the juriſdiction of the court in *Wales*: and in every caſe to repel the juriſdiction of the king's courts, you muſt ſhew a better and a more proper juriſdiction. Now in this caſe no other juriſdiction is ſhewn, even by way of argument; and it is moſt certain, that if the king's courts cannot hold plea in ſuch a caſe, there is no other court upon earth that can do it: for it is truly ſaid, that a governor is in the nature of a viceroy, and, of neceſſity, part of the privileges of the king are communicated to him during the time of his government. No criminal proſecution lies againſt him, and no civil action will lie againſt him; becauſe, what would the conſequence be? Why, if a civil action lies againſt him, and a judgment obtained for damages, he might be taken up and put in priſon on a *capias*; and therefore, locally, during the time of his government, the courts in the iſland cannot hold plea againſt him. But in this peculiar caſe, it is ſaid to have happened in the arraval. Why, it is ſtated in the evidence, that no judge can ſit there at all without his leave. If he is out of the government, he leaves it; he comes and lives in *England*, and he has no effects there to be attached: then there is no remedy whatſoever, if it is not in the king's courts. But there is another very ſtrong reaſon alluded to by Mr. Serjeant *Glynn*, which would alone be deciſive. This is a charge againſt him, which, though a civil injury, has a mixture of criminality in it: it is an aſſault; which is criminal by the laws of *England*, and is an abuſe of that authority given him by the king's letters patent under the great ſeal. Now, if every thing within a dominion is triable by the courts within that dominion, yet the conſequence of the king's letters patent, which gives the power, muſt be tried here; for nothing concerning the ſeigniory can be tried in the place where it is. In the proprietary governments in *America*, they cannot try any queſtion concerning the ſeigniory in their own courts; and therefore, though queſtions concerning lands in the iſle of *Man* are triable in the courts of the iſle of *Man*, yet wherever there is a queſtion concerning the ſeigniory, it muſt be tried in ſome courts in *England*. It was ſo held by the chief juſtice and many of the judges in the reign of queen *Elizabeth*, upon a queſtion ariſing concerning the ſeigniory of the iſle of *Man*. Or whenever there is a queſtion between two provinces in *America*, it muſt be tried in *England*, by analogy to what was done with reſpect to the ſeigniories in *Wales* being tried in *Engliſh* counties: ſo that emphatically the governor muſt be tried in *England*, to ſee whether he has exerciſed legally and properly that authority given him by the king's letters patent, or whether he has abuſed that authority, contrary to the law of *England*, which governs the letters patent by which he is appointed. It does not follow from this, that, according to the nature of the caſe, let the cauſe of action ariſe where it may, that a man is not entitled to give every juſtification that ought to be a defence to him. If by the authority of that capacity in which he ſtood he has done right, he is to lay that before the court by a proper plea, and the court will exerciſe their judgment whether that is not a ſufficient juſtification. In this caſe, if the juſtification had been proved, perhaps the court would have been of an opinion that it was a ſufficient anſwer, and he might have moved in arreſt of judgment afterwards, and taken the opinion of the court; but the court muſt be of opinion that it is a ſufficient anſwer, and that the raiſing a mutiny in a garriſon, though in time of peace, was a reaſon for that ſummary proceeding, in taking him up and ſending him out of the iſland. I could conceive caſes in time of war, in which a governor would be juſtified, though he acted very arbitrarily, in which he could not be juſtified in time of peace. Suppoſe in a ſiege, or when the *French* were going to invade *Minorca*, ſuppoſe that the governor ſhould think proper to ſend a hundred of the inhabitants out of the iſland, and that he did this really acting for the beſt: or ſuppoſe, upon a general ſuſpicion, he ſhould take people up as ſpies: why, upon proper circumſtances laid before the court for their judgment and opinion, it would be very fit to ſee whether he had acted as the governor of the garriſon ought, according to the law of *England* and the juſtice of the caſe. But it is ſaid, if there is a law in the garriſon, or if he acts as the *Spaniſh* governor might have done before, how is that to be known here?—How? Why, there are ways of knowing foreign laws as well as our own, but in a different manner: it muſt be proved as a fact, and in that ſhape the court muſt aſſiſt the jury in finding out what the law really is. Suppoſe there is a *French* ſettlement (there is a caſe in point of the ſort I am ſtating) which depends upon the cuſtom of *Paris*; why, we muſt receive witneſſes with regard to it, to ſhew what the cuſtom is, juſt as you receive evidence of a cuſtom with reſpect to trade.

The judges in the courts of *England* do determine all caſes that ariſe in the plantations, all caſes that ariſe in *Gibraltar* or *Minorca*, in *Jerſey* or *Guernſey*, and they muſt inform themſelves by having the law ſtated to them. As to ſuggeſtions with regard to witneſſes, the plaintiff muſt prove his caſe, and the court muſt take care that the defendant is not ſurpriſed, and that he has a fair opportunity of bringing his evidence, if it is a caſe proper in other reſpects for the juriſdiction of the court. There may be ſome caſes ariſing abroad, which may not be fit to be tried here; but that cannot be the caſe of a governor injuring a man, contrary to the duty of his office, and in violation of the truſt repoſed in him by the king's commiſſion. If he wants to ſend for witneſſes to prove his juſtification, and applies to the court, they will do what this court did in a caſe of a criminal proſecution which aroſe in *Scotland*. This court forced the proſecutor (and would have put off the trial from day to day if he had not ſubmitted to it) to ſuffer the witneſſes to be examined by a commiſſion where the cauſe aroſe, who could not be compelled to come here. The court obliged them to come into theſe terms; or, if they did not, it is a matter of courſe, in aid of a trial at law, to apply upon a real ground, and not upon a fictitious pretence of delay, to a court of equity to have a commiſſion and injunction in the mean time; and the court will certainly take care that juſtice ſhall be done to the defendant as well as to the plaintiff, who muſt come with witneſſes to prove his caſe: and therefore, in every light in which I ſee this matter, it holds emphatically in the caſe of a governor, if it did not hold in reſpect of any other man within the colony, province, or garriſon. But to make queſtions upon matters of ſettled law, where there have been a number of actions determined, which it never entered into a man's head to diſpute—to lay down in an *Engliſh* court of juſtice ſuch monſtrous propoſitions as that a governor, acting by virtue of letters patent under the great ſeal, can do what he pleaſes; that he is accountable only to God and his own conſcience—and to maintain here that every governor in every place can act abſolutely; that he may ſpoil, plunder, affect their bodies and their liberty, and is accountable to nobody—is a doctrine not to be maintained; for if he is not accountable in this court, he is accountable no-where. The king in council has no juriſdiction of this matter; they cannot do it in any ſhape; they cannot give damages, they cannot give reparation, they cannot puniſh, they cannot hold plea in any way. Wherever complaints have been before the king in council, it has been with a view to remove the governor; it has been with a view to take the commiſſion from him which he held at the pleaſure of the crown. But ſuppoſe he holds nothing of the crown, ſuppoſe his government is at an end, and that he is in *England*, they have no juriſdiction to make reparation to the party injured; they have no juriſdiction to puniſh in any ſhape the man that has committed the injury: how can the arguments be ſupported, that, in an empire ſo extended as this, every governor in every colony and every province belonging to the crown of *Great-Britain*, ſhall be abſolutely deſpotic, and can no more be called in queſtion than the king of *France?* and this after there have been multitudes of actions in all our memories againſt governors, and nobody has been ingenious enough to whiſper them, that they were not amenable.

In a caſe in *Salkeld*, cited by Mr. *Peckham*, there was a motion for a trial at bar in an action of falſe impriſonment againſt the governor of *New-York*; and it was deſired to be a trial at bar, becauſe the attorney-general was to defend it on the part of the king, who had taken up the defence of the governor. That caſe plainly ſhews that ſuch an action exiſted; the attorney-general had no idea of a governor's being above the law. Juſtice *Powell* ſays, in the caſe of *Way* and *Yally*, in 6 *Modern*, that an action of falſe impriſonment had been brought here againſt the governor of *Jamaica* for an impriſonment there; and the laws of the country were given in evidence. The governor of *Jamaica* in that caſe never thought that he was not amenable. He defended himſelf. He ſhewed, I ſuppoſe, by the laws of the country, an act of the aſſembly which juſtified that impriſonment; and the court received it, to be ſure, as they ought to do. Whatever is a juſtification in the place where the thing is done, ought to be a juſtification where the caſe is tried. I remember (it was early in my time; I was counſel in it) an action againſt governor *Sabine*, and he was very ably defended. Nobody thought the action did not lie againſt him. He was governor of *Gibraltar*, and he barely confirmed the ſentence of a court-martial, which tried one of the train of artillery by martial law. Governor *Sabine* affirmed the ſentence. This plaintiff was a carpenter in the train. It was proved at the trial, that the tradeſmen that followed the train were not liable to martial law; the court were of that opinion; and therefore the defendant was guilty of a treſpaſs in having a ſhare in that ſentence which puniſhed him by whipping. There is another caſe or two, but they don't occur to me at preſent.

Let us ſee now what the next objection is, with regard to the matter ariſing abroad; and that is a general objection, that as the matter aroſe abroad, it cannot be tried here in *England*. There is a formal diſtinction that prevails in our courts, and likewiſe a ſubſtantial one as to the locality of trials. The ſubſtantial diſtinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had if it is laid in a wrong place. That is the caſe of all ejectments where poſſeſſion is to be delivered by the ſheriff of the county: and as trials here are in particular counties, the officers are county officers; therefore the judgment could not have effect if it was not laid in the proper place and in the proper county. But there likewiſe is a formal diſtinction, where, perhaps, compleat juſtice could be done, let it be laid in what county it might; that is mere matter of form as to caſes that ariſe within the realm: but even with regard to matters that ariſe out of the realm, to be ſure there is a diſtinction of locality too; for there are ſome caſes that ariſe out of the realm, that ought not to be tried any where but in the country where they ariſe, as the caſe alluded to by ſerjeant *Walker*. If there is a ſort of fighting in *France* between two *Frenchmen*, and they happen both caſually to be here, and an action of aſſault is brought by the one againſt the other, which charge a criminality too, that it is done againſt the king's peace, and the laws and cuſtoms of *England*; in that caſe it may be a very material queſtion whether that could be maintained here: for though it is not a criminal proſecution, yet it has that ſort of criminality that, perhaps, without giving an opinion, it ought to be tried by the laws of that country where both parties are ſubjects; it may be a ſubſtantial objection of locality. So likewiſe, if it is concerning an eſtate in a foreign country, where it is a matter of title and not of damages, it may be a ſubſtantial diſtinction. There is likewiſe a queſtion of form, and that ariſes upon the trial; for trials in *England* being by a jury, and the kingdom being divided into counties, and every county, in reſpect of trial, conſidered almoſt as if a ſeparate kingdom or principality, it is abſolutely neceſſary that there ſhould be ſome county where the action is particularly brought, that there may be a proceſs to the ſheriff of that county, to bring a jury from thence to try it; and that is matter of form, which goes to all caſes that ariſe abroad. But the law makes a diſtinction between tranſitory actions and local actions. If the matter which is the cauſe of a tranſitory action ariſes within the realm, it may be laid in any county; the place is not material: and if an impriſonment in *Middleſex*, it may be laid in *Surrey*; and though proved to be done in *Middleſex*, the place not being material, it does not at all prevent the plaintiff recovering damages: for the place of tranſitory actions is never material. But where, by particular acts of parliament, it is made ſo, as in the caſe of churchwardens and conſtables, and other caſes that require the action to be brought in the county; there, by the force of the act of parliament, the objection is fatal: but otherwiſe it may be laid in any county in *England*, let it be done where it will: the parties have an opportunity of applying to the court in time to change the venue. But if they go to trial without it, that is no objection; and all actions of a tranſitory nature that ariſe abroad may be laid as happening in an *Engliſh* county. But there are occaſions which make it abſolutely neceſſary to ſtate in the declaration, that it really happened abroad; as in the caſe of ſpecialties, where the date muſt be ſet forth. When an action is brought upon a ſpecialty which bears a date, if that ſpecialty is ſet out, or if *oyer* is prayed of it, by which the place where it was made muſt appear; if the declaration ſtates it to have been made at *Weſtminſter*, in *Middleſex*, and upon producing the deed it bears date at *Bengal*, there is a variance between the deed and the declaration, which makes it appear to be a different inſtrument. I don't put the caſe, though there are ſome in the books that ſeem to me to have confounded the ſtatute of the 6th of *Richard* the ſecond, therefore I don't put the objection upon the 6th of *Richard* the ſecond; but it goes ſingly upon this: if you don't ſtate the true date or true deſcription of the bond, it is a variance. What does the law in that caſe? (and it has done it for hundreds of years) Why, the law invented a fiction, and has ſaid, 'You ſhall ſet out the deſcription truly, and then give a venue only for form for the trial; *videlicet*, in the county of *Middleſex*, or any other county you pleaſe.' Did any judge ever think that when the declaration ſaid, in fort St. *George* in *Cheapſide*, that the plaintiff meant that it was in *Cheapſide?* No; it is a fiction in form: every country has its forms: it is for the furtherance of juſtice that theſe fictions were invented; to get rid of formalities; to further and advance juſtice. This is a certain rule: You never ſhall contradict the fiction ſo as to defeat the end for which it was invented, but you may contradict it for every other purpoſe. Now this fiction is invented barely for the mode of trial; to every other purpoſe you ſhall contradict it, but not for the purpoſe of ſaying, You ſhall not try it. It is juſt like that queſtion that was long agitated and finally determined ſome years ago, upon a fiction of the teſte of writs taken out in the vacation, which bore date as of the laſt day of the term. That is a fiction of the court. You never ſhall contradict that fiction, and go into the truth of the caſe, to deſtroy the writ, and ſhew it a bad writ. Why? Becauſe the court invented the fiction to make the writ good, for the furtherance of juſtice, that it may appear right in the form; but for every other purpoſe in the world you may contradict it. I am ſorry to obſerve there are ſome ſayings which have been alluded to, inaccurately taken down. Perhaps there were ſhort-hand writers in thoſe days, as there are at preſent, who miſtake every word they hear, and, being unable to correct it, have printed it improperly: but to ſay, that as men they have one way of thinking, and as judges they have another, is an abſurdity. No; they meant to ſupport the fiction. I will mention a caſe or two to ſhew that is the meaning of it. There is a caſe in 6 *Modern* 208, of *Roberts* and *Harnage*. The plaintiff declares, that the defendant became bound to him at fort St. *David*'s in the *Eaſt-Indies* at *London*, in ſuch a bond. Upon demurrer the objection was, that the bond appeared to have been ſealed and delivered at fort St. *David*'s in the *Eaſt-Indies*, and therefore the date made it local; and, by conſequence, the declaration ought to have been of a bond made at fort St. *David*'s in the *Eaſt-Indies*, *viz.* at *Iſlington* in the county of *Middleſex*, or in ſuch a ward or pariſh in *London*; and of that opinion was the whole court. You ſee how this caſe is ſtated. But I will ſtate it from another book, where it is reported more truly; I mean in lord *Raymond*, 1042. There it is ſtated thus. It appeared by the declaration, that the bond was made at *London*, in the ward of *Cheap*. Upon *oyer*, the bond was ſet out, and it appeared on the face of it to be dated at fort St. *George* in the *Eaſt-Indies*. The defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad; but the court ſaid, that it would have been good, if laid at fort St. *George* in the *Eaſt-Indies*, to wit, at *London*, in the ward of *Cheap*. What was the objection there? Why, they had laid it falſely. They had laid the bond as made at *London*. The bond is produced, and appears to be made at another place: that is a variance. You muſt take the bond as it is. Then how do you get to trial? Why, introduce a fiction, and the formality gives you the trial in that county by the *videlicet*, and the bond is truly deſcribed. A caſe was quoted from *Latch*, and a caſe from *Lutwyche*, on the former argument; but I will mention a caſe poſterior in point of time, where the court took it up upon the true ground, where both theſe caſes were cited, and no regard at all was paid to them; and that is the caſe of *Parker* and *Crook*, 10 *Modern* 255. This was an action of covenant upon a deed indented. It was objected to the declaration, that the defendant is ſaid in the declaration to continue at fort St. *George* in the *Eaſt-Indies*; and upon the *oyer* of the deed it bears date at fort St. *George*; and therefore the court, as was pretended, had no juriſdiction. *Latch*, *fol.* 4. *Lutwyche*, 56. Lord chief juſtice *Parker* ſaid, that an action will lie in *England* upon a deed dated in foreign parts, or elſe the party can have no remedy; but then, in the declaration, a place in *England* muſt be alledged, *pro forma*. Generally ſpeaking, the deed, upon the *oyer* of it, muſt be conſiſtent with the declaration; but in theſe caſes *propter neceſſitatem*, if the inconſiſtency be as little as poſſible, not to be regarded: as here, the contract, being of a voyage which was to be performed from fort St. *George* to *Great-Britain*, does import, that fort St. *George* is different from *Great-Britain*: and after taking time to conſider of it, in *Hilary-Term* the plaintiff had his judgment, notwithſtanding the objection. Why then, it all amounts to this: that where the action is ſubſtantially ſuch a one as the court can hold plea of, as the mode of trial is by jury, and as they muſt be called together by proceſs directed to the ſheriff of the county, matter of form is added to the fiction, to ſay it is in that county; and then the whole of the inquiry is, whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the perſons, but for injuries done by ſubject to ſubject; eſpecially for injuries where the whole that is prayed is a reparation in damages, or ſatisfaction to be made by proceſs againſt the perſon or his effects within the juriſdiction of the court? We know it is within every day's experience. I was embarraſſed a great while to find out whether it was really meant to make a queſtion of it. It is ſo in ſea-batteries; but is it to be ſuppoſed that the judge thought it happened in *Cheapſide*, when the party proves where the place was? In ſea-batteries, the plaintiff often lays the injury to have been done in *Middleſex*, and then proves it to be done a thouſand leagues diſtant, on the other ſide of the *Atlantic*. There are caſes of offences on the high-ſeas, where it is of neceſſity to lay in the declaration, that it was done upon the high-ſeas; as the taking of a ſhip as a prize. There is a caſe of that ſort occurs to my memory:—the reaſon I remember it is, becauſe there was a queſtion about the juriſdiction. There likewiſe was an action of that kind before lord chief juſtice *Lee*, and another before me, in which I quoted that determination, to ſhew that when the lords commiſſioners of prizes have given judgment, that is concluſive in the action; and likewiſe, when they have given judgment, it is concluſive as to the coſts, whether they have given coſts or not. But how is that action laid? It is neceſſary to be laid, that his ſhip was taken or ſeized on the high-ſeas, *videlicet*, in

Cheapſide. Now is it ſeriouſly contended, that the judge and jury, and counſel, who tried the cauſe, fancied that ſhip was ſailing in *Cheapſide?* No; it is plain ſenſe; the ſhip was taken upon the high-ſeas, for which an action lies in *England*; and you ſay in *Cheapſide*, which is ſaying no more than that, I pray this action may be tried in *London*; it is plainly underſtood: but if you offer reaſons of fact contrary to the truth of the caſe, there is no end of the embarraſſment. At the laſt ſittings, there were two actions brought by the *Armenian* merchants for aſſaults and treſpaſs in the *Eaſt-Indies*, and they are very ſtrong authorities. Serjeant *Glynn* ſaid, that the defendant, Mr. *Verelſt*, was ably aſſiſted. So he was, and by men who would have taken the objection, if they thought it had been maintainable: and that was after this caſe had been argued once; yet the counſel did not think it could be ſupported. Mr. *Verelſt* would have been glad to have made the objection: he would not have left it to a jury, if he could have ſtopped them ſhort, and ſaid, 'You ſhall not try it at all.' I have had ſome actions before me, rather going further than theſe tranſitory actions; that is, going to caſes which in *England* would be local actions: and I remember one, I think it was an action brought againſt captain *Gambier*, who by order of admiral *Boſcawen* had pulled down the houſes of ſome ſuttlers who ſupplied the navy and ſailors with ſpirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the ſailors' health were affected by it. They were pulled down. The captain was inattentive enough to bring the gentleman over in his own ſhip, who would never have got to *England* otherwiſe; and as ſoon as he came here, he was adviſed that he ſhould bring an action againſt him. He brought his action, and one of the counts in the declaration was for pulling down the houſes. The objection was taken to the count for pulling down the houſes; and the caſe of *Skinner* and the *Eaſt-India* Company was cited in ſupport of the objection. On the other ſide, they produced, from a manuſcript note, a caſe before lord chief juſtice *Eyre*, where he over-ruled the objection; and I over-ruled the objection upon this principle, that the reparation here was perſonal, and for damages; that there would be a failure of juſtice, for it was upon the coaſt of *Nova-Scotia*, where there were no regular courts of juſtice, but if there had been, captain *Gambier* might never go there again; and that the reaſon of locality in ſuch an action in *England* did not hold in this caſe. I quoted a caſe of an injury of that ſort in the *Eaſt-Indies*, where even in a court of equity lord *Hardwicke* had directed ſatisfaction to be made in damages. That caſe was not fully argued; but this was argued, and there were large damages given againſt *Gambier*. I do not quote it for the opinion I was of there, becauſe that opinion is very likely to be erroneous; but I quote it for this reaſon, that there were large damages given againſt captain *Gambier*: and though he was not at the expence, for he acted by the orders of admiral *Boſcawen*, yet the admiral's repreſentatives paid the expence, therefore their inclination was to have got rid of that verdict if they could; but there never was any motion for a new trial. I recollect another cauſe that came on before me: that was the caſe of admiral *Palliſer*; there the very gift of the action was local. It was for deſtroying fiſhing-huts upon the *Labrador*-coaſt. It was a nice queſtion; when the *Canadians* ſettled, and when they had a right to it. It was a diſpute between them and the fiſhermen in *England*. The cauſe went on a great way; the defendant would have turned it ſhort at once, if he could have made that objection; but that objection was not made. There are no local courts among the *Eſquimaux Indians* upon that part of the *Labrador*-coaſt. Whatever injury had been done there by any of the king's officers would have been altogether without redreſs, if that objection of locality would have held: and the conſequence of that circumſtance ſhews, that where the reaſon fails, even in actions which in *England* would be local actions, yet that does not hold to places beyond the ſeas within the king's dominions. That of admiral *Palliſer*'s went off upon a propoſal of a reference, and ended by an award. But as to tranſitory actions, there is not a colour of doubt but that every action that is tranſitory may be laid in any county in *England*, though the matter ariſes beyond the ſeas: and when it is abſolutely neceſſary to lay the truth of the caſe in the declaration, there is a fiction of law to aſſiſt you, and you ſhall not make uſe of the truth of the caſe againſt that fiction, but you may make uſe of it to every other purpoſe. I am clearly of opinion not only againſt the objections made, but that there does not appear a queſtion upon which the objections could ariſe.

The other judges declared themſelves of the ſame opinion, and the court ordered, 'that the judgment ſhould be affirmed.'

In conſequence of the above judgment, on *Saturday* the 4th day of *February* 1775, the gentlemen who were bail for governor *Moſtyn*, to prevent his being taken in execution and carried to priſon, were obliged to pay to Mr. *Fabrigas* the ſum of 3000 *l.* for his damages, and 159 *l.* which the court amerced the governor in coſts.

XXX. *The Trial of* ELIZABETH *Ducheſs-Dowager of* Kingſton, *for Bigamy, before the Right Hon. the Houſe of Peers, in* Weſtminſter-Hall, *in full Parliament aſſembled*, 15*th*, 16*th*, 19*th*, 20*th*, *and* 22*d Days of* April, 1776.

[*This trial was printed under an order of the houſe of lords.*]

Monday, April the 15*th*, 1776.

In the court erected in *Weſtminſter-Hall*, for the trial of *Elizabeth* ducheſs-dowager of *Kingſton*, for bigamy.

ABOUT ten of the clock the lords came from their own houſe into the court erected in *Weſtminſter-Hall*, for the trial of *Elizabeth* ducheſs-dowager of *Kingſton*, in the manner following:

The lord high ſteward's gentlemen attendants, two and two.

The clerks aſſiſtant to the houſe of lords, and the clerk of the parliament.

Clerk of the crown in *Chancery*, bearing the king's commiſſion to the lord high ſteward, and the clerk of the crown in the *King's Bench*.

The maſters in *Chancery*, two and two.

The judges, two and two.

The peers eldeſt ſons, two and two.

Peers minors, two and two.

Cheſter and *Somerſet* heralds.

Four ſerjeants at arms with their maces, two and two.

The yeoman-uſher of the houſe.

The barons, two and two, beginning with the youngeſt baron.

The biſhops, two and two.

The viſcounts and other peers, two and two.

The lord privy ſeal and lord preſident.

The archbiſhop of *York* and the archbiſhop of *Canterbury*.

Four ſerjeants at arms with their maces, two and two.

The ſerjeant at arms attending the great ſeal, and purſe-bearer.

Then *Garter* king at arms, and the gentleman-uſher of the black rod carrying the white ſtaff before the lord high ſteward.

Henry earl *Bathurſt*, chancellor of *Great-Britain*, lord high ſteward, alone, his train borne.

His royal highneſs the duke of *Cumberland*, his train borne.

The lords being placed in their proper ſeats, and the lord high ſteward upon the woolpack, the houſe was reſumed.

The clerk of the crown in *Chancery*, having his majeſty's commiſſion to the lord high ſteward in his hand, and the clerk of the crown in the *King's Bench*, ſtanding before the clerk's table with their faces towards the ſtate, made three reverences; the firſt at the table, the ſecond in the midway, and the third near the woolpack; then kneeled down; and the clerk of the crown in *Chancery*, on his knee, preſented the commiſſion to the lord high ſteward, who delivered the ſame to the clerk of the crown in the *King's Bench* to read: then riſing, they made three reverences, and returned to the table. And then proclamation was made for ſilence, in this manner:

Serjeant at arms. Oyez, oyez, oyez! Our ſovereign lord the king ſtrictly charges and commands all manner of perſons to keep ſilence, upon pain of impriſonment.

Then the lord high ſteward ſtood up, and ſpoke to the peers.

Lord High Steward. His majeſty's commiſſion is about to be read: your lordſhips are deſired to attend to it in the uſual manner; and all others are likewiſe to ſtand up uncovered while the commiſſion is reading.

All the peers uncovered themſelves; and they, and all others, ſtood up uncovered, while the commiſſion was read.

GEORGE R.

GEORGE the third, by the grace of God, of *Great-Britain*, *France*, and *Ireland* king, defender of the faith, and ſo forth. To our right truſty and right well-beloved couſin and counſellor *Henry* earl *Bathurſt*, our chancellor of *Great-Britain*, greeting. Know ye, that whereas *Elizabeth* the wife of *Auguſtus John Hervey*, late of the pariſh of St. *George, Hanover-Square*, in our county of *Middleſex*, eſquire, before our juſtices of *oyer* and *terminer*, at *Hicks's-Hall*, in St. *John-Street*, in and for our county of *Middleſex*, upon the oath of twelve jurors, good and lawful men of the ſaid county of *Middleſex*, then and there ſworn and charged to enquire for us for the body of the ſaid county, ſtands indicted of polygamy and feloniouſly marrying *Evelyn Pierrepont* late duke of *Kingſton*, ſhe being then married, and the wife of the ſaid *Auguſtus John Hervey*: we, conſidering that juſtice is an excellent virtue, and pleaſing to the Moſt High, and being willing that the ſaid *Elizabeth*, of and for the felony whereof ſhe is indicted as aforeſaid, before us, in our preſent parliament, according to the law and cuſtom of our kingdom of *Great-Britain*, may be heard, examined, ſentenced, and adjudged; and that all other things which are neceſſary in this behalf may be duly exerciſed and executed; and for that the office of high ſteward of *Great-Britain* (whoſe preſence in this behalf is required) is now vacant (as we are informed) we, very much confiding in your fidelity, prudence, provident circumſpection, and induſtry, have for this cauſe ordained and conſtituted you ſteward of *Great-Britain*, to hear, execute, and exerciſe for this time the ſaid office, with all things due and belonging to the ſame office in this behalf: and therefore we command you, that you diligently ſet about the premiſes, and for this time do exerciſe and execute with effect all thoſe things which belong to the office of ſteward of *Great-Britain*, and which are required in this behalf. In witneſs whereof we have cauſed theſe our letters to be made patent. Witneſs ourſelf at *Weſtminſter*, the fifteenth day of *April*, in the ſixteenth year of our reign.

By the KING himſelf, ſigned with his own hand.

Yorke.

Serjeant at arms. God ſave the king!

Then *Garter*, and the gentleman-uſher of the black rod, after three reverences, kneeling, jointly preſented the white ſtaff to his grace the lord high ſteward: and then his grace, attended by *Garter*, black rod, and the purſe-bearer (making his proper reverences towards the throne) removed from the woolpack to an armed chair, which was placed on the uppermoſt ſtep but one of the throne, as it was prepared for that purpoſe; and then ſeated himſelf in the chair, and delivered the ſtaff to the gentleman-uſher of the black rod on his right hand, the purſe-bearer holding the purſe on his left.

Clerk of the Crown. Serjeant at arms, make proclamation.

Serjeant at Arms. Oyez, oyez, oyez! Our ſovereign lord the king ſtrictly charges and commands all manner of perſons to keep ſilence, upon pain of impriſonment.

Then the clerk of the crown, by direction of the lord high ſteward, read the *certiorari*, and the return thereof, together with the caption of the indictment, and the indictment certified thereupon, againſt *Elizabeth* ducheſs-dowager of *Kingſton*; *in hæc verba:*

GEORGE the third, by the grace of God, of *Great-Britain*, *France*, and *Ireland* king, defender of the faith, and ſo forth. To our juſtices of *oyer* and *terminer*, at *Hicks's-Hall*, in St. *John-Street*, in and for our county of *Middleſex*, and to every of them, greeting. We being willing, for certain reaſons us thereunto moving, that all and ſingular indictments of whatſoever felonies whereof *Elizabeth* calling herſelf ducheſs-dowager of *Kingſton*, by the name of *Elizabeth* the wife of *Auguſtus John Hervey*, late of the pariſh of St. *George*, *Hanover-Square*, in the county of *Middleſex*, eſquire, is indicted before you (as is ſaid) be determined before us in our parliament, and not elſewhere; do command you and every of you, that you or one of you do ſend under your ſeals, or under the ſeal of one of you, before us in our preſent parliament, immediately after the receipt of this our writ, all and ſingular the indictments aforeſaid, with all things touching the ſame, by whatſoever name the ſaid *Elizabeth* is called in the ſame, together with this writ, that we may cauſe further to be done thereon what of right and according to the law and cuſtom of *England* we ſhall ſee fit to be done. Witneſs ourſelf at *Weſtminſter* the eleventh day of *November*, in the ſixteenth year of our reign.

Yorke.

To the juſtices of *oyer* and *terminer*, at *Hicks's-Hall*, in St. *John-Street*, in and for the county of *Middleſex*, and to every of them, a writ of *certiorari* to certify into the upper houſe of parliament the indictment found againſt *Elizabeth* calling herſelf ducheſs-dowager of *Kingſton*, by the name of *Elizabeth* wife of *Auguſtus John Hervey*, for bigamy, returnable immediately before the king in parliament.

Yorke.

By order of the lords ſpiritual and temporal in parliament aſſembled.

The execution of this writ appears by the ſchedules and indictment to this writ annexed.

The anſwer of ſir *John Hawkins*, knight, one of the juſtices within-written.

Middleſex. } BE it remembered, that at the general ſeſſion of *oyer* and *terminer* of our lord the king, holden for the county of *Middleſex*, at *Hicks's-Hall*, in St. *John-Street*, in the ſaid county, on *Monday* the ninth day of *January*, in the fifteenth year of the reign of our ſovereign lord *George* the third, king of *Great-Britain*, and ſo forth, before ſir *John Hawkins*, knight, *John Cox*, *David Wilmot*, *John Brettell*, eſquires, and others their fellows juſtices of our ſaid lord the king, aſſigned by his majeſty's letters patent under the great ſeal of *Great-Britain* directed to ſame juſtices before named, and others in the ſaid letters named, to enquire more fully the truth by the oath of good and lawful men of the ſaid county of *Middleſex*, and by other ways, means, and methods by which they ſhall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treaſons, miſpriſions of treaſon, inſurrections, rebellions, counterfeitings, clippings, waſhings, falſe coinings, and other falſities of the money of *Great-Britain* and other kingdoms and dominions whatſoever, and of all murthers, felonies, manſlaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, aſſemblies, miſpriſions, confederacies, falſe allegations, treſpaſſes, riots, routs, retentions, eſcapes, contempts, falſities, negligences, concealments, maintenances, oppreſſions, champarties, deceipts, and all other evil-doings, offences, and injuries whatſoever, and alſo the acceſſaries of them, within the county aforeſaid (as well within liberties as without) by whomſoever and in what manner ſoever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumſtances concerning the premiſes, and every of them, or any of them, in any manner whatſoever; and the ſaid treaſons and other the premiſes to hear and determine according to the laws and cuſtoms of *England*, by the oath of *John Tilney*, *James Stafford*, *Richard Phillips*, *Samuel Stable*, *Samuel Bird*, *William Hilliar*, *Paul Barbot*, *William Weatherill*, *Thomas Waddell*, *John Williams*, *Samuel Baker*, *Thomas Sheriff*, *John Leiceſter*, *Thomas Tanton*, *John Goodere*, *John Thomas*, and *Robert Davis*, gentlemen, good and lawful men of the county aforeſaid, now here ſworn and charged to enquire for our ſaid lord the king for the body of the ſame county; it is preſented in manner and form as appears by the indictment and ſchedules hereunto annexed.

Butler.

GEORGE the third, by the grace of God, of *Great-Britain*, *France*, and *Ireland* king, defender of the faith, and ſo forth. To our juſtices of *oyer* and *terminer*, at *Hicks's-Hall*, in St. *John-Street*, in and for our county of *Middleſex*, and to every of them, greeting. Whereas by our writ we have lately commanded you, and every of you, for certain reaſons, you or one of you ſhould ſend under your ſeals, or the ſeal of one of you, before us at *Weſtminſter*, immediately after the receipt of that writ, all and ſingular indictments of whatſoever treſpaſſes, contempts, and felonies whereof *Elizabeth* the wife of *Auguſtus John Hervey*, eſquire, was indicted before you (as was ſaid) with all things touching the ſame, by whatſoever name the ſaid *Elizabeth* ſhould be called therein, together with the ſaid writ to you directed, that we might further cauſe to be done thereon what of right and according to the law and cuſtom of *England* we ſhould ſee fit to be done: and we do, for certain reaſons us thereunto moving, command you and every of you, that you or one of you do wholly ſuperſede whatſoever is to be done concerning the execution of that our ſaid writ; and that you proceed to the determination of the treſpaſſes, contempts, and felonies aforeſaid with that expedition which to you ſhall ſeem right and according to the law and cuſtom of *England*, notwithſtanding our writ as before ſent to you directed for that purpoſe. Witneſs *William* lord *Mansfield*, at *Weſtminſter*, the twenty-third day of *May*, in the fifteenth year of our reign.

Received 13th *June* 1775. *C. E.* By the court. *Burrow.*

By rule of court.

GEORGE the third, by the grace of God, of *Great-Britain*, *France*, and *Ireland* king, defender of the faith. To our juſtices of *oyer* and *terminer*, at *Hicks's-Hall*, in St. *John-Street*, in and for our county of *Middleſex*, and to every of them, greeting. We being willing, for certain reaſons, that all and ſingular indictments of whatſoever treſpaſſes, contempts, and felonies whereof *Elizabeth* the wife of *Auguſtus John Hervey*, eſquire, is indicted before you (as is ſaid) be determined before us, and not elſewhere, do command you and every of you, that you or one of you do ſend under your ſeals, or the ſeal of one of you, before us at *Weſtminſter*, immediately after the receipt of this our writ, all and ſingular the ſaid indictments, with all things touching the ſame, by whatſoever name the ſaid *Elizabeth* may be called in the ſame, together with this our writ, that we may further cauſe to be done thereon what of right and according to the law and cuſtom of *England* we ſhall ſee fit to be done. Witneſs *William* lord *Mansfield*, at *Weſtminſter*, the eighteenth day of *May*, in the fifteenth year of our reign.

By the court. *Burrow.*

At the inſtance of the within-named defendant, by rule of court.

The execution of this writ appears by the ſchedules and indictment to this writ annexed.

The anſwer of ſir *John Hawkins*, knight, one of the juſtices within-written.

Middleſex. } BE it remembered, that at the general ſeſſion of *oyer* and *terminer* of our lord the king, holden for the county of *Middleſex*, at *Hicks's-Hall*, in St. *John-Street*, in the ſaid county, on *Monday* the ninth day of *January*, in the fifteenth year of the reign of our ſovereign lord *George* the third, king of *Great-Britain*, and ſo forth, before ſir *John Hawkins*, knight, ſir *James Eſdaile*, knight, *David Wilmot*, *John Machin*, eſquires, and others their fellows juſtices of our ſaid lord the king, aſſigned by his majeſty's letters patent under the great ſeal of *Great-Britain* directed to the ſame juſtices before-named, and others in the ſaid letters named, to enquire more fully the truth, by the oath of good and lawful men of the county of *Middleſex* aforeſaid, and by other ways, means, and methods, by which they ſhall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treaſons, miſpriſions of treaſon, inſurrections, rebellions, counterfeitings, clippings, waſhings, falſe coinings, and other falſities of the money of *Great-Britain* and other kingdoms and dominions whatſoever, and of all murthers, felonies, manſlaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, aſſemblies, miſpriſions, confederacies, falſe allegations, treſpaſſes, riots, routs, retentions, eſcapes, contempts, falſities, negligences, concealments, maintenances, oppreſſions, champarties, deceipts, and all other evil-doings, offences, and injuries whatſoever, and alſo the acceſſaries of them, within the county aforeſaid (as well within liberties as without) by whomſoever and in what manner ſoever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumſtances concerning the premiſes, and every of them, or any of them, in any manner whatſoever; and the ſaid treaſons and other the premiſes to hear and determine according to the laws and cuſtoms of *England*, by the oath of *John Tilney*, *James Stafford*, *Richard Phillips*, *Samuel Stable*, *Samuel Bird*, *William Hilliar*, *Paul Barbot*, *William Weatherill*, *Thomas Waddell*, *John Williams*, *Samuel Baker*, *Thomas Sheriff*, *John Leiceſter*,

ceſter, *Thomas Tanton*, *John Goodere*, *John Thomas*, and *Robert Davis*, gentlemen, good and lawful men of the county aforeſaid, now here ſworn and charged to enquire for our ſaid lord the king for the body of the ſame county: it is preſented in manner and form as appears by a certain bill of indictment to this ſchedule annexed.

Butler.

GEORGE the third, by the grace of God, of *Great-Britain*, *France*, and *Ireland* king, defender of the faith, and ſo forth. To the ſheriff of our county of *Middleſex*, greeting: We command you, that you omit not, by reaſon of any liberty in your bailiwick, but that you take *Elizabeth* the wife of *Auguſtus John Hervey*, late of the pariſh of St. *George*, *Hanover-Square*, in the county of *Middleſex*, eſquire, if ſhe ſhall be found in your bailiwick, and her ſafely keep, ſo that you may have her body before our juſtices aſſigned by our letters patent under our great ſeal of *Great-Britain*, to enquire more fully the truth, by the oath of good and lawful men of our county of *Middleſex* aforeſaid, and by other ways, means, and methods by which they ſhall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treaſons, miſpriſions of treaſon, inſurrections, rebellions, counterfeitings, clippings, waſhings, falſe coinings, and other falſities of the money of *Great-Britain* and other kingdoms and dominions whatſoever, and of all murthers, felonies, manſlaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, aſſemblies, miſpriſions, confederacies, falſe allegations, treſpaſſes, riots, routs, retentions, eſcapes, contempts, falſities, negligences, concealments, maintenances, oppreſſions, champarties, deceipts, and all other evil-doings, offences, and injuries whatſoever, and alſo the acceſſaries of them, within the county aforeſaid (as well within liberties as without) by whomſoever and in what manner ſoever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumſtances concerning the premiſes, and every of them or any of them, in any manner whatſoever; and the ſaid treaſons and other the premiſes to hear and determine, according to the laws and cuſtoms of *England*, at the next general ſeſſion of *oyer* and *terminer* to be holden for our ſaid county, to anſwer us concerning certain felonies whereof ſhe is indicted before our ſaid juſtices; and have you then there this writ. Witneſs ſir *John Hawkins*, knight, at *Hicks's-Hall*, the ninth day of *January*, in the fifteenth year of our reign.

Butler.

The within-named *Elizabeth* the wife of *Auguſtus John Hervey* is not found in my bailiwick.

The anſwer of
William Plomer, eſquire,
and } Sheriff.
John Hart, eſquire,

GEORGE the third, by the grace of God, of *Great-Britain*, *France*, and *Ireland* king, defender of the faith, and ſo forth. To the ſheriff of our county of *Middleſex*, greeting: We command you, as before we have commanded you, that you omit not, by reaſon of any liberty in your bailiwick, but that you take *Elizabeth* the wife of *Auguſtus John Hervey*, late of the pariſh of St. *George*, *Hanover-Square*, in the county of *Middleſex*, eſquire, if ſhe ſhall be found in your bailiwick, and her ſafely keep, ſo that you have her body before our juſtices aſſigned by our letters patent under our great ſeal of *Great-Britain*, to enquire more fully the truth, by the oath of good and lawful men of our county of *Middleſex* aforeſaid, and by other ways, means, and methods by which they ſhall or may better know (as well within liberties as without) by whom the truth of the matter may be better known, of all treaſons, miſpriſions of treaſon, inſurrections, rebellions, counterfeitings, clippings, waſhings, falſe coinings, and other falſities of the money of *Great-Britain* and other kingdoms and dominions whatſoever, and of all murthers, felonies, manſlaughters, killings, burglaries, rapes of women, unlawful meetings, conventicles, unlawful uttering of words, aſſemblies, miſpriſions, confederacies, falſe allegations, treſpaſſes, riots, routs, retentions, eſcapes, contempts, falſities, negligences, concealments, maintenances, oppreſſions, champarties, deceipts, and all other evil-doings, offences, and injuries whatſoever, and alſo the acceſſaries of them, within the county aforeſaid (as well within liberties as without) by whomſoever and in what manner ſoever done, committed, or perpetrated, and by whom, or to whom, when, how, and after what manner, and of all other articles and circumſtances concerning the premiſes, and every of them, or any of them, in any manner whatſoever; and the ſaid treaſons and other the premiſes to hear and determine, according to the laws and cuſtoms of *England*, at the next general ſeſſion of *oyer* and *terminer* to be holden for our ſaid county, to anſwer us concerning certain felonies whereof ſhe is indicted before our ſaid juſtices; and have you then there this writ. Witneſs ſir *John Hawkins*, knight, at *Hicks's-Hall*, the fourteenth day of *February*, in the fifteenth year of our reign.

Butler.

The within-named *Elizabeth* the wife of *Auguſtus John Hervey*, eſquire, is not found in my bailiwick.

The anſwer of
William Plomer, eſquire,
and } Sheriff.
John Hart, eſquire,

Middleſex. } THE jurors for our ſovereign lord the now king, upon their oath preſent, that *Elizabeth* the wife of *Auguſtus John Hervey*, late of the pariſh of St. *George*, *Hanover-Square*, in the county of *Middleſex*, eſquire, on the eighth day of *March*, in the ninth year of the reign of our ſovereign lord *George* the third, now king of *Great-Britain*, and ſo forth, being then married, and then the wife of the ſaid *Auguſtus John Hervey*, with force and arms, at the ſaid pariſh of St. *George*, *Hanover-Square*, in the ſaid county of *Middleſex*, feloniouſly did marry and take to huſband *Evelyn Pierrepont* duke of *Kingſton* (the ſaid *Auguſtus John Hervey*, her former huſband, being then alive) againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace of our ſaid lord the king, his crown and dignity: and the ſaid jurors for our ſaid ſovereign lord the now king, upon their oath aforeſaid, further preſent, that the ſaid *Elizabeth*, heretofore (to wit) on the fourth day of *Auguſt*, in the eighteenth year of the reign of our late ſovereign lord *George* the ſecond, late king of *Great-Britain*, and ſo forth, at the pariſh of *Lainſton*, in the county of *Southampton*, by the name of *Elizabeth Chudleigh*, did marry the ſaid *Auguſtus John Hervey*, and him the ſaid *Auguſtus John Hervey* then and there had for her huſband; and that the ſaid *Elizabeth* being married, and the wife of the ſaid *Auguſtus John Hervey*, afterwards (to wit) on the eighth day of *March*, in the ninth year of the reign of our ſaid ſovereign lord *George* the third, now king of *Great-Britain*, and ſo forth, with force and arms, at the ſaid pariſh of St. *George*, *Hanover-Square*, in the ſaid county of *Middleſex*, feloniouſly did marry and take to huſband the ſaid *Evelyn Pierrepont* duke of *Kingſton* (the ſaid *Auguſtus John Hervey*, her former huſband, being then alive) againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace of our ſaid ſovereign lord the now king, his crown and dignity.

O. T.

True bill.

Auguſtine Greenland,	*Thomas Dodd*,
Ann Cradock,	*Samuel Harper*,
Chriſtopher Dixon,	*John Fozard.*

Sworn in court.

Lord High Steward. Is it your lordſhips' pleaſure, that the judges have leave to be covered?

Lords. Ay, ay.

Clerk of the Crown. Serjeant at arms, make proclamation for the gentleman-uſher of the black rod to bring his priſoner to the bar.

Serjeant at Arms. Oyez, oyez, oyez! *Elizabeth* ducheſs-dowager of *Kingſton*, come forth and ſave you and your bail, or elſe you forfeit your recognizance.

[*After her ſurrender ſhe was, during the trial, called to the bar by the following proclamation.*]

Gentleman-uſher of the black rod, bring your priſoner *Elizabeth* ducheſs-dowager of *Kingſton* to the bar, purſuant to the order of the houſe of lords.

Then *Elizabeth* ducheſs-dowager of *Kingſton* was brought to the bar by the deputy-gentleman-uſher of the black rod. The priſoner, when ſhe approached the bar, made three reverences, and then fell upon her knees at the bar.

Lord High Steward. Madam, you may riſe.

The priſoner then roſe up, and curtſied to his grace the lord high ſteward, and to the houſe of peers; which compliment was returned her by his grace, and the lords.

Then, proclamation having been made again for ſilence, the lord high ſteward ſpake to the priſoner, as follows.

Lord High Steward.

Madam,

YOU ſtand indicted for having married a ſecond huſband, your firſt huſband being living.

A crime ſo deſtructive of the peace and happineſs of private families, and ſo injurious in its conſequences to the welfare and good order of ſociety, that by the ſtatute-law of this kingdom it was for many years (in your ſex) puniſhable with death: the lenity, however, of later times has ſubſtituted a milder puniſhment in its ſtead.

This conſideration muſt neceſſarily tend to leſſen the perturbation of your ſpirits upon this awful occaſion.

But that, madam, which, next to the inward feelings of your own conſcience, will afford you moſt comfort is, reflecting upon the honour, the wiſdom, and the candour of this high court of criminal juriſdiction.

It is, madam, by your particular deſire that you now ſtand at that bar: you were not brought there by any proſecutor.

In your petition to the lords, praying for a ſpeedy trial, you aſſumed the title of ducheſs-dowager of *Kingſton*, and it was by that title that the court of *King's Bench* admitted you to bail; in your petition you likewiſe averred, that *Auguſtus John Hervey*, whoſe wife the indictment charges you with being, is at this time earl of *Briſtol*: upon examining the records, the lords were ſatisfied of the truth of that averment, and have accordingly allowed you the privilege you petitioned for, of being tried by your peers in full parliament; and from them you will be ſure to meet with nothing but juſtice tempered with humanity.

Before I conclude, I am commanded by the houſe to acquaint you, madam, and all other perſons having occaſion to ſpeak to the court during the trial, that they are to addreſs themſelves to the lords in general, and not to any lord in particular.

Ducheſs of Kingſton. My lords, I, the unfortunate widow of your late brother, the moſt noble *Evelyn Pierrepont* duke of *Kingſton*, am brought to the bar of this right honourable houſe without a ſhadow of fear, but infinitely awed by the reſpect that is due to you, my moſt honourable judges.

My lords, after having, at the hazard of my life, returned from *Rome* in a dangerous ſickneſs to ſubmit myſelf to the laws of my country, I plead ſome little merit in my willing obedience; and I intreat your lordſhips indulgence, if I ſhould be deficient in any ceremonial part of my conduct towards you, my moſt honoured and reſpectable judges; for the infirmities of my body and the oppreſſion of ſpirits under which I labour, leave your unhappy priſoner ſometimes without recollection: but it muſt be only with the loſs of life, that I can be deprived of the knowledge of the reſpect that is due to this high and awful tribunal.

Lord High Steward. Madam, your ladyſhip will do well to give attention, while you are arraigned on your indictment.

Then proclamation was made for ſilence.

After which, *Elizabeth* ducheſs-dowager of *Kingſton* was arraigned, in the form of the ſaid indictment againſt her, by the clerk of the crown in the *King's Bench*.

ELIZABETH ducheſs-dowager of *Kingſton*, you ſtand indicted by the name of *Elizabeth* the wife of *Auguſtus John Hervey*, late of the pariſh of St. *George*, *Hanover-Square*, eſquire (now become a peer of this realm) for that you, on the eighth day of *March*, in the ninth year of the reign of his preſent majeſty our ſovereign lord king *George* the third, being then married, and then the wife of the ſaid *Auguſtus John Hervey*, with force and arms, at the ſaid pariſh of St. *George*, *Hanover-Square*, in the ſaid county of *Middleſex*, feloniouſly did marry and take to huſband *Evelyn Pierrepont* duke of *Kingſton*, the ſaid *Auguſtus John Hervey*, your former huſband, being then alive; againſt the form of the ſtatute in ſuch caſe made and provided, and againſt the peace of our ſaid lord the king, his crown and dignity.

The indictment further charges, that you the ſaid *Elizabeth*, heretofore (to wit) on the fourth day of *Auguſt*, in the eighteenth year of our late ſovereign lord *George* the ſecond, late king of *Great-Britain*, and ſo forth, at the pariſh of *Lainſton*, in the county of *Southampton*, by the name of *Elizabeth Chudleigh*, did marry the ſaid *Auguſtus John Hervey*, and him the ſaid *Auguſtus John Hervey* then and there had for your huſband; and that you the ſaid *Elizabeth*, being married, and the wife of the ſaid *Auguſtus John Hervey*, afterwards (to wit) on the eighth day of *March*, in the ninth year of the reign of our ſaid ſovereign lord *George* the third, now king of *Great-Britain*, and ſo forth, with force and arms, at the ſaid pariſh of St. *George*, *Hanover-Square*, feloniouſly did marry and take to huſband the ſaid *Evelyn Pierrepont* duke of *Kingſton*, the ſaid *Auguſtus John Hervey*, your former huſband, being then alive.

How ſay you? are you guilty of the felony whereof you ſtand indicted, or not guilty?

Ducheſs of Kingſton. I *Elizabeth Pierrepont*, ducheſs-dowager of *Kingſton*, indicted by the name of *Elizabeth* the wife of *Auguſtus John Hervey*, eſquire, ſay, that I am not guilty.

Clerk of the Crown. Cul': prit—How will you be tried?

Ducheſs of Kingſton. By God and my peers.

Clerk of the Crown. God ſend your grace a good deliverance.

Clerk of the Crown. Serjeant at arms, make proclamation.

Serjeant at Arms. Oyez, oyez, oyez! All manner of perſons that will give evidence, on behalf of our ſovereign lord the king, againſt *Elizabeth* ducheſs-dowager of *Kingſton*, the priſoner at the bar, let them come forth, and they ſhall be heard; for now ſhe ſtands at the bar upon her deliverance.

Lord High Steward. My lords, the diſtance of this place from the bar is ſo great, that I muſt deſire your lordſhips leave to go down to the table for the convenience of hearing.

Lords. Ay, ay.

Then his grace removed to the table.

Ducheſs of Kingſton. My lords, the ſuppoſed marriage in the indictment with Mr. *Hervey*, which is the ground of the charge againſt me, was inſiſted upon by him in a ſuit inſtituted by me in the Conſiſtory Court of the right reverend lord biſhop of *London*; by the ſentence of which court, ſtill in force, it was pronounced, decreed, and declared, that I was free from all matrimonial contracts or eſpouſals with the ſaid Mr. *Hervey*: and, my lords, I am adviſed that this ſentence, which I now deſire leave to offer to your lordſhips (remaining unreverſed and unimpeached) is concluſive, and that no other evidence ought to be received or ſtated to your lordſhips reſpecting ſuch pretended marriage.

Lord High Steward. Do the counſel for the proſecutor object to the reading of the ſentence?

Mr. Attorney-general. My lords, obſerving that the priſoner was about to make ſome application to your lordſhips, I was not ſolicitous to riſe in the order and place wherein I ought to have addreſſed myſelf to the houſe; becauſe I would not interrupt, or prevent, any thing which ſhe might think material for her to lay before your lordſhips.

I attended much to the form of the application. If I comprehend the aim of it, ſhe means to object to your lordſhips hearing any evidence, either given or ſtated, in ſupport of the preſent indictment; the ground of her objection being a ſentence, ſaid to have paſſed in the Eccleſiaſtical Court, againſt the firſt marriage ſuppoſed in the indictment. Upon this, your lordſhips have demanded, whether I object to the reading of the ſentence?

If the proceeding referred to had been tendered to your lordſhips in the only place which can be thought the proper or regular one, for receiving the defendant's evidence, to be ſure, many queſtions would naturally have ariſen upon it. Firſt, whether that proceeding, explained as it will be, has the force of a ſentence, or amounts to more than a circumſtance and proof of the fraud complained of? Secondly, whether a ſerious ſentence of that ſort, pronounced between party and party, ought to be admitted in a criminal proſecution, and againſt the king, who was no party to it, nor could have become ſo by any means? Thirdly, whether it creates an *eſtoppel*, or concluſive evidence againſt the crown? Fourthly, whether it does ſo in this peculiar ſpecies of proſecution?

But in the way this thing is urged, it ſeems perfectly impoſſible, or at leaſt altogether premature, to diſcuſs the force and effect of it, as evidence. *That* ſuppoſes a caſe already made for the proſecutor, which requires the aid of evidence, on the part of the priſoner, to diſprove or explain it. But, if I catch the idea perfectly, the preſent inſiſting is, that the ſentence now offered to the conſideration of your lordſhips carries ſome *legal force*—what, I do not pretend to define or explain; for I proteſt I have no gueſs what is meant; but--*ſome legal force* with it, which enables the priſoner to demand, in this ſtage of the buſineſs, that the trial ſhall not proceed, nor any evidence be heard to maintain the indictment, but that the whole matter ſhall be wound up, and conclude with ſome reſolution of your lordſhips,—not to acquit (for in order to that you muſt try) but to diſmiſs the priſoner without trial, after putting herſelf upon her peers for trial.

I have, notwithſtanding, ſhortly intimated the nature of the objections which may be made to it, as an article of evidence for the priſoner; partly to point out, how untenable the propoſition is of ſtopping the trial, by interpoſing a thing whoſe reality, competence, and effect will be ſo much diſputed in matter of fact and of law; but chiefly, to lay in my claim, that this paper (if your lordſhips ſhould think it worth hearing) may be read *at this time*, and for the purpoſe of the motion *now* made by the priſoner *only*, without prejudice to any objection which I may think fit to make to it, if it ſhould be offered as evidence in the courſe of the trial.

If it be read under the reſerve I have mentioned, not as a part of the trial, but to make this application of the priſoner to your lordſhips, previouſly to her trial, intelligible; and for the ſake of raiſing the argument upon it, in caſe your lordſhips ſhould ſuffer ſuch a point to be argued at all; in theſe views, I will not object to the reading of it.

But if it be offered as a piece of evidence for the priſoner, ſo that I muſt admit or object to it *now*, I ſhall certainly inſiſt upon going on with the proſecution, and drive this article of evidence into its own place, the priſoner's defence. There it will be better ſeen, how far it is available, or even competent.

Unleſs I could learn the purpoſe of offering it from thoſe who adviſed it, I do not know how to make a more particular anſwer to your lordſhips queſtion.

Ducheſs of Kingſton. Will your lordſhips pleaſe to permit my counſel to be heard to this point?

Lords. Ay, ay.

Lord High Steward. Mr. Wallace, you may proceed for the priſoner.

Mr. Wallace. My lords, I have the honour to be aſſigned one of the counſel to adviſe and aſſiſt the noble priſoner at the bar in all matters of law that may ariſe in the courſe of the trial.

I ſhall ſubmit with great deference to your lordſhips, that the preſent ſtage of the buſineſs is the proper ſeaſon to introduce the ſentence which has been mentioned to the court.

My lords, the ſentence is conceived to be concluſive upon the fact of that marriage which is the ground of this indictment. The indictment ſuppoſes that the priſoner at the bar was married to *Auguſtus John Hervey*: the ſentence now offered to your lordſhips is not only of a competent juriſdiction to decide that queſtion, but the only conſtitutional juriſdiction.

My lords, whilſt this ſentence remains unimpeached, I conceive that it is concluſive againſt all evidence to be produced of the fact of the marriage. It is in that light the priſoner is adviſed to offer it to your lordſhips, that a court of competent juriſdiction having decided the point, it will be in vain to call parole witneſſes to the fact; and it will only take up your lordſhips time, and it will be of no real uſe, to ſtate the evidence of witneſſes, which witneſſes cannot appear to give that evidence before the court.

My lords, the office of a counſel in opening the caſe to any court is, as I conceive, to ſtate with clearneſs the evidence that is to be adduced, that the court may better underſtand and apply it: therefore, unleſs the evidence is competent, your lordſhips will not hear any ſtate of it. This too perhaps may be the time, though I ſhall forbear at preſent to enter into it, to diſcuſs whether the ſentence be admiſſible; or, if admiſſible, whether concluſive: but we are now, my lords, upon the order of producing this ſentence; and if it has the effect which I ſhall humbly ſubmit in a proper ſeaſon to your lordſhips that it has, of being abſolutely concluſive, then the evidence, which is now ready to be ſtated by the counſel for the proſecution, ought not to be produced, and of courſe ought not to be ſtated. This is the light in which the cauſe appears to me at this moment; and I truſt your lordſhips will concur in opinion, that if the ſentence has the concluſive effect which we are ready to ſubmit to your lordſhips it has, it repels all teſtimony, and makes it improper therefore to ſtate any. If a precedent ſhould be thought neceſſary for what is prayed by the noble priſoner at the bar, I beg leave to refer your lordſhips to a caſe determined at the bar of the court of *King's Bench* in the reign of king *William*: it is reported in Mr. Serjeant *Carthew*'s Reports, 225, upon a trial of an ejectment. The queſtion was, if ſir *Robert Carr* was actually married to *Iſabella Jones*, by whom he had iſſue, and under whom the plaintiff in that cauſe claimed the eſtate. The defendant, by way of anticipation of the evidence which the plaintiff was about to give, moved the court, that the plaintiff ought not to be allowed to prove a marriage between them, becauſe there was a ſentence in the *Arches* upon a ſuit of jactitation brought againſt her; by which it was decreed, that there was no marriage between them, but that they were free from all matrimonial contracts and eſpouſals. The ſentence was then offered in evidence by the defendant's counſel at the bar, to conclude the plaintiff from any proof of the marriage, unleſs he could ſhew that the ſame was repealed: and upon a debate, the court were all of opinion, that this ſentence, whilſt unrepealed, was concluſive againſt all matters precedent; and that the temporal courts muſt give credit to it, until it is reverſed, it being a matter of mere ſpiritual cognizance: and upon this the plaintiff was nonſuited. Your lordſhips may perceive that this caſe is applicable to another part of the buſineſs before your lordſhips; but I cite it now merely to ſhew the ſentence was offered, and received, to preclude the examination of witneſſes; and ſurely if witneſſes are not admiſſible, their teſtimony ought not to be ſtated.

Mr. Attorney-general. My lords, I do not even now comprehend the order of proceeding propoſed.

If there be any thing in the preſent motion, conſidered as propoſing a fit manner of regulating this trial, or as a point of general law—in ſhort, if their propoſition be maintainable at all—I do aſſure your lordſhips, that I am not anxious, or in any degree deſirous, to ſtate a caſe to this audience which muſt wound the ſenſibility of the priſoner: this I would avoid, unleſs public juſtice, and the neceſſity of the proſecution, ſhould abſolutely require it of me.

If it be poſſible, on her part, to make any ground for ſtopping the proſecution in this manner, I ſhall be well content to ſtop here: to me it appears flatly impoſſible. I ſtated ſome general hints to this effect when I ſpoke laſt.

The learned counſel, in attempting to make good their propoſition of ſtopping the trial in this ſtage, have contented themſelves with a general averment, that the law is with them; and refer to the manner in which evidence was received in the particular caſe of one ejectment, where no contradiction or controverſy appears to have been raiſed among the counſel about the nature of the cauſe depending, the ſentence produced, or the parties to both. *Here*, a great deal is to be previouſly ſettled on thoſe heads.

I did not imagine the learned counſel would have ſtopped ſo ſhortly: but if they thought well of the motion, I expected they would have gone the length of arguing on it, and of endeavouring to demonſtrate the poſſibility of winding up the whole proceeding here, by comparing the nature of the ſentence with the whole compaſs of the proſecution, ſtated with every degree of imaginable aggravation.

Your lordſhips might eaſily perceive my reaſon for expecting the argument to take this courſe. The ſentence may be read—indeed it muſt be read. It is the only ground of the motion. But unleſs ſuch is demonſtrated to be the effect of it, your lordſhips can take no order upon it, nor make any uſe or application of it, without hearing the proſecutor's caſe. It is not therefore enough to read the ſentence.

My reaſon for troubling your lordſhips at all was only to obſerve, that the motion concludes againſt even hearing the proſecutor; and to ſubmit, according to my humble duty, to your lordſhips, whether that be a point of law fit to hear the priſoner upon by her counſel. If it be, your lordſhips will call upon the learned counſel whom you have allowed the priſoner, to ſuſtain it fully in argument. Otherwiſe your lordſhips will reject it as inadmiſſible. All proſecutions might be ſtopped in this manner.

A Lord. Does Mr. Attorney-general object to the reading of the ſentence?

Mr. Attorney-general. Subject to the reſervation of my right to object to it in every ſhape, when it ſhall be offered *in evidence:* upon that ground I do not object to it. I am not now admitting this ſentence to be adduced *in the courſe of the cauſe*, or as *a part of the defence*, to which I ſhall ſay, it is incompetent. But I let it in, to ground a motion anterior to the hearing of the cauſe. In that view, and in that view only, I admit it to be read. Indeed it ſeems to be offered as a part of the counſel's ſpeech; and I admit it as containing the whole of the argument, yet offered in ſupport of the motion.

That your lordſhips may underſtand what is to be made of this ſentence when read, they muſt read, in their order, the original allegation of *Elizabeth Chudleigh*; the croſs-allegation delivered in by Mr. *Hervey*; her anſwer; the articles on which the proofs were taken; the depoſitions; and the ſentence: for thus the ſentence proceeded.

Lord Mansfield. They muſt give in evidence the whole ſentence.

(The ſentence only begun to be read.)

Mr. Attorney-general. I muſt trouble your lordſhips again.

They are now offering to read the ſentence only, without reading the allegations of the parties, their articles and proofs. For what reaſon I very well comprehend. But I apprehend, that, if a judgment be read in a court of law, they muſt read the declaration, plea, replication, and all other matters leading to the judgment, in order to make it intelligible. Here they would read the ſentence, abſtractedly from the allegations and other matters upon which that ſentence proceeded.

Lord Camden. I wiſh to know of the counſel for the priſoner, whether they meant to object to the whole proceedings in the jactitation cauſe being read.

Mr. Wallace. I have not, upon the part of the noble priſoner, the leaſt objection that all the proceedings ſhould be brought before your lordſhips. I conceive that what the officer has now brought before the court was what is uſually given in evidence in ſuch caſe. I do not recollect any other, in any caſe I have found, being produced but the ſentence, which ſtates in ſhort the proceedings had in that court; but I underſtand the proceedings are here; and on the part of the noble priſoner there is not the leaſt objection to the whole being laid before the court.

The lords then permitted the following proceedings in the jactitation cauſe, and the ſentence pronounced in the Eccleſiaſtical Court, to be read *de bene eſſe*.

SECOND SESSION. *Michaelmas-Term* 1768.

Chudleigh againſt *Hervey*. Libel given the 9th of *November* 1768. *Biſhop*.

In the name of God, Amen. Before you the worſhipful *John Betteſworth*, doctor of laws, vicar-general of the right reverend father in God *Richard*, by divine permiſſion, lord biſhop of *London*, and official principal of the conſiſtorial epiſcopal court of *London* lawfully conſtituted, your ſurrogate, or any other competent judge in this behalf of the proctor of the honourable *Elizabeth Chudleigh*, of the pariſh of Saint *Margaret*, *Weſtminſter*, in the county of *Middleſex* ſpinſter; againſt the honourable *Auguſtus John Hervey*, of the pariſh of Saint *James*'s, *Weſtminſter*, in the county of *Middleſex* and dioceſe of *London*, a batchelor; and againſt any other perſon or perſons lawfully intervening or appearing for him in judgment before you by way of complaint, and hereby complaining unto you in this behalf, doth ſay, alledge, and in law articulately propound as follows; that is to ſay,

1. THAT the ſaid honourable *Elizabeth Chudleigh* was and is free, and no way engaged in any matrimonial contract or eſpouſals with the ſaid honourable *Auguſtus John Hervey*; and for and as a perſon free, and no way engaged, was and is commonly accounted, reputed, and taken to be, amongſt her neighbours, friends, and familiar acquaintance: and the party proponent doth alledge and propound every thing in this article contained jointly and ſeverally.

2. That the ſaid honourable *Auguſtus John Hervey*, ſufficiently knowing the premiſes, and notwithſtanding the ſame, did in the year of our Lord one thouſand ſeven hundred and ſixty-three, one thouſand ſeven hundred and ſixty-four, one thouſand ſeven hundred and ſixty-five, one thouſand ſeven hundred and ſixty-ſix, and one thouſand ſeven hundred and ſixty-ſeven, and in the ſeveral months therein concurring, and in this preſent year of our Lord one thouſand ſeven hundred and ſixty-eight, within the pariſh of Saint *James*, *Weſtminſter*, aforeſaid, and in other pariſhes and places in the neighbourhood thereof and thereto adjoining, or in all, ſome, or one of the afore-mentioned times and places, in the preſence of ſeveral credible witneſſes, falſely and maliciouſly boaſt, aſſert, and report, that he was married to or contracted in marriage with the aforeſaid honourable *Elizabeth Chudleigh*; whereas in truth and fact not any ſuch marriage was ever ſolemnized or ever contracted between them: and this was and is true, publick, and notorious; and the party proponent doth alledge and propound of any other time or times and places as ſhall appear from the proofs to be made in this cauſe, and as before.

3. That the ſaid honourable *Auguſtus John Hervey* hath been oftentimes, or at leaſt once, on the part and behalf of the ſaid honourable *Elizabeth Chudleigh*, and her friends and acquaintance, aſked and requeſted, or deſired to deſiſt and abſtain from his aforeſaid pretended falſe and malicious boaſting, aſſerting, and reporting, as mentioned in the next preceding article: and the party proponent doth alledge and propound as before.

4. That the ſaid honourable *Auguſtus John Hervey*, being as aforeſaid aſked and requeſted to ceaſe, deſiſt, and abſtain from his aforeſaid pretended falſe and malicious boaſting, aſſerting, and reporting, hath not in the leaſt, nor doth in the leaſt at preſent, ceaſe, deſiſt, and abſtain therefrom, but continually with like malice and raſhneſs does conſtantly, falſely, and maliciouſly boaſt, aſſert, affirm, and report the ſame, to the great danger of his ſoul's health, no ſmall prejudice to the ſaid honourable *Elizabeth Chudleigh*, and pernicious example of others: and this was and is true, publick, and notorious; and the party proponent doth alledge and propound as before.

5. That of all and ſingular the premiſes it was and is, by and on the part and behalf of the ſaid honourable *Elizabeth Chudleigh*, ſpinſter, thinking herſelf greatly injured, aggrieved, and diſquieted by reaſon of the aforeſaid pretended falſe and malicious boaſting, aſſerting, and reporting of the ſaid honourable *Auguſtus John Hervey*, rightly and duly complained to you the judge aforeſaid, and to this court, for a fit and meet remedy to be had and provided in this behalf: and the party proponent doth alledge and propound as before.

6. That the ſaid honourable *Auguſtus John Hervey* was and is of the pariſh of Saint *James*, *Weſtminſter*, in the county of *Middleſex* and dioceſe of *London*, and therefore and by reaſon of the premiſes was and is ſubject to the juriſdiction of this court: and the party proponent doth alledge and propound as before.

7. That all and ſingular the premiſes were and are true, publick, and notorious, and thereof there was and is a public voice, fame, and report, and of which legal proof being made, the party proponent prays right and juſtice to be effectually done and adminiſtered to him and his party in the premiſes; and alſo that by this court it may be pronounced, decreed, and declared, that the ſaid honourable *Elizabeth Chudleigh* at and during all the times in this libel mentioned was a ſpinſter, and free from all matrimonial contracts and eſpouſals with him the ſaid honourable *Auguſtus John Hervey*; and that he, notwithſtanding the premiſes, did, in the years, months, and places in this libel mentioned, or in ſome or one of them, falſely and maliciouſly boaſt, aſſert, and report, that he was married to, or contracted in marriage with, the ſaid honourable *Elizabeth Chudleigh*; and that he may be enjoined perpetual ſilence in the premiſes, and obliged and compelled to ceaſe, deſiſt, and abſtain from ſuch his aforeſaid falſe and malicious boaſtings, aſſertions, and reports for the future; and that he may be condemned in the coſts made and to be made in this cauſe on the part and behalf of the ſaid honourable *Elizabeth Chudleigh*, and compelled to the due and effectual payment thereof by you or your definitive ſentence or final decree to be given in this cauſe; and further to do and decree in the premiſes what ſhall be lawful in this behalf, the party proponent not obliging himſelf to prove all and ſingular the premiſes, or to the burthen of a ſuperfluous proof, againſt which he proteſts; and prays, that, ſo far as he ſhall prove in the premiſes, he may obtain in his petition, the benefit of the law being always preſerved, humbly imploring the aid of your office in this behalf.

Arth. Collier.
Pet. Calvert.
Wm. Wynne.

Hervey againſt *Hervey* called *Chudleigh*. *Fountain—Biſhop.*

Which day *Fountain*, in the name of and as the lawful proctor of the right honourable *Auguſtus John Hervey*, and as ſuch, and under that denomination, did, by all ways and means which may be moſt beneficial and effectual for his ſaid party in this behalf, and to all intents and purpoſes in law whatſoever, ſay, alledge, and in law articulately propound as follows; to wit:

1. THAT ſome time in the year one thouſand ſeven hundred and forty-three, or one thouſand ſeven hundred and forty-four, the right honourable *Auguſtus John Hervey*, then the honourable *Auguſtus John Hervey*, eſquire, and ſon of the right honourable *John* late lord *Hervey*, became acquainted with *Elizabeth Chudleigh*, now *Hervey*, at *Wincheſter* races; and the ſaid honourable *Auguſtus John Hervey*, eſquire, having

conceived a liking and affection for the ſaid *Elizabeth Chudleigh*, and being a batchelor, and a minor of the age of ſeventeen or eighteen years, and free from any matrimonial contract, did privately make his addreſſes of love and courtſhip to the ſaid *Elizabeth Chudleigh*, who was then alſo a minor, and a ſpinſter of the age of about eighteen years, and alſo free from any matrimonial contract; and ſhe the ſaid *Elizabeth Chudleigh*, now *Hervey*, did receive and admit ſuch his addreſſes and courtſhip, and entertain him as a ſuitor to her in the way of marriage, but without the privity or knowledge of either of their relations or friends, excepting her aunt the late Mrs. *Hanmer*; and they mutually contracted themſelves to each other: and the party proponent doth alledge and propound of any other time and place, and of every thing in this article contained jointly and ſeverally.

2. That in the ſaid year one thouſand ſeven hundred and forty-four, the ſaid honourable *Auguſtus John Hervey*, eſquire, was a lieutenant in the navy, and belonged to his majeſty's ſhip *Cornwall*, which in *Auguſt* one thouſand ſeven hundred and forty-four lay at *Portſmouth*; that the ſaid *Elizabeth Chudleigh*, in *July* one thouſand ſeven hundred and forty-four, being on a viſit at *John Merrill*'s, eſquire, at *Lainſton*, in the pariſh of *Sparſhot*, in the county of *Southampton*, with her aunt Mrs. *Hanmer*, and the ſaid *Auguſtus John Hervey*, being then on board the ſaid ſhip the *Cornwall* at *Portſmouth*, went from thence to the ſaid Mr. *Merrill*'s in order to ſee the ſaid *Elizabeth Chudleigh*; and the ſaid ſhip being under ſailing orders for and being ſoon to depart for the *Weſt-Indies*, it was propoſed between the ſaid *Auguſtus John Hervey* and Mrs. *Hanmer*, that they the ſaid *Auguſtus John Hervey* and *Elizabeth Chudleigh* ſhould be married privately at the ſaid Mr. *Merrill*'s houſe; and accordingly they the ſaid *Auguſtus John Hervey* and *Elizabeth Chudleigh* were, on or about the fourth day of *Auguſt* one thouſand ſeven hundred and forty-four, in Mr. *Merrill*'s houſe in the pariſh of *Sparſhot* aforeſaid, joined together in holy matrimony, about eleven o'clock at night, by the reverend *Thomas Amis*, ſince deceaſed, a clergyman in holy orders, according to the rites and ceremonies of the church of *England*, in the preſence of Mrs. *Hanmer*, the aunt of her the ſaid *Elizabeth Chudleigh*, and Mr. *Mountnay*, both ſince deceaſed; and were then and there by him the ſaid *Thomas Amis* pronounced for and as lawful huſband and wife: and the party proponent doth alledge and propound as before.

3. That after the ſaid *Auguſtus John Hervey* and *Elizabeth Chudleigh*, now *Hervey*, were ſo privately married, they conſummated ſuch their marriage at the ſaid Mr. *Merrill*'s houſe, by having the carnal knowledge of each other's bodies, and laying for ſome time in one and the ſame bed naked and alone, but without the privity or knowledge of any part of the family and ſervants of the ſaid Mr. *Merrill*: and the party proponent doth alledge and propound as before.

4. That the ſaid *Auguſtus John Hervey*, eſquire, continued at the ſaid Mr. *Merrill*'s about two or three days, and then returned to his ſaid ſhip *Cornwall*, wherein he in *November* following ſailed for the *Weſt-Indies*; and that, on account of certain circumſtances of his family, it being neceſſary that the ſaid marriage ſhould be kept a ſecret from every perſon, except thoſe before-mentioned, therefore the ſaid *Elizabeth Hervey* continued to go by the name of *Chudleigh* when ſhe left the ſaid Mr. *Merrill*'s, reſiding at different places, and paſſing for a ſingle perſon; that the ſaid *Auguſtus John Hervey*, eſquire, remained in the *Weſt-Indies* till the month of *Auguſt* in the year one thouſand ſeven hundred and forty-ſix, when he ſailed for *England*, and landed at *Dover* on or about the ſixteenth of *October* following; that the ſaid *Elizabeth Hervey* at that time reſided in *Conduit-Street*, where the ſaid *Auguſtus John Hervey*, eſquire, went to ſee her as his wife ſeveral times, and ſhe received him and acknowledged him to be her huſband, but they did not publickly own their marriage, or cohabit together as huſband and wife: and this was and is true; and the party proponent doth alledge and propound as before.

5. That the ſaid *Auguſtus John Hervey*, eſquire, on the twenty-eighth day of the month of *November* in the ſaid year one thouſand ſeven hundred and forty-ſix, went to ſea again, and returned to *England* in the *January* following; that the ſaid *Elizabeth Hervey* otherwiſe *Chudleigh* at that time continued in *Conduit-Street*; but ſome differences ariſing between them on account of the conduct of the ſaid *Elizabeth Hervey*, they continued to live ſeparate from each other for the future; and the ſaid honourable *Auguſtus John Hervey* thereupon forbore viſiting the ſaid *Elizabeth Hervey*, and, ſome time in the month of *May* one thouſand ſeven hundred and forty-ſeven, ſailed for the *Mediterranean* ſea in the ſhip called the *Princeſſa*, and continued abroad till the month of *December* in the following year; that from the time they ſo continued to live ſeparate as aforeſaid to this time, the ſaid *Auguſtus John Hervey* has never viſited the ſaid *Elizabeth Hervey*: and this was and is true; and the party proponent doth alledge and propound as before.

6. That all and ſingular the premiſes were and are true, publick, and notorious, and therefore there was and is a publick voice, fame, and report, of whichl egal proof being made, the party proponent prays right and juſtice to be adminiſtered to him and his party in the premiſes, and that it may be pronounced, that the ſaid right honourable *Auguſtus John Hervey* and *Elizabeth Chudleigh* were and are lawful man and wife.

Geo. Harris.

Conſiſtory of London, FOURTH SESSION *of* Michaelmas-Term, 6th *December* 1768.

Chudleigh againſt *Hervey*. *Biſhop—Fountain.*

On which day *Biſhop*, in the name of and as lawful proctor of the honourable *Elizabeth Chudleigh*, ſpinſter, and as ſuch, and under that denomination, did, by all ways and means which may be moſt beneficial and effectual in this behalf, and to all intents and purpoſes in law whatſoever, ſay, alledge, and articulately propound as follows; to wit:

1. THAT as well before as ever ſince the pretended time of the pretended marriage pleaded and propounded by the right honourable *Auguſtus John Hervey*, the other party in this ſuit, to have been on or about the fourth of *Auguſt* one thouſand ſeven hundred and forty-four, the ſaid honourable *Elizabeth Chudleigh* has always paſſed as a ſingle woman, and has always gone, been known, and been addreſſed by the name of *Elizabeth Chudleigh*, and by no other, and hath always viſited and received viſits as a ſingle woman, and hath always lived ſeparate and apart from the ſaid right honourable *Auguſtus John Hervey*, without any interpoſition, let, or hindrance of the ſaid right honourable *Auguſtus John Hervey*, and hath not at any time lived or cohabited with him, or he with her: and this was and is true; and ſo much the ſaid right honourable *Auguſtus John Hervey* well knows and believes in his conſcience to be true; and the party proponent doth alledge and propound every thing in this article contained jointly and ſeverally.

2. That in the year of our Lord one thouſand ſeven hundred and forty-three, the ſaid *Elizabeth Chudleigh* was admitted a maid of honour to her royal highneſs the princeſs of *Wales*; and on the death of his royal highneſs the prince of *Wales*, on or about the ſeventeenth of *April* one thouſand ſeven hundred and fifty-one, re-admitted and continued maid of honour to her royal highneſs the princeſs-dowager of *Wales*, without any let or hindrance of the ſaid right honourable *Auguſtus John Hervey*, and hath during the whole of the ſaid time continued and now continues a maid of honour to her royal highneſs the princeſs-dowager of *Wales*, without any let or hindrance of the ſaid right honourable *Auguſtus John Hervey*: and this was and is true; and ſo much the ſaid right honourable *Auguſtus John Hervey* knows and believes in his conſcience to be true; and the party proponent doth alledge and propound as before.

3. That in ſupply of proof of the premiſes mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex two certificates, and copies of the entries from the treaſurer's office of the princeſs-dowager of *Wales*, marked with the letters A and B, of the admiſſion of the ſaid *Elizabeth Chudleigh* as maid of honour, and of her continuance now in ſuch poſt, and prays that the ſame may be here read, and taken as if herein inſerted; and doth alledge that the ſame contain true copies of the entries of the ſaid *Elizabeth Chudleigh* as maid of honour, and was and is ſigned by Mr. *William Watts*, deputy-treaſurer to her royal highneſs the princeſs-dowager of *Wales*; and that *Elizabeth Chudleigh* therein named, and *Elizabeth Chudleigh* party in this ſuit, was and is one and the ſame perſon, and not divers: and the party proponent doth alledge and propound as before.

4. That in the year one thouſand ſeven hundred and fifty-three, the ſaid *Elizabeth Chudleigh*, in her own name as a ſpinſter, and without any interpoſition, let, or hindrance of the ſaid right honourable *Auguſtus John Hervey*, or his being a party thereto or any ways concerned therein, took a leaſe of the right honourable lord *Berkeley of Stratton* of certain land in *Hill-Street*, in the pariſh of *St. George, Hanover-Square*, in the county of *Middleſex*, whereon the ſaid *Elizabeth Chudleigh* cauſed to be built a houſe, wherein ſhe continued to live for the ſpace of five years and upwards, and afterwards ſold the ſame to *Hugo Meynell*, eſquire, and received the money proceeding from the ſale thereof to her own uſe: and this was and is true; and the party proponent doth alledge and propound as before.

5. That in ſupply of proof of the premiſes mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex the original leaſe of the land aforementioned, dated the fourteenth of *April* one thouſand ſeven hundred and fifty-three, executed by the ſaid lord *Berkeley* and *John Phillips*, who was intereſted therein, and thereby leaſed to the ſaid *Elizabeth Chudleigh*, ſpinſter, her executors, adminiſtrators, and aſſigns, for the term of eighty-ſeven years, and marked with the letter C, and prays that the ſame may be here read, and taken as if herein inſerted; and doth alledge that every thing was ſo had and done as is therein contained; and that *Elizabeth Chudleigh*, ſpinſter, therein mentioned, and *Elizabeth Chudleigh*, ſpinſter, party in this cauſe, was and is one and the ſame perſon, and not divers: and this was and is true; and the party proponent doth alledge and propound as before.

6. That on the third day of *February*, in the year of our Lord one thouſand ſeven hundred and fifty-ſeven, the ſaid *Elizabeth Chudleigh*, ſpinſter, was admitted a copyholder and tenant to the dean and chapter of *Weſtminſter* for the houſe and land, or ſome part thereof, wherein ſhe now lives, at *Knightſbridge*, in the county of *Middleſex*, in her own then and now maiden name of *Elizabeth Chudleigh*, and without any interpoſition, let, or hindrance of the ſaid right honourable *Auguſtus John Hervey*, or without his being a party thereto or any ways concerned therein: and this was and is true; and the party proponent doth alledge and propound as before.

7. That in ſupply of proof of the premiſes mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, a copy of the court-roll of the ſaid *Elizabeth Chudleigh*'s being admitted tenant to the premiſes mentioned in the next preceding article, and marked with the letter D; and that *Elizabeth Chudleigh* therein mentioned, and *Elizabeth Chudleigh* party in this cauſe, was and is one and the ſame perſon, and not divers: and the party proponent doth alledge and propound as before.

8. That in the year of our Lord one thouſand ſeven hundred and ſixty-two the ſaid *Elizabeth Chudleigh*, ſpinſter, tranſacted buſineſs with *John Butcher* in her own maiden name of *Chudleigh*, and took a leaſe from the ſaid Mr. *Butcher* of certain lands ſituate in the pariſh of *Kenſington*, in the county of *Middleſex*, and this without any interpoſition, let, or hindrance of the ſaid right honourable *Auguſtus John Hervey*, or his being a party thereto or any ways concerned therein; and in ſuch leaſe the ſaid *Elizabeth Chudleigh* was deſcribed by the name of *Elizabeth Chudleigh*: and this was and is true; and the party proponent doth alledge and propound as before.

9. That in ſupply of proof of the premiſes mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if therein inſerted, the ſaid leaſe mentioned in the preceding article, and marked with the letter E; and doth alledge that every thing was ſo had and done as therein is contained; and that *Elizabeth Chudleigh* therein named, and *Elizabeth Chudleigh*, ſpinſter, party in this cauſe, was and is one and the ſame perſon, and not divers:

and this was and is true; and the party proponent doth alledge and propound as before.

10. That Mrs. *Ann Hanmer*, the aunt of the ſaid *Elizabeth Chudleigh*, ſpinſter, the party proponent, and who, in the ſecond article of the pretended allegation admitted on the part of the ſaid right honourable *Auguſtus John Hervey*, is pretended to have been preſent at the pretended marriage pleaded by the ſaid *Auguſtus John Hervey*, did, in the year one thouſand ſeven hundred and ſixty-two, write a letter with her own hand to the ſaid *Elizabeth Chudleigh*, ſpinſter, wherein ſhe addreſſes her as a ſingle woman, therein calling her ‘ dear Mrs. *Chudleigh*;’ and alſo in or about the year following did make her laſt will and teſtament, and codicil, the codicil not dated, but the will bearing date the eleventh day of *June* one thouſand ſeven hundred and ſixty-three, and both will and codicil, as well as the letter aforeſaid, are of the hand-writing of the ſaid Mrs. *Ann Hanmer*, and ſo known to be by perſons who have ſeen her write and ſubſcribe her name to writings, and are well acquainted with her manner and character of hand-writing; and in which will and codicil, proved in the Prerogative Court of *Canterbury*, and now remaining in the regiſtry thereof, the ſaid Mrs. *Hanmer* hath by the will given a ſilver ſugar-urn and ſpoon, and by her codicil hath given and bequeathed a legacy of one hundred pounds, to the ſaid *Elizabeth Chudleigh*, by the name and deſcription of the honourable Mrs. *Elizabeth Chudleigh*: and this was and is true; and the party proponent doth alledge and propound as before.

11. That in ſupply of proof of the premiſes mentioned in the next preceding article, the party propounding doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, the ſaid letter marked with the letter F, beginning thus; ‘ *Sunning-hill*, *Auguſt* the 14th ‘ —62. Dear Mrs. *Chudleigh*,’ and ending, ‘ I am, dear madam, your ‘ ſincere well-wiſher and humble ſervant, *A. Hanmer*;’ and alſo doth exhibit a copy of the ſaid will and codicil of the ſaid Mrs. *Hanmer*, marked with letter G; and doth alledge that Mrs. *Hanmer*, the aunt of the party proponent, who wrote the ſaid letter to the ſaid Mrs. *Chudleigh*, and who made the ſaid will and codicil, and Mrs. *Hanmer*, whom the ſaid right honourable *Auguſtus John Hervey* pretends to have been a witneſs to his pretended marriage, was and is one and the ſame perſon, and not divers; and that Mrs. *Chudleigh* mentioned in the ſaid letter, and the honourable Mrs. *Elizabeth Chudleigh* mentioned in the ſaid laſt will and codicil, and *Elizabeth Chudleigh*, ſpinſter, party in this cauſe, was and is the ſame perſon, and not divers: and this was and is true; and the party proponent doth alledge and propound as before.

12. That Mr. *Merrill*, at whoſe houſe the ſaid right honourable *Auguſtus John Hervey* hath pleaded the ſaid pretended marriage to have been ſolemnized, wrote two letters with his own hand, and ſent them by the poſt to the ſaid *Elizabeth Chudleigh*, party in this cauſe, wherein he addreſſes her as a ſingle woman, the ſaid letters being dated *Nov.* 1ſt, 1765, and *Nov.* 3d, 1765, written in one ſheet of paper, and ſuperſcribed or directed thus; ‘ To the honourable Mrs. *Elizabeth Chudleigh*, at *Chal*‘*mington*, near *Dorcheſter*, *Dorſet*;’ and in the letter of the 3d of *Nov.* 1765 are theſe words, to wit; ‘ I have added your Chriſtian name to your ‘ ſurname in the direction of this, leſt the word *honourable* ſhould not ‘ be ſufficient to prevent a blunder, and the letter ſhould be given to Mrs. ‘ *Chudleigh*. I have met with ſo many and ſuch groſs blunders, that I think ‘ I can never enough guard againſt them;’ and the party proponent doth alledge, that by theſe words, ‘ ſhould be given to Mrs. *Chudleigh*,’ was meant Mrs. *Chudleigh*, at *Chalmington*, aunt to the ſaid *Elizabeth Chudleigh*, the party proponent, at whoſe houſe ſhe then was: and this was and is true; and the party proponent doth alledge and propound as before.

13. That in ſupply of proof of the premiſes in the next preceding article mentioned, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, the ſaid two letters mentioned in the next preceding article, the firſt marked with the letter H, beginning thus, ‘ *Lainſtone*, *November* the 1ſt, 1765. Dear ‘ madam, tho' I have nothing particular to write to you upon,’ and ending thus, ‘ Tho' had I mentioned it to them, Mrs. *Kelly*'s and Mrs. *El*‘*ſtob*'s would not have been wanting. I am, dear madam, your moſt ‘ obedient humble ſervant, *John Merrill*;’ and the other letter, marked with the letter I, beginning thus, ‘ *November* 3d, 1765. Dear madam, ‘ the above, as you ſee, was intended to go by the laſt poſt,’ and ending thus, ‘ that I think I can never enough guard againſt them. I am, dear ‘ madam, your moſt obedient humble ſervant, *John Merrill*;’ and the party proponent doth alledge and propound that the whole body, ſubſcriptions, and ſuperſcription of the ſaid letters were and are of the proper hand-writing and ſubſcription of the ſaid *John Merrill*, and ſo known and believed to be by perſons who are well acquainted with his manner and character of hand-writing and ſubſcription; and that by the words, ‘ I have added your Chriſtian name to your ſurname in the direction of ‘ this,’ was meant and intended the Chriſtian and ſurname of *Elizabeth Chudleigh* the party in this ſuit; and that the honourable Mrs. *Elizabeth Chudleigh* mentioned in the ſaid ſuperſcription, and the honourable *Elizabeth Chudleigh* party in this ſuit, was and is one and the ſame perſon, and not divers: and this was and is true; and the party proponent doth alledge and propound as before.

14. That the ſaid Mr. *Merrill* hath alſo in and by his laſt will and teſtament, bearing date the firſt day of *January* one thouſand ſeven hundred and ſixty-ſeven, proved in the Prerogative Court of *Canterbury*, and now remaining in the regiſtry thereof, given and bequeathed a legacy or legacies to the ſaid *Elizabeth Chudleigh*, ſpinſter, party in this ſuit, by her then and now maiden name of *Elizabeth Chudleigh*: and this was and is true; and the party proponent doth alledge and propound as before.

15. That in ſupply of the premiſes mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, a copy of the clauſe of the will of the ſaid Mr. *Merrill*, marked with the letter K; and doth alledge that Mr. *Merrill* at whoſe houſe the pretended marriage pleaded by the ſaid right honourable *Auguſtus John Hervey* is ſaid to have been ſolemnized, and Mr. *Merrill* who made the ſaid will, was and is one and the ſame perſon, and not divers; and that the honourable *Elizabeth Chudleigh* mentioned in the ſaid will, and the honourable *Elizabeth Chudleigh*, ſpinſter, party in this ſuit, was and is alſo one and the ſame perſon, and not divers: and this was and is true; and the party proponent doth alledge and propound as before.

16. That in the year of our Lord one thouſand ſeven hundred and ſixty-ſix, the ſaid *Elizabeth Chudleigh* borrowed of Mr. *John Drummond*, a banker, at divers times, on mortgage and bond ſecurity, in her own name, and without any interpoſition, let, or hindrance of the ſaid right honourable *Auguſtus John Hervey*, or his being a party thereto, or his being any ways concerned therein, the ſum of five thouſand one hundred and ſixty pounds, and gave the ſaid Mr. *Drummond* a bond for one thouſand pounds, part thereof, in her then and now maiden name of *Elizabeth Chudleigh*, and alſo mortgaged certain premiſes ſituate in the manor of *Knightſbridge*, in the county of *Middleſex*, in her ſaid then and now maiden name of *Elizabeth Chudleigh*, unto the ſaid Mr. *Drummond*, for the repayment of the ſum of four thouſand one hundred and ſixty pounds to the ſaid Mr. *Drummond*, as will appear by the original bond and mortgage-deed now in the cuſtody or power of the ſaid Mr. *Drummond*, to which ſhe refers; and the party proponent doth alledge that *Elizabeth Chudleigh* mentioned in the ſaid bond and mortgage-deed, and *Elizabeth Chudleigh*, ſpinſter, party in this ſuit, was and is one and the ſame perſon, and not divers: and this was and is true; and the party proponent doth alledge and propound as before.

17. That in ſupply of proof of the premiſes mentioned in the next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, the counterpart of the ſaid mortgage-deed, dated the eighteenth of *April* one thouſand ſeven hundred and ſixty-ſix, marked with the letter L; and doth alledge and propound that the ſame was and is the counterpart of the ſaid mortgage-deed remaining in the cuſtody or power of the ſaid Mr. *Drummond*, as mentioned in the next preceding article; and that *Elizabeth Chudleigh* mentioned in the ſaid bond and mortgage-deed, and *Elizabeth Chudleigh*, ſpinſter, party in this ſuit, was and is the ſame perſon, and not divers: and this was and is true; and the party proponent doth alledge and propound as before.

18. That in the month of *February* in the year of our Lord one thouſand ſeven hundred and ſixty-five, and in the month of *June* one thouſand ſeven hundred and ſixty-eight, the ſaid *Elizabeth Chudleigh*, ſpinſter, borrowed of Mr. *William Field*, of the *Inner-Temple*, attorney at law, ſeveral ſums of money, to the amount of the ſum of one thouſand nine hundred pounds, or thereabouts, for which ſhe gave to the ſaid Mr. *Field*, as ſecurity, two bonds in her own name of *Elizabeth Chudleigh*, without the interpoſition, let, or hindrance of the ſaid *Auguſtus John Hervey*, or without his being party thereto, or any ways concerned therein: and this was and is true; and the party proponent doth alledge and propound as before.

19. That on or about the twenty-fifth of *February* one thouſand ſeven hundred and fifty-ſix, adminiſtration of the goods, chattels, and credits of *Harriot Chudleigh*, late of *Windſor-Caſtle*, in the county of *Berks*, widow, deceaſed, the mother of the ſaid *Elizabeth Chudleigh*, party in this ſuit, was granted to the ſaid *William Field*, as the attorney and for the uſe and benefit of *Elizabeth Chudleigh*, deſcribed in the ſaid adminiſtration, and in the records of the Prerogative-Court of *Canterbury*, by the name and deſcription of *Elizabeth Chudleigh*, ſpinſter, the natural and lawful daughter and only child of the ſaid *Harriot Chudleigh* deceaſed, without the interpoſition, let, or hindrance of the ſaid right honourable *Auguſtus John Hervey*, or without his being party thereto, or any ways concerned therein: and this was and is true; and the party proponent doth alledge and propound as before.

20. That in ſupply of proof of the premiſes in the next preceding article mentioned, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, a copy of the adminiſtration-act entered on record in the ſaid *Prerogative-Court* of *Canterbury*, and ſigned by the deputy-regiſtrars of the ſaid court, or one of them, marked with the letter M; and doth alledge that *Elizabeth Chudleigh*, ſpinſter, therein mentioned, and *Elizabeth Chudleigh*, ſpinſter, party in this cauſe, was and is one and the ſame perſon: and this was and is true; and the party proponent doth alledge and propound as before.

21. That the ſaid Mr. *William Field*, as the attorney of the ſaid *Elizabeth Chudleigh*, and by virtue of a letter of attorney from her for that purpoſe, given in her name of *Elizabeth Chudleigh* to him, uſed to receive her ſalary as maid of honour, without any interpoſition, let, or hindrance of the ſaid right honourable *Auguſtus John Hervey*: and this was and is true; and the party proponent doth alledge and propound as before.

22. That on or about the fifth day of *May* one thouſand ſeven hundred and ſixty-ſix, the ſaid *Elizabeth Chudleigh*, party in this ſuit, preſented, in her own name of *Elizabeth Chudleigh*, by virtue of a preſentation ſigned by her for that purpoſe, the reverend Mr. *John Julian* junior, to the living of *Hartford*, in the county of *Devon*, who was in virtue of the ſaid preſentation duly inſtituted and inducted to the ſaid living, without any interpoſition, let, or hindrance of the ſaid right honourable *Auguſtus John Hervey*, or his being a party thereto, or any ways concerned therein: and that this was and is true; and the party proponent doth alledge and propound as before.

23. That in ſupply of the proof of the premiſes mentioned in the ſaid next preceding article, the party proponent doth exhibit and hereunto annex, and prays may be here read and taken as if herein inſerted, an authentic copy of the ſaid preſentation marked with the letter N, ſigned by   and alſo a certificate of the inſtitution of the ſaid reverend *John Julian* to the ſaid rectory of *Hartford*, ſigned by *Richard Burn*, notary-publick, ſecretary to the lord biſhop of *Exeter*, and marked with the letter O; and doth alledge that *Elizabeth Chudleigh* mentioned in the ſaid preſentation and certificate, and *Elizabeth Chudleigh* party in this cauſe, was and is one and the ſame perſon, and not divers:

and this was and is true; and the party proponent doth alledge and propound as before.

24. That the ſaid *Elizabeth Chudleigh*, for many years ſubſequent to the pretended time of the pretended marriage aforeſaid, kept a current account of caſh with the *Bank of England* in her name of *Elizabeth Chudleigh*, and as a ſingle woman; and alſo in all common as well as other occurrences of buyings and ſellings, and other money matters, whenever occaſion happened, the ſaid *Elizabeth Chudleigh*, ſpinſter, party in this ſuit, hath, as well before as ever ſince the pretended time of the pretended marriage pleaded by the ſaid right honourable *Auguſtus John Hervey*, conſtantly in her own name of *Elizabeth Chudleigh*, ſpinſter, tranſacted ſuch buſineſs, by paying and receiving money, giving and taking receipts for the ſame, hiring and diſcharging ſervants, and on all other occaſions, without the interpoſition, let, or hindrance of the ſaid right honourable *Auguſtus John Hervey*, or his being any ways concerned therein: and this was and is true; and the party proponent doth alledge and propound as before.

25. That all and ſingular the premiſes were and are true, and ſo forth.

Arth. Collier.
Pet. Calvert.
Wm. Wynne.

Chudleigh againſt *Hervey.* — Sentence read and promulged the 10th of *February* 1769.

IN the name of God, Amen. We *John Betteſworth*, doctor of laws, vicar-general of the right reverend father in God *Richard*, by divine permiſſion, lord biſhop of *London*, and official principal of the conſiſtorial and epiſcopal court of *London*, having ſeen, heard, and underſtood, and fully and maturely diſcuſſed the merits and circumſtances of a certain cauſe of jactitation of marriage which was lately controverted, and as yet remains undetermined before us in judgment, between the honourable *Elizabeth Chudleigh*, of the pariſh of St. *Margaret*, *Weſtminſter*, in the county of *Middleſex*, ſpinſter, the party, agent, and complainant, of the one part, and the right honourable *Auguſtus John Hervey*, of the pariſh of St. *James*, *Weſtminſter*, in the county of *Middleſex* and dioceſe of *London*, batchelor, falſely calling himſelf the huſband of the ſaid honourable *Elizabeth Chudleigh*, the party accuſed and complained of, on the other part; and we rightly and duly proceeding therein, and the parties aforeſaid lawfully appearing before us by their proctors reſpectively, and the proctor of the ſaid honourable *Elizabeth Chudleigh* praying ſentence to be given and juſtice to be done to his party, and the proctor of the ſaid right honourable *Auguſtus John Hervey* alſo earneſtly praying ſentence and juſtice to be done to his ſaid party; and we having carefully looked into and duly conſidered of the whole proceedings had and done before us in the ſaid cauſe, and obſerved by law what ought to be obſerved in this behalf, have thought fit and do thus think fit to proceed to the giving and promulging our definitive ſentence or final decree in this ſame cauſe, in manner and form following (to wit):

Foraſmuch as by the acts enacted, alledged, exhibited, propounded, proved, and confeſſed in this cauſe, we have found and clearly diſcovered, that the proctor of the ſaid honourable *Elizabeth Chudleigh* hath fully and ſufficiently founded and proved his intention deduced in a certain libel and allegation and other pleadings and exhibits given in, exhibited, and admitted on her behalf in this ſame cauſe, and now remaining in the regiſtry of this court (which libel and allegation and other pleadings and exhibits we take and will have taken as if herein repeated and inſerted for us to pronounce as herein after we ſhall pronounce); and that nothing, at leaſt effectual in law, hath on the part and behalf of the ſaid right honourable *Auguſtus John Hervey* been excepted, deduced, exhibited, propounded, proved, or confeſſed in this ſame cauſe, which may or ought in any wiſe to defeat, prejudice, or weaken the intention of the ſaid honourable *Elizabeth Chudleigh* deduced as aforeſaid; and particularly that the ſaid right honourable *Auguſtus John Hervey* hath totally failed in the proof of his allegation given in and admitted in this cauſe, whereby he pleaded and propounded a pretended marriage to have been ſolemnized between him and the ſaid honourable *Elizabeth Chudleigh*, ſpinſter: and therefore we *John Betteſworth*, doctor of laws, the judge aforeſaid, firſt calling upon God and ſetting him alone before our eyes, and having heard counſel in this cauſe, do pronounce, decree, and declare, that the ſaid honourable *Elizabeth Chudleigh* at and during all the time mentioned in the ſaid libel given in and admitted in this cauſe, and now remaining in the regiſtry of this court, was and now is a ſpinſter, and free from all matrimonial contracts or eſpouſals (as far as to us as yet appears) more eſpecially with the ſaid right honourable *Auguſtus John Hervey*; and that the ſaid right honourable *Auguſtus John Hervey*, notwithſtanding the premiſes, did in the years and months libellate wickedly and maliciouſly boaſt and publickly aſſert (though falſely) that he was contracted in marriage to the ſaid honourable *Elizabeth Chudleigh*, or that they were joined or contracted together in matrimony: wherefore we do pronounce, decree, and declare, that perpetual ſilence muſt and ought to be impoſed and enjoined the ſaid right honourable *Auguſtus John Hervey* as to the premiſes libellate, which we do impoſe and enjoin him by theſe preſents; and we do decree the ſaid right honourable *Auguſtus John Hervey* to be admoniſhed to deſiſt from his boaſting and aſſerting that he was contracted to or joined with the ſaid honourable *Elizabeth Chudleigh* in matrimony as aforeſaid; and we do alſo pronounce, decree, and declare, that the ſaid right honourable *Auguſtus John Hervey* ought by law to be condemned in lawful expences made or to be made in this cauſe on the part and behalf of the ſaid honourable *Elizabeth Chudleigh*, to be paid to the ſaid *Elizabeth Chudleigh* or her proctor; and accordingly we do condemn him in ſuch expences, which we tax at and moderate to the ſum of one hundred pounds of lawful money of *Great-Britain*, beſides the expence of a monition for payment on this behalf by this our definitive ſentence or final decree, which we read and promulge by theſe preſents.

Arth. Collier.
Pet. Calvert.
Wm. Wynne.

J. Betteſworth.

This ſentence was read, promulged, and given by the within-named the vicar-general and official principal on *Friday* the tenth day of *February* in the year of our Lord one thouſand ſeven hundred and ſixty-nine, in the dining-room adjoining to the common-hall of *Doctors-Commons*, ſituate within the pariſh of St. *Benedict*, near *Paul's Wharf*, *London*, there being then and there preſent the witneſſes ſpecified in the acts of court, which I atteſt.

Mark Holman, notary-publick,
deputy-regiſter.

Mr. *Wallace.*

Your lordſhips are now poſſeſſed of a ſentence given by the conſiſtory court of the biſhop of *London* in a cauſe inſtituted there to try a claim made by Mr. *Hervey* of marriage with the noble priſoner; your lordſhips find by that ſentence the claim examined, and the decree pronounced upon the allegations and the evidence given in the cauſe; by which decree the noble priſoner at the bar is declared free from all matrimonial contracts and eſpouſals with Mr. *Hervey*.

My lords, the noble priſoner by the indictment is charged, ſubſequent to this ſuppoſed marriage to Mr. *Hervey*, to have married the late duke of *Kingſton*.

It is for me now to ſubmit to your lordſhips, that this ſentence is concluſive as long as it remains in force, and that of neceſſity it muſt be received in evidence in all courts and in all places where the ſubject of that marriage can become a matter of diſpute.

My lords, I don't know any court which the conſtitution of this kingdom has placed the deciſions of the rights of marriage in but the eccleſiaſtical: I believe it will not be contended, that the common-law courts of this country have any ſuch original juriſdiction. Marriages may indeed incidentally come to be diſcuſſed and determined in the courts of common law, and in many caſes abſolutely neceſſary to the due adminiſtration of juſtice; but, my lords, it will not be found, that where the proper forum has given a deciſion upon the point, the common-law courts have ever taken upon themſelves to examine into the grounds, or at all queſtion the validity, of that ſentence.

My lords, as far as we have books to reſort to, we find inſtances from the earlieſt times down to the preſent, where the power of the eccleſiaſtical courts is in terms recognized by the common-law courts, and where their deciſions have been conſidered as concluſive upon every queſtion in which they have juriſdiction, and eſpecially in caſes like the preſent, particularly belonging to them.

My lords, I don't know in the common-law courts any inſtance where the legality of marriage can come directly in queſtion, that the courts have decided upon it without referring to the biſhop, the ordinary of the place, to certify; unleſs the marriage has been decided by a ſuit inſtituted in the Eccleſiaſtical Courts.

Your lordſhips will permit me to refer your lordſhips to thoſe authorities of law which are to be found in our books; and by the able aſſiſtance which your lordſhips indulgence has given the priſoner at the bar, you will more particularly have explained the nature of the proceedings in the eccleſiaſtical courts, how far and to what purpoſes in thoſe courts they are concluſive, and where they are open to ſuch litigation. I ſhall beg to refer your lordſhips to a caſe reported by lord chief juſtice *Coke*, in the fourth part of his *Reports*, by the name of *Bunting* and *Addingſhall*. In the 27th year of the reign of *Elizabeth*, there was a marriage between one *Thomas Tweede* and one *Agnes Addingſhall*, and ſubſequent to this marriage a perſon of the name of *Bunting* libelled againſt the wife of *Tweede*, claiming under a pre-contract, and the Spiritual Court enforced that contract: afterwards, on the death of *Bunting*, a queſtion aroſe between the iſſue of the ſecond marriage and the collateral relations of *Bunting*; the collateral relations inſiſting that the ſecond marriage was utterly void, becauſe there had exiſted a firſt marriage, and the huſband living at the time of the ſecond. Another objection I ſhall ſtate to your lordſhips was, that though it might be concluſive between the parties, yet *Tweede* the firſt huſband being no party to the ſuit, nor to the ſentence which diſſolved the marriage between them in the Eccleſiaſtical Court, it could not affect him, nor indeed any body but the parties: the reſolution of the court was, that he being then *de facto* the huſband, though he was not a party to the ſuit, nor in the Eccleſiaſtical Court, yet the ſentence againſt the wife ſhould bind the huſband *de facto*; and ‘foraſmuch as the cognizance of the right of marriage belongs to the Eccleſiaſtical Court, and the ſame court has given ſentence in this caſe, the judges of our law ought (although it be againſt the reaſon of our law) to give faith and credit to their proceedings and ſentences, and to think that their proceedings are conſonant to the law of holy church, for *cuilibet in ſuo arte perito credendum eſt*; and ſo the iſſue of the firſt marriage, in conſequence and upon the credit of the ſentence, were conſidered as legitimate.’ My lord chief juſtice *Coke* has alſo reported another caſe upon the ſubject of marriage in the 40th year of queen *Elizabeth*, which your lordſhips will find in the ſeventh part of his *Reports*, page 41, by the name of *Kenn*'s caſe, which is ſhortly this:— *Chriſtopher Kenn*, eſquire, married *Elizabeth Stowell*, and had iſſue; afterwards the Eccleſiaſtical Court pronounced a ſentence of divorce between Mr. *Kenn* and the lady, who were not of the age of conſent at the time of the marriage; and in conſequence of this ſentence he married a ſecond wife: the iſſue of the firſt marriage, claiming the inheritance, exhibited a bill in the court of *Wards* of that day, in order to have the benefit of the ſucceſſion; and offered to prove, that though the ſentence had been given in the Eccleſiaſtical Court on the ground of his father and mother being within the age of conſent, yet that they were above the age of conſent; that in truth they had cohabited together for eight or nine years, and had iſſue of that marriage. There could be no doubt, if the matter was open to examination, that the firſt marriage was effectual: for, in the firſt place, the parties were above the age of conſent, and if they had been under the age of conſent, yet their cohabitation together after that age, and more eſpecially as they had iſſue, would have been ſufficient to eſtabliſh the marriage. It was argued too, that it was open to examination, becauſe both the ſtatute and common law of the country take notice of the age of conſent; and therefore it was equally competent to a court of common law to examine into the queſtion, as to an eccleſiaſtical court. It was further urged, that the queſtion related to an inheritance of which the Eccleſiaſtical Court had no juriſdiction or controul, and therefore it was a queſtion properly before a court of common law: but the court then conceived themſelves ſo far bound by the deciſion of the Eccleſiaſtical Court, though founded on falſe ſuggeſtion, that they held the plaintiff in that cauſe not intitled to any relief.

My lords, I beg leave to trouble your lordſhips with the words of the court upon that ſubject: after ſtating the reaſons, the book proceeds:

'But it was reſolved by all the juſtices' (for it was a reference to the two chief juſtices, to two other juſtices, to the chief baron, and two other barons) 'that the ſentence ſhould conclude as long as it remained in force.' And, my lords, the reaſons given are, 'that the eccleſiaſtical judge has ſentenced the contract and marriage to be void and of no effect; and although they were of the age of conſent, yet if the original contract was void and of no effect, then there was juſt cauſe of divorce; and if the marriage had been within the age of conſent, the eccleſiaſtical judge is judge as well of the aſſent as of the firſt contract, and what ſhall be a ſufficient aſſent or not; and although the eccleſiaſtical judge ſhews the cauſe of his ſentence, yet foraſmuch as he is judge of the original matter, that is, of the lawfulneſs of the marriage, we will never examine the cauſe, whether it be true or falſe; for of things the cognizance whereof belongs to the Eccleſiaſtical Court, we ought to give credit to their ſentences, as they give to the judgments in our courts.'

Your lordſhips find here a caſe where, according to the facts ſtated, there was no doubt of the validity of the firſt marriage, and of the legitimacy of the iſſue claiming in that cauſe; and if there had been no ſentence of the Eccleſiaſtical Court, no doubt could have exiſted of the right of ſucceſſion: but the ſentence in the Eccleſiaſtical Court having interpoſed, the court of common law conceived themſelves abſolutely bound, nay, that they had no right to look into the cauſe of that ſentence, for it was a matter originally of eccleſiaſtical juriſdiction, and they muſt give faith and credit to the ſentence of the eccleſiaſtical judge in that cauſe. Your lordſhips will find that my lord chief juſtice *Coke* cited a caſe ſo long ago as the 22d of *Edward* the fourth, where the ſame doctrine was laid down in the Eccleſiaſtical Court having a complete and deciſive juriſdiction upon this point.

My lords, theſe caſes, from the reporter and from the judges who determined them, the reporter being one, I take to be of the higheſt authority, and acknowledging thoſe principles which occur frequently in the books, though not under ſolemn deciſions, but as the received opinions of judges and of lawyers from the earlieſt of times.

My lords, I did before mention to your lordſhips a caſe from *Carthew*; I ſhall not ſtate it particularly now, but only to the point which we are now upon, that is, of the ſentence being concluſive.

My lords, this was not, as ſuppoſed in the argument, a *niſi prius* opinion, which every judge muſt give with the information he carries with him, and without the aſſiſtance of the reſt of the judges of the court, but a ſolemn deciſion in trial at bar in the court of *King's Bench* in the fourth of king *William*, when I think lord chief juſtice *Holt* preſided in that court: it was too upon a ſentence of jactitation of marriage, which your lordſhips have now before you, which was there held to be concluſive evidence, and that no teſtimony whatever ought to be received againſt it. Your lordſhips will take the words of the court upon that occaſion: 'upon the debate, the court were all of opinion, that this ſentence whilſt unrepealed was concluſive againſt all matters precedent; and that the temporal courts muſt give credit to it until it is reverſed, being a matter of mere ſpiritual cognizance.'

Your lordſhips find, that in the reign of king *William*, that notion which had from all time prevailed was as ſtrong as ever, and that the judges of the court of *King's Bench*, in which it was tried, were all clearly of opinion, that a caſe like the preſent of jactitation of marriage was concluſive upon the point, till it was reverſed or repealed.

My lords, the ſame doctrine is laid down by my lord chief juſtice *Holt*, who preſided at the trial of this cauſe, in a caſe reported in *Salkeld*, 290, by the name of *Blackham*'s caſe: it turns upon the claim of property in the goods of a woman deceaſed. The plaintiff proved the goods to be in his poſſeſſion, and to be taken away by the defendant. Againſt this claim of the plaintiff, the defendant ſhewed that theſe were the goods of one *Jane Blackham* in her life-time, and that the defendant had taken out letters of adminiſtration to her, and ſo was intitled to the goods. Upon this the plaintiff proved, that ſome few days before her death ſhe was actually married to him; and in anſwer to that it was inſiſted, that the Spiritual Court had determined the right to be in the defendant; for they could not have granted adminiſtration to the defendant but upon a ſuppoſition that there was no ſuch marriage; and that this ſentence being a matter within their juriſdiction was concluſive, and could not be gainſaid as in evidence. My lord chief juſtice *Holt*, who was the judge ſitting at *niſi prius*, who determined the caſe I laſt cited, ſays thus: 'a matter which has been directly determined by their ſentence cannot be gainſaid; their ſentence is concluſive in ſuch caſes, and no evidence ſhall be admitted to prove the contrary; but then it muſt be in point directly tried.'

My lords, the ſentence before your lordſhips at preſent is in a cauſe, where the object of the proſecution was to queſtion the claim of marriage, and where the marriage is the point directly tried and determined; ſo that according to lord *Holt*'s opinion, if the ſentence be directly upon the queſtion, it is ſo concluſive, that it is not competent for any court of common law to examine into the matter, or receive any evidence to contradict it.

My lords, theſe are caſes as far as have happened in the courts of law.

I ſhall now trouble your lordſhips with a caſe determined in the houſe of lords, under the name of *Hatfield* and *Hatfield*: it came on before the houſe of lords in the year 1725. The caſe, as collected from the printed caſes of the times, is thus:—one *Leonard Hatfield* married *Jane Porter*, who had different names I ſee aſſigned her, and by his will made a proviſion for her as his wife. In *March*, 1720, ſhe filed a bill in the court of *Exchequer*, in *Ireland*, where the ſubject of her proviſion lay, againſt *Leonard Hatfield*, a ſon by a former wife, and againſt a truſtee, to have the benefit of the proviſion. In *January* following the defendant, the ſon and heir of her huſband, having diſcovered that ſhe had been before married to one *Porter*, which *Porter* was then living, he procured a releaſe of part of the proviſion from *Porter*, and filed a croſs-bill for a diſcovery of the marriage, and to ſtay the proceedings upon her bill. In this croſs-bill he queſtioned her upon her marriage to *Porter*: ſhe denied that ſhe had ever gone by the name of *Porter*; but with reſpect to a marriage with *Porter*, ſhe pleaded that ſhe ought not to make a diſcovery, becauſe it tended to criminate herſelf; and being an accuſation of bigamy againſt her, the plea by the rules of the court of equity was of courſe allowed, that court never compelling perſons to diſcover on oath crimes which may be the ſubject of proſecution againſt themſelves.

My lords, however by the plea one pretty plainly diſcovers, that there was reaſon to ſuppoſe ſhe was the wife—indeed ſhe knew it—it was capable of proof, and would be proved in the cauſe.

My lords, they proceeded to the examination of the witneſſes, and clear evidence was given that this woman was the wife of *Porter*: *Porter* himſelf had confeſſed it in his anſwer, and he had ſtated the miniſter and the witneſſes who were preſent at the marriage; ſo that he gave *Hatfield*, the heir at law, an opportunity of bringing direct proof of the marriage from the very perſons preſent. This woman, finding that ſhe would be preſſed by that proof, had recourſe to the Eccleſiaſtical Court: ſhe inſtituted a ſuit againſt this *Porter* of jactitation of marriage, pending the cauſe; and after depoſitions taken, though not publiſhed, ſhe got *Porter* over to her intereſt. He was willing to defeat that releaſe which he had given; and therefore he does not enter into proof, but appears by a proctor for form ſake, that a judgment might paſs againſt him. Upon this the eccleſiaſtical judge decreed, as in all cauſes of jactitation they do where they find that there is no marriage, that the party libelling was free from all matrimonial contracts and eſpouſals with *Porter*. In this caſe *Porter* had given a releaſe, as her huſband had upon oath, in the court of *Exchequer* in *Ireland*, ſtated the marriage with preciſion, even named the miniſter and the witneſſes at the marriage, yet in the Eccleſiaſtical Court he appears by a proctor, and has ſentence paſſed againſt him, without inſiſting on the marriage or any defence. The court of *Exchequer* in *Ireland* received this ſentence as concluſive againſt the marriage with *Porter*; they conceived they were bound to give credit to the Eccleſiaſtical Court. The plaintiff in the cauſe, knowing in what manner he had been deceived, that in truth *Porter* was the huſband of this woman, appealed to the houſe of lords in *England*. The houſe of lords here conceived, as the court of *Exchequer* had done, that the matter was determined by a competent juriſdiction; and yet your lordſhips ſee there was fraud upon the face of the proceedings, if it had been competent to the court to have entered into that conſideration: but the houſe of lords here conceived the matter at an end whilſt the ſentence remained in force, and the decree of the court of *Exchequer* was affirmed. Upon the pleading this ſentence, the court of *Exchequer* in the firſt inſtance, the houſe of lords in the laſt, proceeded to determine the matter. It is ſo taken notice of by ſir *John Strange*, in a caſe I ſhall preſently mention. It is taken notice of by a very laborious compiler of the law, Mr. *Viner*: under his title of *Marriage*, he mentions the ground of the determination thus:—the legality of marriage ſhall never be agitated in equity, eſpecially after ſentence in the Spiritual Court in a cauſe of jactitation of marriage, although the proceedings in the Spiritual Court were only faint and colluſive.

My lords, I take this to be a caſe of the greateſt authority, a deciſion of the houſe of peers in this country, and upon a point of jactitation of marriage, a ſentence of the ſame nature with the preſent before your lordſhips.

I ſhall beg leave to trouble your lordſhips with a caſe or two more upon the ſubject, which are of more modern times: one is reported by ſir *John Strange* in the ſecond part of his *Reports*, 960, under the name of *Clews* and *Bathurſt*. The action was for maliciouſly procuring the plaintiff's wife to exhibit articles of the peace againſt him, and for living with her in adultery: the plaintiff proved the marriage by the parſon and a woman, and alſo a conſummation; to encounter which, the defendant produced a ſentence of the Conſiſtory Court of *London*, in a cauſe of jactitation of marriage brought by the woman againſt the plaintiff, wherein ſhe was declared free from all contract, and perpetual ſilence impoſed upon the plaintiff; which ſentence was pronounced ſince the iſſue had been joined in the cauſe; and the chief juſtice ruled this to be concluſive evidence till reverſed by appeal, and the plaintiff was non-ſuited. Your lordſhips find here was a cauſe rightly brought, clear proof of the marriage made at the trial by the witneſſes preſent, no doubt of the fact, but the production of a ſentence in the Eccleſiaſtical Court in diſaffirmance of that marriage; a ſentence of jactitation. The chief juſtice who tried the cauſe conſidered the buſineſs as concluded; that it was of no conſequence when the deciſion was made; if the moment before the trial, it was enough, being by a court having the proper and the ſole juriſdiction of the matter, and whoſe opinion muſt be deciſive; and therefore, though the cauſe had been brought before any ſuit inſtituted in the Eccleſiaſtical Court, though there was no doubt of the foundation for that cauſe, yet the ſentence is permitted to have effect, and to non-ſuit that plaintiff who had been injured in the manner the caſe ſtates.

My lords, there was too, at the ſame ſittings, another caſe which is reported in the following page by ſir *John Strange*, of *Da Coſta* and *Villa Real*, which was an action upon a contract of marriage, *per verba de futuro*, brought by the gentleman againſt the lady, who pleaded the uſual plea *non aſſumpſit*. When the plaintiff had opened his caſe, the defendant offered in evidence a ſentence of the Spiritual Court in a cauſe of contract, where the judge had pronounced againſt the ſuit for a ſolemnization in the face of the church, and declared Mrs. *Villa Real* free from all contract: and the chief juſtice held this to be proper and concluſive evidence; that it was a cauſe within their juriſdiction; that the nature of the contract was properly examinable by them; and therefore, as a point determined, he non-ſuited the plaintiff in that cauſe, though the plaintiff there opened, and was ready to have proved, the fact of the marriage before the court; but the ſentence having interpoſed, the court conceived they were to pay that credit which every court before had done in *Weſtminſter-Hall*, which all judges in every age had done to the eccleſiaſtical juriſdiction in caſes within their juriſdiction; and finding himſelf concluded by that, defeated the plaintiff of the effect of this ſuit. My lords, it was in this caſe that the caſe of *Hatfield* and *Hatfield* was quoted as an authority.

My lords, theſe are caſes upon the very points of marriage, and many of them your lordſhips find upon the effect and force and concluſion of a ſentence ſimilar to that now under conſideration, that of a jactitation cauſe. My lords, this has been more recently and within our own memory underſtood to be law, recognized to the law, and decided accordingly. It is not long ago ſince an action was brought againſt the honourable Mr. *Thomas Hervey*, by a tradeſman, to recover a debt for neceſſaries found for his wife. On that trial the marriage was proved to the ſatisfaction of the jury, and the defendant found liable to pay for thoſe neceſſaries. Mr. *Hervey* inſtituted a ſuit, in the conſiſtory court of the biſhop of *London*, of jactitation, and he was declared free from all eſpouſals and contracts of marriage with the lady. During the continuance of this ſentence, though appealed from, another creditor brought an action againſt Mr. *Hervey*, and had to produce in evidence the ſame witneſſes who had proved the caſe of the other creditor before any ſentence had been obtained, and had ſucceeded; but the learned chief juſtice who tried that cauſe, conceived it was not then open to examination; that though, in the firſt inſtance, when the cauſe of the firſt creditor came to be diſcuſſed, there was no ſentence in the Eccleſiaſtical Court, and of neceſſity the court of common law muſt decide upon the marriage; but there had then intervened a ſentence in the Eccleſiaſtical Court, which, whilſt in force, was concluſive; and of courſe diſmiſſed the plaintiff's claim; and the intent of that appeal was to ſuſpend and reverſe that ſentence; yet while it ſtood unreverſed it was concluſive, the fact of marriage was open to no examination in any court whatſoever. This is only an affirmance of the principles of the law, and the doctrine found in the determinations of a thouſand caſes which the books furniſh.

My lords, it is not peculiar to the caſe of marriage; it is the ſame in other inſtances where the eccleſiaſtical courts have the juriſdiction; it is ſo in the probate of wills, it is ſo in the granting of letters of adminiſtration: if a will is forged, if a will is fraudulently obtained of a perſonal eſtate, of which the Eccleſiaſtical Court has the juriſdiction; if that court has granted a probate, it is not open to a court of common law, it is not open to a court of equity, to enter into the fraud made uſe of in obtaining the will, or to the forgery committed upon a teſtator. I ſhall refer your lordſhips to a caſe or two upon that head: that of *Noel* and *Wells*, in firſt *Levinz*'s *Reports* 235, in the 19th of king *Charles* the ſecond: it was an action brought by the executrix of the huſband, and upon the trial the plaintiff produced the probate of the will in evidence. The defendant inſiſted the will was forged; and the chief juſtice before whom it was tried was of opinion, he could not give ſuch evidence directly againſt the ſeal of the ordinary, in any things within his juriſdiction: upon which a caſe was made for the opinion of the court, and a verdict was for the plaintiff, and the court held that the chief juſtice at the trial had done right in rejecting the evidence of the forgery, that no ſuch evidence ought to be given till the probate was repealed: they might indeed, by proving the ſeal of the ordinary forged, have relief; but if the ſeal of the ordinary was genuine, then whatever forgery or fraud was committed, it was not open to the examination of a common-law court.

My lords, the ſame doctrine is to be found in the caſe of *Branſby* and *Kerrick* and others, which was determined by the houſe of lords. It was ſtated in that caſe, that one *Robert Branſby*, the complainant's ſon, being intitled to the reverſion of a freehold and copyhold eſtate expectant upon the death of the complainant, made his will, by which he gave all his real and perſonal eſtate to the defendant *Kerrick*, and made him his executor, who proved the will in the Eccleſiaſtical Court, in common form: afterwards, in a conteſt in the Eccleſiaſtical Court touching the validity of that will, a ſentence was given in favour of the will in the year 1716. *Branſby*, the father, filed a bill in *Chancery*, to ſet aſide the will for fraud and impoſition. Witneſſes were examined, and many acts and circumſtances of impoſition were proved upon the defendant. The cauſe came to be heard before lord *Macclesfield*, then chancellor, upon the 14th of *November* 1718, when his lordſhip, ſtruck with the monſtrous fraud and iniquity of the tranſaction, declared the executor ſhould ſtand as a truſtee for the next of kin. Upon appeal, the houſe of lords reverſed the decree, upon the ground that it was not competent to a court of equity to examine into fraud and impoſition in a will touching perſonal eſtate; that the court of eccleſiaſtical juriſdiction had decided that point; that it was no longer open to diſcuſſion.

My lords, the ſame rules obtain with reſpect to every court of competent juriſdiction, whether foreign or domeſtick: we give credit to the deciſions of all foreign courts in points within their proper juriſdiction, and do not examine into the facts, but are concluded by the ſentence. I will only refer your lordſhips to a caſe in Sir *Thomas Raymond*'s *Reports* 473. In the war between the *Dutch* and the *French* in the time of *Charles* the ſecond, a ſhip was ſeized by the *French* as a *Dutch* ſhip, and condemned. The ſhip being in truth *Engliſh*, the purchaſer under the *French* condemnation, brought the ſhip into *England*, where the right owner ſeized her: upon this an action was brought by the purchaſer under the condemnation. The defendant, the original owner, offered to prove his property, and that the ſhip was never a *Dutch* ſhip, nor was liable to be taken and condemned by the *French*: but what ſaid the court? We muſt give credit to the condemnation of the court in *France*; we are forced to give credit to and believe that this ſhip was in the condition of a *Dutch* ſhip, and ſubject to a condemnation: and, upon the ground, that if a court of competent juriſdiction gives a ſentence, all other courts muſt be bound by it, the *Engliſhman* was precluded from aſſerting his right. It was the ſame upon a caſe of an inſurance, which will occur to ſome of your lordſhips, where the ſhip was warranted *Swediſh*, and condemned in the war between *England* and *France*: the parties were concluded from inſiſting that the ſhip is any longer *Swediſh* or a neutral, becauſe a court of competent juriſdiction had decided the matter. The ſame law holds in reſpect to the courts of *Admiralty*: whether prize or not prize, belongs to the court of *Admiralty*; juriſdiction of that court decides upon the ſubject; though they have given a wrong deciſion, though the facts did not warrant it, though the judge has done it corruptly, yet it is a ſentence which the common-law courts muſt be bound by, wherever it comes in litigation here: and I have known, in point of experience, in an action of treſpaſs brought here for ſeizing a ſhip, where it has been before a court of *Admiralty* and received a deciſion, that the court of common law no longer entertains the cauſe, for the queſtion of prize or not prize is peculiarly belonging to the admiralty juriſdiction, and you give faith and credit to that juriſdiction. I might refer your lordſhips too (but the caſes are innumerable upon the ſubject) to that of *Burroughs* and *Jamineau*, in *Strange*, 233, which was upon a bill of exchange, where, by a peculiar local cuſtom within *Leghorn*, it is competent to the acceptor of a bill, by a judgment of the court, to have his acceptance annulled, if the drawer becomes bankrupt before the bill be payable. There is no ſuch law in this country; yet, giving credit to the ſentence of that court, the court of *Chancery* here would not ſend it to a trial at law, but determined upon the point, that the ſentence in that court was deciſive upon the ſubject, it being a matter within their juriſdiction.

My lords, in almoſt every caſe where judgments or records of other courts have been the ſubject of diſcuſſion, the ſentences of the Eccleſiaſtical Court have always been cited and argued from as concluſive upon the ſubject of diſpute, and the courts have uniformly adopted thoſe caſes as law; but the attempt has ever been to diſtinguiſh caſes immediately before the court from thoſe determined by the eccleſiaſtical juriſdiction. Your lordſhips will find much of that in the caſe of *Philips* and *Bury*, in *Skinner*, 468.

My lords, there was a very late caſe determined in the court of *Common-Pleas*, and which is now got into print, reported by Mr. Serjeant *Wilſon*, which is *Biddulph* and *Ather*. It aroſe upon a queſtion of claim by the duke of *Norfolk* to all wreck within the cape of *Bramber*, in *Suſſex*, which was proved by many records: it was a queſtion whether thoſe records were admiſſible, or, if admiſſible, were concluſive evidence. The counſel who argued in favour of thoſe records and the concluſion which was to ariſe from them, compared them to the caſe of eccleſiaſtical ſentences, and would gladly have brought thoſe records within that rule. The court in that caſe acknowledged the argument proper with reſpect to the eccleſiaſtical courts. The court admitted that the ſentence of an eccleſiaſtical court, in a matter whereof they have the ſole cognizance, is concluſive evidence, and parole evidence ſhall never be received. My lords, there is a manuſcript note in being of what the judges particularly ſaid; and I find it was cited, as one of the inſtances where the ſentence was concluſive, by the learned chief juſtice who then preſided in the court: he ſays, if there is a ſentence in an eccleſiaſtical court declaring a marriage—for inſtance, if it could be proved by a hundred witneſſes that the parties were never within 500 miles of each other, that evidence is not to be received, but the judgment of the Eccleſiaſtical Court is concluſive upon the point. In many of the caſes I have cited to your lordſhips, the queſtion came directly before the court, and received a ſolemn diſcuſſion: in ſome the doctrine has been recognized; in none, nor in any caſe that I know of, has it ever been doubted. My lords, though the caſes reſpect civil ſuits, I truſt that no real ground of diſtinction can be made between criminal and civil proceedings: in civil ſuits, courts go as far as poſſible to relieve claims founded in equity and juſtice; in criminal caſes, the leaning is always to the defendants; and therefore I ſhould conceive ſuch evidence ſtronger, in a criminal proſecution, in favour of innocence.

My lords, I will take the liberty, however, of reminding your lordſhips of two or three caſes in criminal law, where the ſame doctrine has been eſtabliſhed, and the acts of the Eccleſiaſtical Court deemed concluſive upon the ſubject, until reverſed by appeal. My lords, in the firſt volume of ſir *John Strange*'s *Reports*, 481, your lordſhips will find a caſe that happened at the *Old-Bailey* in the 8th of *George* the firſt; it was an indictment for forging a will of a perſonal eſtate. On the trial, the forgery was proved; but the defendant producing a probate, that was held to be concluſive evidence in ſupport of the will, and the defendant was acquitted. This your lordſhips ſee was a proſecution for a very ſerious offence indeed; a proſecution for the forgery of a will: the forgery is ſtated to have been actually proved at the trial, but upon the production of a probate from the Eccleſiaſtical Court, whoſe deciſions are final and concluſive upon ſuch ſubjects, the defendant was acquitted, and the evidence of the forgery rejected. It ought not to have been received, if that circumſtance of the probate had been diſcovered ſooner to the court; but the defendant, perhaps conceiving that there could be no evidence to affect him with the guilt of forgery, with-held the probate; whatever might be the reaſon, it is immaterial, he produced it in time to ſave himſelf; for you muſt receive a probate in the Eccleſiaſtical Court againſt the teſtimony of ten thouſand witneſſes.

Your lordſhips will find the ſame doctrine in the ſame book, 1ſt ſir *John Strange*'s *Reports*, in the caſe of *King* and *Roberts*, where that defendant exhibited a will in *Doctors-Commons*, as executor, and demanded probate; after long conteſt, it was determined in favour of the plaintiff; and upon an appeal to the *Delegates*, this ſentence was confirmed; after the ſentence, the parties who had brought it about fell out amongſt themſelves, and diſcovered that the will which had been proved was a forgery. The manner of giving relief was to grant a commiſſion of review; but the perſon who had been diſappointed and injured by this forgery, alſo preferred a bill of indictment againſt the perſons concerned in the act of forgery. The chief juſtice refuſed to try the cauſe whilſt the ſentence was in force, but inſiſted that it ſhould ſtand off till the ſentence was laid out of the caſe by the deciſion of the commiſſioners under that commiſſion of review. My lords, in this your lordſhips find the doctrine recognized in the ſtrongeſt manner.

The next caſe, which came before the court of *King's Bench*, is the *King* and *Gardell.* It was an indictment proſecuted by Mr. *Crawford*, a fellow-commoner of *Queen's College*, for aſſault upon him. At the trial of the indictment, the defendant, who had acted by the orders of the college, produced the acts of the college by which Mr. *Crawford* was expelled. He came into the garden of the college afterwards with an intent to take poſſeſſion of his rooms, and the officer of the college took hold of him, and conducted him out of the limits of the college; and this was the aſſault in that indictment, and which was in point of law an aſſault; and unleſs the defendant had a defence, or an excuſe for his acts, he muſt have been found guilty. The act of expulſion was given in evidence. An offer was made by Mr. *Crawford* to prove the invalidity of thoſe acts, that by the conſtitution of this college more perſons were neceſſary to concur in an act of expulſion than had been preſent at that time, and other objections were made to the validity of thoſe acts. The learned judge, before whom that cauſe came to be tried, conceived himſelf concluded upon this ſubject; that as the college had the ſole juriſdiction of the cauſe, their deciſion was concluſive upon him; and it did not ſignify upon what grounds they had gone, for the effect of their judgment was an excuſe of the defendant, and ſo long as it remained unimpeached, and unreverſed in the proper courſe, there could be no doubt but it furniſhed protection to the defendant, or, to ſpeak more properly, a defence againſt this indictment. This doctrine not being ſatisfactory to the gentleman, he brought the buſineſs before the court of *King's Bench*; and that court were unanimouſly of opinion, that the court had done right at the trial of the cauſe to reject all evidence upon the ground of theſe acts of expulſion; that the acts themſelves, being within the juriſdiction of the college, were ſufficient for the defendant to avail himſelf of; and that it was not competent to the proſecutor of that indictment to ſhew to the court that theſe were not regularly or orderly done, or that they were invalid in any reſpect whatſoever. My lords, in that caſe the general doctrine was recognized, that in all courts of competent jurſdiction their acts, however wrong they are, yet while they remain in force, are concluſive upon every other court: the caſes of eccleſiaſtical ſentences, and many others, were then mentioned.

I might refer your lordſhips memory to the caſes in *Exchequer* ſeizures, where condemnations are given conſtantly without a defence almoſt, and yet all other courts are concluded by them. It has been thought ſo extremely hard a doctrine, that judges have wiſhed for the liberty of examining into the fact, and to have the matter fully diſcuſſed in the courts; yet when the matter came to be fully argued, the reſult has ever been, that the judgment has been found concluſive upon all other courts whatever.

My lords, under theſe authorities for a ſucceſſion of ages, I confidently reſt that your lordſhips will, in the preſent cauſe, conceive the ſentence of the Eccleſiaſtical Court now produced, in a caſe clearly within their juriſdiction, in a caſe in which they have the ſole juriſdiction, to be concluſive; no courts whatever have a direct cognizance of marriage but the Eccleſiaſtical Court. Suppoſe a perſon without any grounds whatever claims a marriage; it may be highly injurious to the lady; ſhe has no remedy but by reſorting to an eccleſiaſtical court, becauſe there is no other court that can bring the matter immediately and directly in queſtion: if a woman ſeparate from her lawful huſband, what court is there to compel her to cohabit with him but the cenſure of the Eccleſiaſtical Court? It is that forum which the conſtitution of this country has intruſted with the deciſion of the legality of marriages.

As there are not to be found, in common-law or eccleſiaſtical courts, any deciſion contrary to thoſe I have, with great deference, already ſubmitted to your lordſhips conſideration, I truſt your lordſhips will give that determination upon the validity and effect of this ſentence, which courts of law have ever done, when a ſentence of the ſame kind has been a matter of diſcuſſion.

Mr. *Mansfield.*

My lords,

I am alſo to trouble your lordſhips in ſupport of that ſentence, which has been offered to you as concluſive upon the preſent occaſion. The ſentence having been read to your lordſhips, you are now apprized of the contents of it. The proceedings in the Eccleſiaſtical Court, of which the noble lady at the bar hopes to avail herſelf, begin, as your lordſhips have heard, by a complaint on her part, that Mr. *Hervey* did, before that ſuit was commenced, improperly and without ground lay claim to her as his wife; in other words, in the language uſed in that court, that he did jactitate that the lady was his wife. The ſuit being thus begun, the next proceeding in it is in the common way, where a perſon thus called upon means to inſiſt upon a marriage. The defendant in the ſuit admits that he did claim the lady as his wife, and contends that he had a right to do ſo, becauſe he was lawfully married to her. Such being his allegation, her ladyſhip's anſwer to it is, that there is no foundation for his claim; that ſhe is not, that ſhe never was his wife; and ſhe ſtates in the allegations made by her, which your lordſhips have heard, a great variety of particulars during a very long period of her life, in which in the moſt public manner, and upon the moſt important occaſions, ſhe was univerſally reputed, received, and acted as a ſingle woman. After this allegation of hers, the next proceeding was to examine a great variety of witneſſes, upon the reſult of whoſe teſtimony follows that which is the important part of the buſineſs, that is, the ſentence of the eccleſiaſtical judge; which ſentence pronounces in the ſame way in this as in all other ſuits, where two parties litigate a marriage claimed on one ſide and denied on the other—that theſe two parties were free from any matrimonial contract. If that ſentence is to have the force which, as it is apprehended by thoſe who ſit on this ſide of the bar, by law it muſt have, it will of courſe follow, that this indictment muſt fall to the ground; becauſe the ſole foundation of the criminal charge is the ſuppoſed marriage with Mr. *Hervey*, which this ſentence, if concluſive, muſt unanſwerably prove never to have exiſted. It muſt, we ſubmit to your lordſhips, follow as a conſequence, that this is the proper place and point of time to ſtop: it would be to no purpoſe for your lordſhips to ſit here to hear a long ſtory, the object of which, when the ſentence was concluſive, would only be to give pain to one whoſe ſufferings no one would wiſh to encreaſe, and at laſt, after it had been heard, no poſſible good effect could follow from it. As evidence ought not to be heard, if this ſentence is concluſive, becauſe it would be hearing that which could have no intention, no weight, no conſequence; ſo it would be nugatory to ſtate it, and every body would wiſh to decline the hearing it for the reaſons to which I alluded; and I am perſuaded, not only for the ſake of the noble lady at the bar, but for the ſake of preſerving that which every one will always think of great importance, that is, uniformity in legal deciſions and judicatures, that this ſentence muſt upon this occaſion, as I believe on every one has been in which any ſuch ſentence has ever been produced in a court, be deemed deciſive and unanſwerable.

My lords, that it ought to be ſo upon this occaſion, I will firſt endeavour to ſhew to your lordſhips by conſidering the nature of that act of parliament upon which the preſent proſecution is founded, and the ſtate of the law before that act of parliament was made.

My lords, the act of parliament creates no new offence; it puniſhes nothing but what was puniſhable before, a ſecond marriage while a former exiſted: taking a ſecond huſband or wife while there was a former in being, was undoubtedly an offence long before this ſtatute of king *James* the firſt; indeed as long as the eccleſiaſtical conſtitution of this country has ſubſiſted. This act of parliament makes no other alteration in the law, but as it ſubjects perſons committing this offence to temporal proſecution and puniſhment; before this act, ſuch an offence could only be the object of eccleſiaſtical cenſure and puniſhment: but, my lords, the makers of this ſtatute never dreamt, that they were in any reſpect altering the eccleſiaſtical conſtitution of this kingdom; that they were in any inſtance invading or breaking in upon the rights of the eccleſiaſtical courts: no ſuch thing is to be found in the ſtatute; nothing is to be collected from that. Indeed, if you might collect from the preamble to the act of parliament, it will appear to every one who reads it, that it was not in the imagination of thoſe who framed this law, that a ſecond marriage could be made the object of puniſhment, where there had been a ſentence which prevented a ſuppoſed former marriage being binding upon the parties. When I ſay that, I allude to the exceptions in the act, which make no part of your lordſhips preſent conſideration. But beſides that, the preamble of the act tells your lordſhips what it was that the makers of it had in view: the preamble tells your lordſhips, that divers evil-diſpoſed perſons being married, run out of one county into another, or into places where they are not known, and there become to be married, having another huſband or wife living, to the great diſpleaſure of God and utter undoing of divers honeſt mens children and others. Now it never was ſuppoſed by the makers of this act of parliament, that the perſons deſcribed in the preamble of it would go through the form and ceremony of a trial and litigation, and obtain a deciſion in the Eccleſiaſtical Court, before ſuch ſecond marriage was to take effect, which was to be the object of this law: but it is enough that in this ſtatute there is not any thing that tends to diminiſh or break in upon the dominion of the Eccleſiaſtical Court; but that the ſtatute left thoſe courts and the law relating to them juſt in the ſame ſituation as they were before. Now if this was an offence before the act, how was it puniſhable? What would have been the operation of ſuch a ſentence before this law? Unqueſtionably, a perſon taking a ſecond huſband or wife, the firſt being living, might have been made the ſubject of puniſhment in the eccleſiaſtical courts. Let me ſuppoſe a proſecution commenced for that purpoſe by the ſecond huſband or wife, the firſt huſband or wife being living: thoſe who ſtand near me, who are much better acquainted with the proceedings of the Eccleſiaſtical Court than myſelf, will tell your lordſhips, that, ſo long as this ſentence remains, the relation of huſband and wife could not exiſt, which alone muſt be the foundation of a proſecution; for taking a ſecond huſband upon this ſtatute, the act upon which the whole proceeding is founded, having made no alteration in the caſe, the law remains the ſame. It does not follow from thence, nor are your lordſhips to ſuppoſe it, that ſuch a ſentence as this would in the Eccleſiaſtical Court have made adultery lawful, or have made a marriage with a ſecond huſband or wife a good one: certainly not; but while the ſentence ſubſiſted, it would have proved, that there was no firſt marriage at any time by any parties intereſted. Such a ſentence as this may be undone; it is a fundamental rule in all matrimonial cauſes in the eccleſiaſtical courts, that, in their language, *ſententia contra matrimonium non tranſibit in rem judicatam.* The iſſue or the kindred of perſons intitled to eſtates may have a variety of reaſons for impeaching marriages. As to the continuing in a ſecond marriage, the continuing in adultery, the repeating it is only an increaſe and aggravation of ſin where the firſt marriage ought to have prevented it. At any time there may be a ſuit to reſtore and ſet up a firſt marriage, which has been undone by a ſentence by accident, by miſtake, by collusion, or from any other reaſon not ſatisfactory. If all the evidence that could have been had reſpecting the marriage has not been laid before the ſpiritual judge, any party who has any intereſt may at any time again apply to that court, again inſtitute a ſuit, offer new evidence, have that which has been already heard, heard again, that the marriage, if it did really exiſt, may be eſtabliſhed by a ſentence of that court: this is I believe clear law, and undoubted in that judicature. If it is, then your lordſhips are not to conclude, that by any ſanction which you give this ſentence, you either authorize adultery, or give effect to ſecond marriages while firſt marriages ſubſiſt; no, at any time that firſt marriage may be eſtabliſhed notwithſtanding a ſentence againſt it, when any perſon ſhall think fit in a legal way in ſuch judicatures to impeach that ſentence: but all that is contended for is, that while that ſentence remains, the matter is concluded; the marriage cannot be proved to exiſt; the relation of huſband and wife is deſtroyed.

My lords, if this which I have now ſubmitted to your lordſhips be, as I apprehend it is, well founded in the known practice and law of theſe courts, the conſequence I truſt will be, that this ſentence muſt now have the effect under a proſecution upon the preſent act of parliament, as it would have had in a proſecution in the Eccleſiaſtical Court for an adultery, or a crime againſt the firſt marriage. In that judicature, the only one which by the laws of this country has a regular juriſdiction to enquire into marriages, by a ſolemn judgment theſe two parties are declared not to be married; that would have been an anſwer to any proſecution before the ſtatute. The ſtatute leaves the power of the eccleſiaſtical courts exactly as it was before; leaving it ſo, a ſentence pronounced by that court in a cauſe, in which it has clear juriſdiction, muſt I apprehend be deciſive. But, my lords, it is undoubted. Various caſes, which I ſhall not trouble your lordſhips with the repetition of, have been mentioned, which prove that to no purpoſe can this noble lady at the bar and Mr. *Hervey* be conſidered as man and wife, or proved to be man and wife while this ſentence ſubſiſts. No conjugal duties can be exacted from one to the other; was a wife ſtarving in the ſtreets, ſhe could not in any way oblige him to contribute to her ſupport. Whilſt ſuch a ſentence remains, the woman cannot be a wife for any beneficial purpoſe reſulting from matrimony: and it will be, I believe, difficult to point out one for which ſhe can be a wife, unleſs it be for the ſingle purpoſe of ſubjecting her to be puniſhed as a felon for marrying a ſecond huſband. I can hardly believe that any human creature can be found, who would wiſh that the noble lady at your bar ſhould for this purpoſe alone, and in this ſingle inſtance, be deemed a wife, when ſhe can be in no other. But if there be any who wiſh it, I am ſatisfied your lordſhips wiſhes will go along with the law as I underſtand it to be, if the law be ſo: and that it will be very difficult to convince your lordſhips, that ſhe, who was not a wife for any other purpoſe, ſhould be deemed a wife in order to be ſubjected to criminal puniſhment for an open, an avowed, and by her thought an honourable marriage with a noble duke.

My lords, in every inſtance in which an iſſue in the temporal courts, in the courts of common law, is joined upon matrimony, where a marriage is inſiſted upon on one ſide and denied on the other; in every inſtance of that ſort we know the temporal courts decide not; they ſend to the ſpiritual courts to have the matter enquired into and decided upon; nothing is more clear than that rule of law. So it is in caſes of dower; where dower is claimed by a widow, where it is denied that ſhe was ever lawfully married to her huſband, the temporal court ſays, it has no power to enquire into the matter, it muſt refer it to the Spiritual Court; and the deciſion of the biſhop is final upon the point. It is not only in the caſe of marriage, but in other caſes, that the deciſion of the Eccleſiaſtical Court is the only competent one, and is final and concluſive to all purpoſes: ſo it is upon queſtions of legitimacy, where baſtardy is alledged and denied; the common-law courts decide not the point; they ſend it to the Eccleſiaſtical Court: ſo it is with regard to the probate of wills; and no caſe can be ſtronger than that which was mentioned to your lordſhips, where even upon a criminal accuſation, a charge of forgery, an accuſation reſembling the preſent, a deciſion of the Eccleſiaſtical Court in favour of a will was held to be concluſive evidence upon an indictment for forgery, and that no proof could be received of the fact of forgery in oppoſition to ſuch a ſentence. It is not only ſo in theſe inſtances of the Eccleſiaſtical Court; there are others with regard to captures; the deciſions of the courts of *Admiralty* are in like manner concluſive: ſo the court of *Exchequer*, upon diſputes concerning the revenue: there are many other inſtances which might be pointed out to your lordſhips, in which, after the ſentences of courts having competent juriſdiction, all other courts are ſhut out from enquiry into the matter, however it might appear that ſuch ſentences are not founded in truth. This rule is ſo clear and ſo well known, that I will trouble your lordſhips with no particular caſes or inſtances in which any ſuch matter is determined: but there are ſome that have been already mentioned to your lordſhips, and one other which I ſhall add, to which I ſhall beg your lordſhips attention on account of another view, which it is neceſſary for him, who would contend for the full force of this ſentence, to ſee this ſubject in.

My lords, it may be ſaid, ſomething of that has been hinted already; much we know has been talked out of doors, not all I believe warranted by the fact; but of that now we are not to judge or enquire: but it may be ſaid, in anſwer to theſe arguments giving the utmoſt force to ſuch ſentences, let them be final and concluſive as they may, yet if a ſentence can be ſhewn to be the effect of agreement and colluſion, that it ſhall not be final, that it ſhall not have a binding force. If thoſe, who are to argue againſt the effect of this ſentence in the extent in which it is now endeavoured to be urged, ſhould be at liberty to ſay, that they would attempt to ſhew that this ſentence now in queſtion before your lordſhips was the effect of what is called in the common-law courts, covin, or colluſion; if there was any ground, as I do moſt firmly believe there is not, to impute this ſentence to any ſuch original; yet before your lordſhips I truſt it will appear, that this is not the place in which any ſuch colluſion ought to be enquired into. Thoſe courts, which the conſtitution has truſted with the inveſtigation and deciſion of matters relating to marriage, are fully equal to the deciſion of any ſuch colluſion; they may undo their ſentences where they appear to be colluſive: and it is not to be preſumed that any colluſive ſentences would be encouraged in thoſe courts. Indeed there is one ſtrong and cogent reaſon, why no ſuch colluſive ſentences are to be feared in thoſe courts; becauſe, as I before obſerved to your lordſhips, a ſentence there, though concluſive while it ſtands, may at any time be attacked or impeached by thoſe who find an intereſt in ſo doing: and if it may, then it would be idle for perſons to be colluſively obtaining a ſentence, when any relations that might be affected by iſſue of a ſecond marriage, in ſhort, any perſon who has an intereſt, might overturn and deſtroy it. This at leaſt is very obvious upon the ſentence that is now urged to your lordſhips, and the effect of it with regard to the preſent proſecution, that, if it was to ſtop the preſent proſecution, the utmoſt conſequence that would follow from it would be this, that it could only prevent ſuch proſecutions having effect in caſes in which in truth the parties, who had to do in the cauſe in the Eccleſiaſtical Court, and who obtained the ſentence, were ſo circumſtanced, that it would not be the intereſt of any human creature to endeavour to undo their work: and that it is not one of that ſort of marriages, ſuch a ſecond marriage, as it was the object of this temporal law, the ſtatute of *James* the firſt, to make the ſubject of puniſhment. It was made on account of temporal miſchiefs happening, as recited in the preamble. Although it is mentioned, and truly mentioned in that ſtatute, that ſuch ſecond marriages are to the diſhonour of God, and are undoubtedly high offences againſt religion, and the holy ceremony of marriage; yet if that had been the only evil that had been apprehended or found from ſuch ſecond marriages, it is not to be believed, but that the legiſlature of this country would have left ſuch marriages to have been conſidered, enquired into, and puniſhed in thoſe courts, in which all other offences againſt religion are very properly only cognizable and puniſhable. It was the temporal miſchief that produced that law; and your lordſhips may eaſily judge, what apprehenſions of any temporal miſchief would ariſe from ſuch weight being given to this ſentence, as is contended for from proſecutions being ſtopped by ſuch ſentences, when it is clear that ſentence cannot do miſchief to any human creature, who does not chuſe to ſit down and acquieſce under it; for the remoteſt iſſue, at the greateſt diſtance, that can be hurt, may commence a ſuit in the Spiritual Court, and may therefore get rid of this ſentence. Give it therefore its utmoſt force, let it weigh as much as is deſired in the ſcale in favour of this lady, it would only go to prevent a proſecution, where the marriage undone was of ſuch a ſort, that no human creature would have an intereſt to ſupport it. This I obſerve to your lordſhips, ſuppoſing that it may be urged againſt this ſentence, that it will be attempted to be proved to be produced by agreement and colluſion.

My lords, there are caſes, one of which has been already mentioned to your lordſhips, that in terms prove that that colluſion is not the ſubject of temporal enquiry, that it ought to be confined to the ſpiritual courts. There are other caſes, which ſeem to me in effect to prove the ſame thing.

The caſe of *Kenn* has already been mentioned to your lordſhips: in that caſe it was an attempt by the iſſue of that marriage, where there had been a divorce between the parents of that iſſue, to eſtabliſh the marriage. In the divorce the ſentence had proceeded upon the parties not having been of marriageable age, that is, the man of fourteen, the woman of twelve; that they had never cohabited together, or conſented to the marriage after they had attained to marriageable years, to the years of conſent, as they are called. But who is it attempts to undo that marriage?—The child who was born of thoſe parents, cohabiting together long after they had attained the age of conſent. And yet that iſſue was not heard: no, the ſentence was held to be concluſive; a ſentence proceeding clearly upon a ground which muſt be falſe; ſtating that the parties were not of the age of conſent; ſtating that they had never conſented after they had attained that age; when it was an undoubted fact, indeed the exiſtence of that iſſue which litigated it proved, that they muſt have conſented to the marriage after the age of conſent.

The next caſe that I would ſuggeſt to your lordſhips is one that has not been mentioned, but which appears to me to be extremely ſtrong to the preſent purpoſe. It is the caſe of *Morris* and *Webber*, in *Moore*'s *Reports*, 225. The caſe, in ſhort, was this: two perſons, one of the name of *Berry* and the other of *Wilmot Gifford*, had been married; they had been married ſome years; they had no offspring; a ſuit was commenced in the Spiritual Court for a divorce; a ſentence was pronounced, which in the words of the book are *propter vitium perpetuum et impotentiam generationis* in the huſband. The ſentence having ſo proceeded, not long afterwards both theſe parties married again, and each by the ſecond marriage had ſeveral children: ſome years afterwards a cauſe aroſe, in which it became a queſtion, whether the iſſue by the ſecond marriage of the huſband thus divorced could be legitimate? It was contended, that thoſe ſubſequent children by that huſband had proved, and irrefragably proved, that the foundation of the divorce was falſe; that there could not be that *vitium perpetuum* which was made the ground of the divorce. The common-law court, before whom this queſtion came, clearly held, that *that* was neceſſarily proved by the ſubſequent children which that huſband had had; but ſtill clear as it was, that this ſentence was founded in an apparent falſhood, yet it muſt ſtand: it is the ſentence of that court to which the conſtitution of the country has entruſted the deciſion of ſuch matters; it is not for our courts to enquire into it; we ſhould uſurp a juriſdiction which does not belong to us; and upon that ground it was determined, that till that ſentence of divorce was undone in the Eccleſiaſtical Court, it muſt be binding and concluſive, and the iſſue of the ſecond marriage muſt be deemed legitimate.

My lords, no caſes can well be imagined ſtronger than theſe to ſhew, that even ſentences founded in agreement, founded on what may be called colluſion of the parties, are yet binding, till they are reſcinded in that court to which alone the law of *England* has intruſted and confined the conſideration of ſuch matters.

Another caſe, which has already been mentioned to your lordſhips, is the caſe of *Hatfield* and *Hatfield*, which ſeems to me alſo to decide this point, and to decide in terms. The caſe has been already fully ſtated to your lordſhips; I need therefore only point out one or two particulars of it. There was a diſpute between the heir of one *Hatfield* and a woman, who claimed to be the widow of the father of that heir. He inſiſted upon it, that ſhe was not the wife of *Hatfield* his father, becauſe ſhe had been married to one *Porter*. The marriage with *Porter* was proved. *Porter*, who was a party to the ſuit in the court of equity, admitted it upon his oath. A releaſe was obtained by the heir from that *Porter*. In order to get rid of this releaſe, and though the fact of marriage was proved in the cleareſt terms, the woman commenced a ſuit for jactitation of marriage againſt *Porter* in the Spiritual Court. A ſentence upon his not appearing was pronounced in that court againſt him, and that was held in the houſe of lords to be concluſive. Thoſe who went before your lordſhips, then ſitting in judicature, ſaid, this was a ſentence by a court which had the alone juriſdiction of the matter, and, while it ſtood, it muſt decide. The books that take notice of this caſe expreſsly ſay, that the ſentence was conſidered—indeed, after the caſe ſtated to your lordſhips it could not but be ſo conſidered,--as colluſive, I think is one of the words to be found in the books; and yet though appearing to be a feigned and colluſive ſentence, the anſwer was, that colluſion is to be judged of alone in the court where the original matter ariſes, which has alone juriſdiction upon the ſubject; no other court can conſider it.

My lords, I am aware that it may be ſaid in anſwer to this caſe, that this was in a court of equity, which had no juriſdiction to enquire into queſtions concerning marriage in the Eccleſiaſtical Court. My lords, that is no anſwer; for wherever a ſentence founded in agreement between parties is uſed to the prejudice of a third perſon, in whatever court it is, unleſs the ſubject be of ſuch a nature that it is excluſively confined to the particular court in which it ariſes, wherever ſuch a ſentence is attempted to be uſed againſt a third perſon, that third perſon may avail himſelf of the colluſion upon which it is founded: for how is it, that in all common caſes, where queſtions ariſe about colluſive ſentences, that the party againſt whom they are uſed gets rid of them? In order to do that, no proceeding is requiſite in the court in which the ſentence is: no; the perſon againſt whom it is urged ſays, However that ſentence may be between you two, who are parties to it, however it may bind you, it is founded in agreement between you two, and it is nothing to me; as againſt me it is void. Thus in the common caſe of executors, a creditor has a right to be paid out of the effects left by a dead perſon, who is debtor: the executor intending to cheat the creditor by an agreement with another perſon, who is no real creditor, prevails upon him to commence a ſuit, and ſuffers judgment to paſs at the inſtance of ſuch a friend; by which he is made the original creditor, and the executor, as repreſentative, debtor to the perſon ſo ſuing by agreement. The real creditor cannot purſue any ſteps to undo the judgment: no; he ſays, by way of anſwer, That judgment is void againſt me; you two perſons agreeing and colluding together ſhall not turn the forms of law to my prejudice: and as this may be done in one caſe, why not in every other, where a judgment or a ſentence founded upon colluſion is uſed againſt a third perſon, who has no way to anſwer it but by ſaying at once, It is void againſt me, however it may ſtand good between you?

This, my lords, is the way in which all judgments by colluſion or by covin, in my knowledge, are anſwered and got rid of. But in the caſe of *Hatfield* and *Hatfield*, which I laſt alluded to, it is anſwered, that the court of equity, and the houſe of lords judging as a court of equity, had no authority to enquire at all into a matter depending in the Eccleſiaſtical Court relating to marriage, becauſe that court hath an excluſive juriſdiction upon the ſubject; and yet in that caſe and in this there could be no reaſon, I ſubmit to your lordſhips, why, if an agreement of the parties could be a ground for impeaching a judgment, it might not be as well done in that judicature as in this?

My lords, when I am ſpeaking of any arguments that one may ſuppoſe to be urged from an attempt to prove colluſion, there are differences between any ſuch judgments as are got rid of by a third perſon, becauſe prejudicial to him, and founded upon an agreement between two parties to a ſuit with which he has nothing to do: is that the preſent caſe? No third perſon, that has an intereſt, attempts now to ſet aſide this judgment: the object here is to annul the judgment as between the parties to that ſuit. In all the caſes that can be referred to, where queſtions ariſe upon judgments paſſing by agreement, intended to be levelled againſt a third perſon; in all ſuch caſes, as between the parties, the judgment ſtands good. The object of thoſe, who in ſuch reſpects impeach the judgment, is merely to prevent its having effect againſt thoſe who are ſtrangers to it: but here this judgment, this ſentence muſt, as between the parties, be totally undone and annihilated, or elſe it decides the queſtion; becauſe unleſs it is undone, if it ſtands good between thoſe two parties till properly impeached in the Eccleſiaſtical Court, why then they are not huſband and wife: and this conſideration materially diſtinguiſhes ſuch a judgment, ſo impeached as the preſent is, from the common caſe in which judgments are to be affected; not ſo as to be avoided between the parties, between whom they ſtand good, but as being laid aſide more properly than being avoided, ſo as not to be turned to the prejudice of a third perſon, who is not a party to them.

My lords, another diſtinction which I have before ſuggeſted to your lordſhips, which I remind your lordſhips of, as upon the preſent head of the arguments I am ſuggeſting to your lordſhips, there is this difference between all the caſes that can be brought before your lordſhips upon the head of colluſion or agreement; in all thoſe caſes, in ſuch as I have alluded to, and a hundred others might be put which fall within the ſame rule as a judgment ſet on foot by an executor to defraud an honeſt creditor; in ſuch caſes the parties have no way themſelves to commence a ſuit to ſet aſide this judgment; their mode of doing it is, when the judgment is uſed againſt them, anſwering, Whatever the judgment may be as between you two, as to me it is void: but there is no regular proceſs of law, no ſuit to be commenced, by which any ſuch judgment can be ſet aſide by a third perſon; there is no ſuit. If it could be done at all, it muſt be done in a manner which furniſhes argument in ſupport of the preſent ſentence, becauſe it could only be done by an application to that court in which ſuch a judgment is given. Another court may ſay, where it is attempted to be uſed, that if it be proved to be founded in agreement by thoſe who are parties to it, it ſhall not be turned againſt a third perſon; but no other court but that in which the judgment is given can ſet it aſide and annul it.

My lords, theſe diſtinctions clearly appear, as I ſubmit to your lordſhips, in ſuch caſes where ſuch judgments are attempted to be got rid of by third perſons as detrimental to their intereſts: but I believe I can produce to your lordſhips a legiſlative inſtance, that a colluſive judgment in the Spiritual Court cannot be ſet aſide after once given; that it is final and concluſive. I have already mentioned it to your lordſhips as one of thoſe points ariſing in courts of juſtice, upon which all conſideration is confined to the eccleſiaſtical courts: none is more important than a queſtion concerning baſtardy or legitimacy. The way, your lordſhips know, in which that queſtion is ſent to be tried by the Eccleſiaſtical Court, is this: in actions of various ſorts, where a perſon claims a title by deſcent, the legitimacy of his birth becomes material. If the party againſt whom he claims ſays that he is a baſtard, and upon that an iſſue is joined, the common-law courts in which the queſtion ariſes ſend the matter to the Eccleſiaſtical Court to be enquired of and decided. In anſwer to a writ for that purpoſe going from the common-law court the eccleſiaſtical judge makes a certificate, and he certifies that the party is a baſtard, or is legitimate: that certificate is concluſive; it is not only concluſive between the parties to the ſuit, it is concluſive to all the world; it never can be touched or moved again; that certificate once received, that record in the common-law courts is final for ever.

My lords, to prevent the miſchiefs that might ariſe from ſuch tranſactions happening by agreement, and a falſe certificate obtained by colluſion, depriving perſons of their legal rights, various forms are now requiſite by an act of parliament, which I will ſtate to your lordſhips, that originally were not ſo. Various proclamations are neceſſary in the court of *Chancery*, and likewiſe in the court of common law, in which ſuch queſtion ariſes, in order to give univerſal notice to all perſons who may by poſſibility be intereſted, that ſuch a queſtion is to be ſent to the Eccleſiaſtical Court: but before that act of parliament no ſuch proclamations were neceſſary. The act of parliament will ſhew your lordſhips what then was the effect of a colluſive ſentence in the Spiritual Court upon the ſubject of baſtardy; and the ſentence of that court was concluſive, and could not be touched by any temporal judicature.

My lords, the act of parliament was made in the 9th of king *Henry* the VIth, chapter the 11th: the title of the act is, ‘ proclamations before a ‘ writ be awarded to a biſhop to certify baſtardy.’

My lords, the preamble of the act before it comes to the enacting part is very long. I need not read the whole of it to your lordſhips: it is in ſubſtance this: ‘ that ſeveral perſons, who are named as petitioning in the law, who claim, ſome as ſiſters, and others as claiming under ſiſters, to be heirs of *Edmond* earl of *Kent*, were apprehenſive of the effect of a colluſive certificate that would be obtained by *Eleanor* the wife of *James* lord *Audley*, who pretended herſelf to be the daughter of that *Edmond* earl of *Kent*; and the meaning of the act was to prevent the effect of ſuch a colluſive certificate, which was apprehended would be obtained by this *Eleanor* wife of *James* lord *Audley*; and ſtating that there was no foundation for any ſuch pretence; that ſhe was not the daughter of the ſaid *Edmond*. The act goes on to ſay; ‘ nevertheleſs the ſaid *Eleanor*, the wife of *James*, upon great ſubtilty, proceſs imagined, privy labour, and other means and coloured ways, to the intent that ſhe ought to be certified *mulier* by ſome ordinary, in caſe that baſtardy ſhould be alledged in her perſon, hath brought, as it is ſaid, in examination before certain judges in the Spiritual Court, knowing nothing of theſe contrivances, certain ſuborned proofs and perſons of her aſſent and covin, depoſing for her, that ſhe was begotten within marriage had and ſolemnized between the ſaid *Edmond* and *Conſtance*, late wife of *Thomas* lord *Deſpenſer*; ſo that it is very likely that the ſame ordinary would certify the ſaid *Eleanor* the wife of *James mulier*; which certificate ſo had and made ought, by the law of *England*, to diſherit the ſaid ducheſs, duke of *York*, earl of *Saliſbury*, earl of *Weſtmorland*, *John* earl of *Typtoff*, *Alice*, *Joyce*, and *Henry*, and their iſſue for ever, of the whole inheritance aforeſaid.’ Thus your lordſhips ſee it is ſtated that ſuch a certificate, ſo obtained by the moſt flagrant covin and colluſion, which is ſtated here in this preamble of the act, is ſaid to have ſuch effect, that it ought by the law of *England* to diſinherit the heirs and their iſſue for ever, though a certificate moſt palpably obtained upon the groſſeſt fraud and colluſion. Then it goes on to *provide*, ‘ whereupon the premiſes tenderly conſidered, and to eſchew ſuch ſubtle diſheriſons, as well in the ſaid caſe as in other caſes like in time to come, by the advice and aſſent of the lords, and at the requeſt of the ſaid commons, it is ordained, that if *Eleanor* the wife of *James* be certified *mulier*, that no manner of certificate ſhall in anywiſe put to prejudice, bind, endamage, or conclude any perſon, but him or his heirs that was a party to the plea.’ Thus it provides a remedy in that particular caſe. Then it goes on to *enact*, that in future all proceedings of this ſort ſhall be attended with different proclamations that are ordered by that act, that it may in future be known when ſuch certificate will be applied for to the ſpiritual courts, and that all parties intereſted may have notice to make their objections. Now, my lords, what will be ſaid of the effect, the weight, the authority of eccleſiaſtical ſentences in this part of the law after the act of parliament? Does it not appear by this law, that the certificate, in other words the deciſion, of the Eccleſiaſtical Court in a caſe of baſtardy, even though founded upon colluſion, was deciſive, when once it was formally received from the eccleſiaſtical judge? And if it was ſo, will it be at all a ſtretch of the authority of that judicature now to ſay, that a ſentence in a cauſe of marriage, which is as peculiarly to be confined to their juriſdiction, ought to have the ſame force? And if it is not to have the ſame force, will it not be breaking in upon or evading that juriſdiction, in a way which your lordſhips predeceſſors have never done, if you ſhould now ſuffer this ſentence in another place to be impeached and overturned?

My lords, your lordſhips will remark, that in thoſe caſes which your lordſhips have been referred to, there is one, the caſe of forgery, which is the caſe of *Farr*, that is more exactly like the preſent, and where a deciſion of the Spiritual Court upon a will is held to be deciſive againſt the cleareſt proof of forgery. But with reſpect to the other caſes, your lordſhips will obſerve, that they are all civil caſes: and if this deference and reſpect is to be paid to ſentences by the eccleſiaſtical judicature in civil cauſes, I am ſure I need not obſerve to your lordſhips that in criminal cauſes, where the noble lady at your lordſhips bar is to be entitled to every indulgence, to every favour, theſe deciſions do from that conſideration acquire double force.

My lords, it may be ſaid, what did this act of parliament of *James* the firſt mean? That when there had been ſuch a ſentence as this, though thoſe who were parties to it knew that they were in truth man and wife, that after ſuch a ſentence either of the parties, ſo knowing that they were man and wife, ſhould be at liberty to marry again without incurring the penalties of this ſtatute? In anſwer to that it may be replied, that whilſt this ſentence ſtands, if there be any weight in the arguments urged in ſupport of it, it is not to be preſumed that it was ſo, or could be ſo, known to the parties; becauſe that was to impeach the ſentence. But another anſwer occurs from the act itſelf; for the act did not mean in all caſes to puniſh a ſecond marriage, where the former huſband and wife were found to be living; becauſe there is an exception in the act, an exception which permits, I mean ſo as not to make it puniſhable, permits a marriage with a ſecond huſband or wife, even though the former be living, and be known to be living. Let but the ſea be placed between the huſband and *wife* for ſeven years, though they know each other to be living, the law takes not place; they are not the ſubjects of puniſhment: that I take to be extremely clear. The circumſtance of knowledge does not neceſſarily import, that a perſon marrying a ſecond huſband or wife muſt be ſubject to the penalties of this law on account of that knowledge of the firſt huſband or wiſe being living. As to the immorality of the caſe, as to the effect againſt religion, againſt the eternal ſacred obligation of marriage, it remains exactly the ſame, whether the huſband is on this ſide the channel or the other. But the law has ſaid in that caſe, though the ceremony of marriage would be thus offended againſt, though the obligation would be ſo far violated, that a huſband or wife, knowing that the other huſband or wife were living, ſhould take a ſecond; yet that knowledge is not ſufficient within the act in that inſtance to ſubject the party to puniſhment. It is not therefore in every caſe that the taking a ſecond huſband or wife, even with knowledge that there is a former ſubſiſting, will ſubject a party to puniſhment: that the act ſays. It is not a part of the preſent queſtion before your lordſhips. To ſuppoſe that after this ſentence, the noble lady at your bar could be ſo well acquainted with the eccleſiaſtical law, as to know that this ſentence would not be binding; that is too abſurd to ſuppoſe. If a ſentence in the Eccleſiaſtical Court is to have that weight, which it has had from the earlieſt times; if the ſame rule is to take place in criminal courts of judicature, and in favour of the criminal, which has been again and again eſtabliſhed in civil cauſes; then this ſentence is concluſive; there will be an end of the preſent proſecution. And your lordſhips will not forget what I did before take the liberty to ſuggeſt to your lordſhips, that giving the utmoſt ſanction to this ſentence, you never baſtardize iſſue, you never diſturb families, you never deprive individuals of their right; becauſe every human creature, who is at all intereſted to diſpute a ſentence againſt a marriage, who wiſhes to ſet up or ſupport it, may at any time apply to the Eccleſiaſtical Court, and there have the marriage ſet up again and eſtabliſhed. No cauſe therefore can ever paſs, in which a marriage will remain undone by ſuch a ſentence, except where there is no human creature who thinks it worth their while to endeavour to ſupport it: and this temporal law may ſurely very well go uninforced while a ſentence ſtands, and on account of that ſentence, which, with the utmoſt weight and credit given to it, can produce no temporal miſchief. If it be wrong, if the parties to it in procuring it did wrong, it may at any time be undone in the Eccleſiaſtical Court; and as to the offence againſt the right of marriage, againſt the religious conſtitution of the kingdom, that court may at any time effectually puniſh thoſe who have been guilty of any ſuch offence, who have improperly married a ſecond huſband or wife, who have improperly attempted to get rid of a marriage that was legally eſtabliſhed.

And therefore upon the whole I ſubmit to your lordſhips, that upon the authorities of law there is no ground to impeach or attack this ſentence; that it is final, it is concluſive, of courſe no other evidence ought to be received impeaching this marriage; that the indictment therefore muſt fall; and that as no evidence can be received, it would be idle, impertinent, and of no uſe to ſtate it.

Doctor *Calvert.*

My lords,

It is my duty likewiſe to treſpaſs a little upon your lordſhips patience on the ſame ſide with the gentlemen who have gone before me, though this queſtion has been by them conſidered in the wideſt extent of view that I believe it is capable of.

My lords, the motion now made by the noble lady at your lordſhips bar is this, that having that ſpecies of evidence which ſhe apprehends is concluſive in her favour, and precludes the proſecutor from going into any evidence on his part, it may be received by your lordſhips as the only matter proper to take into conſideration.

My lords, that evidence which her grace offers, is a ſentence in the Eccleſiaſtical Court, pronounced in a due ſuit thereupon, in a direct line of marriage; the purport of which was, that there was no marriage ſubſiſting between the honourable Mr. *Auguſtus Hervey* and the noble lady at the bar, as the indictment lays there was, at the time ſhe married the late duke of *Kingſton*, that marriage being the ſole foundation of this accuſation; for if that fails, the marriage with the duke of *Kingſton* was perfectly innocent. If this is a proof, ſuch a one as your lordſhips by law ought to abide by, that there was no ſuch marriage ſubſiſting between them, to go into evidence of any ſort muſt be totally nugatory.

My lords, it is well known, that by the conſtitution of this kingdom there are different courts appointed for the litigation of different queſtions. Theſe courts are, as the conſtitution ſuppoſes, well adapted to the purpoſes, and exerciſe that juriſdiction which can take up the point originally, and determine it directly; and it is contended, that while that determination ſubſiſts, it ought to have its effect in all other places, and in all other courts where there ſhall be occaſion to make uſe of it.

My lords, this is not aſſerted only of one ſpecies of courts, I mean the eccleſiaſtical courts, but it applies, I apprehend, to ſentences of all others whatever, that when a judgment has been given by any court having original and direct juriſdiction, though that may incidentally come before another court, yet they don't go into that queſtion which has by a competent judicature been before determined.

My lords, it is true, it is impoſſible for any courts to continue to exerciſe their juriſdiction for any conſiderable time without many queſtions incidentally ariſing, which are not really and originally within their juriſdiction, many of eccleſiaſtical cognizance; and for the purpoſe of determining that cauſe, if the incidental point has not already had a deciſion in an eccleſiaſtical court, they muſt be gone into; becauſe if they were not, there would be no end of the interruption of juſtice. Many queſtions ariſe in the eccleſiaſtical courts, which are originally of common-law juriſdiction, yet the Eccleſiaſtical Court muſt go ſo far into that conſideration, as to ſee whether the pretence be true: for the purpoſe only of determining the cauſe then before that court, they could not have originally determined this queſtion. Suppoſe, for inſtance, a legatee claiming a legacy in an eccleſiaſtical court, the executor may plead a releaſe; now the validity or invalidity of that releaſe is originally cognizable by the common-law courts and no other, yet the eccleſiaſtical judge muſt ſo far take that plea into conſideration, as to ſee whether there is *prima facie* a releaſe or no: but it was pleaded in reply, that there had been a queſtion upon that releaſe at common law, that it had been there put in iſſue, and that there was a verdict againſt that releaſe. I apprehend, that no eccleſiaſtical judge then would think himſelf at liberty to enter into the queſtion, whether it was a good releaſe or no; but the verdict muſt be taken as true, becauſe the court, though incidentally it was obliged to take notice of it, has not a juriſdiction to determine the original queſtion.

My lords, this may be applied to the queſtion that is now before your lordſhips: marriage cauſes are peculiarly by the conſtitution given to the eccleſiaſtical courts; they alone can determine an original and direct queſtion of marriage as between the parties; and if determinations of courts, having original and direct juriſdiction, are to receive weight, and meet with credit from all other, then the determinations of eccleſiaſtical courts upon marriage ought, wherever they come in queſtion in any other court, likewiſe to be received as concluſive. The obvious reaſon of this ſtrikes me to be, becauſe though every court can determine in ſome meaſure a queſtion merely as applied to what is then before them, yet they cannot determine it generally, they cannot determine the very queſtion as applicable to other purpoſes. As for inſtance, ſuppoſe any temporal right under a marriage is to be conſidered in a common-law court, and it may be neceſſary for that purpoſe to enquire whether there be ſuch a marriage; the general queſtion, whether ſuch perſons are to all intents and purpoſes man and wife, whether they are bound by the obligations of duty ariſing from that ſtate, is certainly not to be determined but in a court of eccleſiaſtical juriſdiction: and when that court has been in poſſeſſion of the original and general queſtion, and has determined it, for the common-law court to enter into it, might be in effect to alter and undo a judgment, as far as the conſideration then is before the court, which certainly that court has no juriſdiction to do. That this is to be received as a general poſition, I apprehend, is ſupportable upon this ground; upon the great incongruity of ſentences which otherwiſe muſt ariſe. Now ſuppoſe there be a ſentence in a court that has the original juriſdiction to determine marriages between man and wife; to determine upon the ſtate of thoſe perſons, whether they are in fact in that relationſhip; all determinations upon that queſtion in any other court may be directly contradictory to that ſentence, which ſtill muſt remain; for the parties will and muſt remain man and wife, or the contrary not man and wife, according as the ſentence was, if that queſtion has been directly determined in an eccleſiaſtical court; and any determination that would be given by another court, may be contrary to that obligation and that connection which the court, having a power, has determined was between them. On theſe conſiderations, therefore, I apprehend it is, that whenever a queſtion of matrimony has ariſen in any common-law court, if there has been no determination in the Eccleſiaſtical Court, the queſtion may be open; but if that queſtion has ever come directly in point before the court, having direct juriſdiction to determine it, I apprehend to this time there always has been ſuch credit given to the ſentence, that it is taken to be concluſive and be determined between the parties.

My lords, this diſtinction was made, I conceive, upon the beſt grounds, ſo long ago as that caſe alluded to by the learned gentlemen who have gone before me: I mean *Kenn*'s caſe, reported by ſir *Edward Coke*; that was in the reign of king *James* I. In that caſe there is cited the caſe of

Corbett, which was as early as *Edward* IV. Taking the doctrine laid down upon theſe two caſes together, the poſition there eſtabliſhed, and I truſt adhered to ever ſince, is this, that when there has been a queſtion of marriage litigated by the parties themſelves in a proper court, and the queſtion has been determined upon the marriage, the ſentence will always hold good, till it is reverſed by that court. So much was determined in the caſe of *Kenn*. In the caſe of *Corbett* it was determined, that where one of the parties is dead, and no ſuch ſentence was had between the parties while living, a perſon cannot commence proceedings in the Eccleſiaſtical Court relative to that marriage. The reaſon is, that then the object of ſuch a ſuit muſt be temporal conſiderations only; it muſt be to baſtardize iſſue, or it muſt be for ſome purpoſes which the Eccleſiaſtical Court has not original juriſdiction of. But the mere queſtion of marriage, of connection between man and wife, can never come into queſtion, nor ought it to be litigated after the death of the parties: therefore, the Eccleſiaſtical Court, after the death of the parties, does not entertain that ſuit, nor can it be legally commenced.

My lords, there are a variety of caſes which have been determined that have been quoted already to your lordſhips, and which I ſhould be very ſorry to take up your time in repeating; but it ſeems to me on thoſe authorities to have been eſtabliſhed, that as often as theſe ſentences have been pleaded they have been allowed, whether they were ſentences in cauſes of nullity, of marriage, or in jactitation of marriage.

My lords, if danger is to be apprehended from too much credit being given to ſuch ſentences, leſt for improper purpoſes they might be unduly obtained, there ſeems to be leſs danger in queſtions that ariſe upon marriage than in any other; for this reaſon, that there can be no determination againſt a marriage but what is open to future litigation. We all know, that in a queſtion of marriage any perſon that has an intereſt may intervene before ſentence given; and any perſon having an intereſt, though they have neglected to intervene in that cauſe, might appeal within the proper time: nay, I will go ſo far as to ſay, that if any perſon having an intereſt ſhould have ſo far neglected it as to omit availing himſelf of an intervention or appeal, yet he might ſtill come before the court, ſhew his intereſt, and be heard. A marriage cauſe goes farther ſtill; for I believe in moſt other caſes a determination would be for ever binding, at leaſt to the parties; but in theſe queſtions, I conceive it is not: for if there was to be a queſtion between a huſband and wife in a cauſe of jactitation, and, as in this cauſe, it was determined that there was no marriage; yet the party againſt whom that ſentence was obtained, I apprehend, might appear afterwards, he might produce any new proof that he did not know of at that time, or, even if he had not produced what proof he had, he might be heard upon it. The reaſon of that indulgence I take to be this: by the canon-law a marriage was held to be indiſſoluble, and for that reaſon a ſentence againſt it never could be final; *ſententia contra matrimonium nunquam tranſibit in rem judicatam.* The canon-law, it is well known, has been received in this country with reſpect to marriage, particularly as to that poſition of its being indiſſoluble. In moſt other queſtions, as of property, a perſon might be bound by time, bound by not making ſo good a caſe as he ſhould have done; but as a perſon cannot releaſe himſelf from the obligations of marriage by any lapſe of time, or any neglect in ſtating his caſe, the queſtion is ever open; therefore theſe caſes are certainly the leaſt dangerous, becauſe if any body appears who apprehends himſelf injured in this matter, and has an intereſt to ſhew that this judgment was not duly obtained, he may be heard; but while ſuch a ſentence remains unimpeached, I apprehend it is concluſive. The ſentence now before your lordſhips is a ſentence in a cauſe of jactitation. It has been ſuppoſed upon the authorities, many of which have been cited to your lordſhips to-day, that when a ſentence determining upon this point has been offered in any court coming in incidentally, it has been conſtantly received: but, my lords, it has been received with this reſtriction, as it is laid down expreſly in *Blackham*'s caſe, which has been already quoted, it muſt be where the marriage has been directly in iſſue; for if it be an incidental point only, it would not then be ſatisfactory. In *Blackham*'s caſe, where the queſtion aroſe upon the grant of an adminiſtration, it was argued, that the Eccleſiaſtical Court having determined upon that adminiſtration, they had virtually determined the marriage, and therefore it was binding upon all parties: but it was ſaid, No, the queſtion muſt be originally and directly upon the marriage, or it ſhall not have effect; and the diſtinction ſeems to be exceedingly good.

My lords, in order to bring the preſent caſe therefore within this principle, it is neceſſary to ſhew, that the ſentence now under your lordſhips conſideration is a direct determination upon a marriage; becauſe if it be not, it would be liable to the objection which I have now ſtated.

My lords, the proceeding is that of a cauſe of jactitation, which is begun by a man or woman: in this cauſe it was the woman calling upon the perſon who claims to be the huſband, for having boaſted and aſſerted that lady to be his wife, to abſtain from ſuch aſſertions for the future.

My lords, here the queſtion originally ſeems to be, whether the perſon called upon had ever really claimed the lady. In that ſtage of the cauſe, if the claim had not gone as far as a juſtification, ſome of the books aſſimilate this proceeding to a cauſe of defamation, ſuppoſing it to be a caſe of words only; and when upon a marriage being pleaded to juſtify the claim, the queſtion turns upon that marriage, it may perhaps be argued, that it is not a direct caſe of marriage, but an incidental one only: it may not therefore be improper to conſider it in this caſe, leſt ſuch an obſervation ſhould be made. I take it, that when in a cauſe of jactitation the defendant gives in a plea ſtating a marriage, and that marriage is contradicted by the plaintiff, though it is intended indeed as a defence to the accuſation for which he is called upon to anſwer, that of having claimed the lady, yet the queſtion then alters its nature; the plea is not only intended to entitle the defendant to his admiſſion, but the court is then in poſſeſſion of the queſtion, whether there was a marriage between the parties, and the determination is direct upon a marriage. If the marriage be proved, there is the ſame ſentence paſſed as in a matrimonial cauſe; there is a ſentence directly pronouncing there was a marriage, the parties are pronounced to be man and wife, and they might be admoniſhed to reſtore to each other conjugal rights. If, on the contrary, the defendant ſhould fail in proof, the determination is this, that the party has failed in his juſtificatory matter; and the ſentence in this caſe goes, that the judge has found that he has failed in the proof of the marriage alledged to have been had between them, he is declared to be free from all matrimonial contracts, and injoined not to boaſt in future; it would be therefore a fallacy to argue, that this is not a direct determination of the queſtion of marriage: it is indeed ingrafted upon the original cauſe of jactitation, but that is agreeable and conſonant to practice in other inſtances.

My lords, it is not a monſtrous thing to aſſert, that a cauſe may change its nature from its original inſtitution.

[*At a motion of one of the peers, part of the ſentence read.*]

Doctor *Calvert*. Unacquainted as I am with the proceedings of this high and auguſt court, which I never had the honour to appear in before, I conceive it is my duty to take immediate notice of thoſe words which have been read, as I ſuppoſe they were called for, becauſe I ought to confine my obſervations to them before I go any farther. The lady, who is the object of that enquiry, is pronounced to be a ſpinſter as far as yet appears.

My lords, theſe words are inſerted in this ſentence, and I apprehend are in every ſentence of this nature; the purport of which, I truſt, means this, that the caſe is open to future diſquiſition upon the principles that have been already ſtated; that though the judge determines upon the evidence that is then before him, yet the parties having an intereſt to bring that queſtion on again, may be heard. As far as yet appears to us, ſays the judge, the lady is free from all matrimonial contracts; and as long as that ſentence remains, I mean to argue that it is a concluſive ſentence. I don't mean that the court is precluded from another enquiry; I have ſtated, that no parties are precluded from another enquiry; and I conceive the meaning of thoſe words are to expreſs, that according to the light which then appears to the court, the court pronounces the ſentence. But a ſentence of that ſort is not from thence to be argued to be nugatory, and that the court determines nothing: the court determines upon what it has heard; and as long as that ſentence remains, that is the way in which I meant to put it, it is deciſive and concluſive.

My lords, I have ſaid, that though the cauſe began originally upon the one party calling on the other to juſtify his claim as huſband in a cauſe of jactitation, it is nothing monſtrous to ſuppoſe it has ſo far changed its nature as to become a marriage cauſe; and I will mention other caſes in which the eccleſiaſtical courts, as is well known to the practitioners in thoſe courts, adopt and admit of a ſimilar practice. Suppoſe, for inſtance, a man was to bring a ſuit againſt his wife for the reſtitution of conjugal rights; in bar of that reſtitution, the woman may plead adultery or cruelty in the huſband, which is certainly a reaſon againſt admoniſhing her to return home to her huſband. But, my lords, this is not all that the court would do in ſuch a caſe; for ſhe having pleaded adultery, that plea becomes in fact a libel in the cauſe, and it will become a cauſe of adultery; and I have known within my memory, and ſince my attendance at the bar, inſtances of that ſort. In a caſe of *Mathews* and *Mathews*, determined in 1770, in the Conſiſtory of *London*, the wife pleaded adultery in bar to reſtitution; the cauſe went on in that ſuit, and there was a ſentence of divorce: would any body contend, that it was not as direct a ſentence of divorce, as if it had been ſo originally inſtituted? and in caſe either of thoſe parties had married again during that divorce, and an indictment had been preferred for polygamy, can it be contended that this ſentence of divorce would not be a defence under the proviſo in the body of the act?

My lords, another inſtance: ſuppoſe a man brings a ſuit for ſeparation by reaſon of adultery againſt his wife; the wife may recriminate, and may give in an allegation pleading adultery in the huſband. The prayer indeed on each ſide would be for a ſeparation; but there is a very conſiderable difference between a ſentence for ſeparation formed upon a crime being in the man or in the woman, whether it is at the ſuit of one or the other: but if the party that is defendant in the original ſuit ſhould go on and prove that adultery, and the plaintiff ſhould not, the defendant would be intitled not only to a diſmiſſion from the ſuit the plaintiff originally brought, but to a ſeparation upon account of the adultery pleaded by the defendant.

I mention theſe caſes to ſhew, that it is not enormous to ſuppoſe, that though the original queſtion might begin in a cauſe of jactitation, yet the marriage being pleaded, the ſentence either one way or the other is and muſt be as determinate as if the queſtion had originally been upon marriage. There is a caſe that was litigated in the Eccleſiaſtical Court not long ago, and which at the time was much talked of, and is well known; I mean the caſe of Mr. *Thomas Hervey*, who brought a ſuit of jactitation of marriage in the Conſiſtory Court of *London* againſt Mrs. *Hervey*. In that court a marriage was pleaded; the ſentence was againſt that marriage; the ſame was affirmed in the court of *Arches*; but when it was appealed to the court of *Delegates*, they reverſed this judgment, and pronounced for the marriage; pronounced not only that Mrs. *Hervey* was juſtified in her jactitation, but pronounced expreſly and directly for the marriage; and I believe nobody will doubt, but that marriage was as concluſively determined between them as if it had been originally a marriage cauſe, or a ſuit of nullity of marriage. That theſe ſentences have been held to be concluſive in the courts of common law where they have been offered, thoſe many inſtances that have been mentioned ſeem to me to put it out of all doubt.

It will not be improper to conſider what effect a ſentence of this ſort would have in the Eccleſiaſtical Court; and I ſhall contend, that while a ſentence of this ſort is exiſting, a wife could not be heard to have any claim upon her huſband; ſhe could not claim the reſtitution of conjugal rights; there is no light in which ſhe would be underſtood to be the wife until the marriage be again brought into queſtion. There is a caſe in print that ſeems to me to go exactly to the point I am now contending for; it is in the caſe of *Clews* and *Bathurſt*, which has been mentioned already to your lordſhips, as reported in *Strange* 968. But, my lords, that caſe is reported likewiſe in another book, a book lately publiſhed, which I am told is good authority, and the caſes well and correctly taken; it is called, *Caſes in the time of Lord Hardwicke*, and it is to be found in page 11. There the caſe is ſtated a little more at large; and a caſe is ſaid to be quoted by Dr. *Lee*, of *Melliſent* and *Melliſent* in the year 1718. In that caſe a woman had claimed to be the wife of a Mr. *Melliſent*. *Melliſent* libelled her in the Eccleſiaſtical Court in a jactitation of marriage. She pleaded a marriage, but failed in the proof; and there was a ſentence, I apprehend, of the ſame ſort as in this cauſe. After the death of her huſband the woman would have made out her right to the adminiſtration, and for that purpoſe ſhe pleaded her marriage; that muſt have originally began in the inferior court, and from the nature of the ſuit, I ſuppoſe, came from the Prerogative; but however, the determination I am alluding to was in the court of *Delegates*: it was determined, as there remained in force a ſentence which was a bar to her, ſhe could not be heard to make out her caſe as a widow to the deceaſed. Your lordſhips very well know, that though the Prerogative is an eccleſiaſtical court, yet the juriſdiction of that court is confined merely to probates and adminiſtrations, and it does not entertain cauſes of marriage. Mrs. *Melliſent* there claiming as the widow of the deceaſed in that court where the ſentence of the marriage could not be ſet aſide, it was held, there being a ſentence in a cauſe of jactitation, in which the marriage was pronounced againſt, ſhe could not claim as widow. In that caſe the Prerogative Court held the ſame, as we are contending your lordſhips will upon this occaſion.

There was another caſe in the Prerogative Court in the year 1771, lady *Mayo* againſt *Brown*. The queſtion aroſe upon an adminiſtration to *Gertrude Brown*, who died inteſtate. Adminiſtration had been granted to *Stephen Brown* as her huſband, he having married her in the year 1720. Afterwards that adminiſtration was called in by lady *Mayo*, a daughter by a former huſband; and ſhe contended that *Brown* had no right to that adminiſtration, inaſmuch as at the time he married *Gertrude* he was already the huſband of one *Eleanor Cutts*. In anſwer to that it was pleaded, that there had been a ſuit of jactitation of marriage brought by *Brown* againſt *Cutts*, in which the marriage was pronounced againſt, and he was pronounced to be free from all matrimonial contracts with *Eleanor*. In anſwer to that, another plea was given, ſtating that it was a colluſive ſuit; that they could ſhew fraud and colluſion. The admiſſion of this allegation came on to be debated before the judge of the Prerogative; and thus far the judge ſaid: There being a ſentence now in another court (this was in the Prerogative that had not juriſdiction of marriage, there being a Conſiſtory of *London)* by which it is pronounced that this perſon was free from matrimonial contract, this court cannot admit this allegation: and all proceedings in that court were ſtopped, that is, that allegation was not admitted, till the party, if ſhe thought proper, might go to the proper court to reverſe it. Nothing has been done in that cauſe ſince; and I conceive in all probabilityy never will: I apprehend thererefore that this ſentence, which is now under your lordſhips conſideration, muſt, as long as it remains in force, be held to be concluſive, for this reaſon; becauſe though it can be enquired into, yet it is not now even in a way of litigation; nothing has been done to repeal it, nor are there any ſteps towards it, but it remains in its full force.

My lords, the learned gentlemen who have gone before me have thought proper, in order to obviate any objections that may ariſe, to conſider what would be the caſe, ſuppoſing it ſhould be urged by the counſel on the other ſide, that the proſecutor would undertake to ſhew that this was a fraudulent ſentence, and obtained by colluſion. My lords, the reaſon of our mentioning that is, not on ſuppoſition or belief that there would come out any ſuch practices in the preſent cauſe, but that, taking it up as we do as a previous queſtion, it is our duty to conſider it even in the moſt diſadvantageous view, and to maintain, that in no caſe which they can ſuppoſe ought evidence to be received againſt the ſentence: and upon that head I apprehend that every argument which can be adduced to ſhew that the conſideration of truth or the want of truth in ſuch a ſentence ought not to be gone into by this court, may with equal propriety be applied againſt going into the queſtion of colluſion, becauſe that court which gave the ſentence is open to that enquiry, and, I apprehend, alone proper and competent to the purpoſe. How vague and unſatisfactory muſt be the enquiry of different courts proceeding upon different matter, different principles, even the terms made uſe of quite different! Should they enquire into the queſtion, whether the proceedings were fair or not, it may be productive of error. Suppoſe it ſhould be ſhewn in ſome particular that there was evidence ſupplied, how would it appear the judgment did depend upon that ground? Their entering into the proof of colluſion would be as ſtrongly exceptionable as their enquiring into the right or propriety of the ſentence, whether it was duly and rightfully pronounced by the judge, which is an exerciſe of juriſdiction which no independent court has over the ſentences or judgments of another. Your lordſhips are well acquainted, that there is no appellate juriſdiction in a criminal court over an eccleſiaſtical court; the queſtion can only be, whether that ſentence ſhall be received as final and concluſive: but the method in which it was obtained, whether it was rightly and duly pronounced, are very good queſtions for a court of appeal, which can reverſe that ſentence; but an enquiry into the method of obtaining it is improper, as long as the ſentence remains. If then a ſentence of this ſort will be held to be concluſive and ſatisfactory in all civil queſtions, and I conceive the authorities which have been quoted will be ſufficient to eſtabliſh that principle, ſurely it will much more ſtrongly apply to all criminal caſes; becauſe your lordſhips will ſee it to be the ſtrangeſt propoſition to maintain, that when a man or woman are not to be conſidered as huſband and wife to any civil purpoſe, yet they ſhall be ſo only for the purpoſe of puniſhment: this ſurely would be the greateſt abſurdity. Yet ſuppoſing the ſentence not repealed, which imports the man and woman are not huſband and wife; and ſuppoſe that be the general ſentence that ought to apply to them in every ſituation whatever, though the criminal juriſdiction ſhould go on to paſs cenſure upon the perſon accuſed (for that is all the criminal juriſdiction can do) that will not deſtroy the ſentence in the Eccleſiaſtical Court, and they will remain not huſband and wife, though the criminal court ſhould puniſh one of them for what is ſuppoſed a ſecond marriage.

My lords, I ſuppoſe it will not be contended, that a determination before a criminal judicature ought to have the effect of a determination directly upon the marriage: I apprehend, that in point of law it cannot be ſuppoſed it ſhould be ſo argued. Your lordſhips will ſee the injuſtice of ſuch a proceeding then would be prodigious, becauſe then a criminal juriſdiction muſt determine upon the rights of many perſons who have not a poſſibility of being heard. Keep their queſtion in the civil court, adhere to the determination of that court that has an original juriſdiction, there all parties might have been heard, and they may in future, if they can ſet up any intereſt; but a determination in a criminal court that might apply in the moſt remote degree to determine civil cauſes, would be the moſt manifeſt injuſtice, becauſe no perſons could be heard for their intereſt.

The queſtion for your lordſhips determination, if it ſhould be ever gone into, will be upon the marriage ſaid to be had with Mr. *Hervey*. Any determination here that may affect that right, may affect not only the perſons that were immediately the parties to that ſuit; but your lordſhips ſee many connections ariſe upon marriage, many relationſhips and new claims that may be precluded by ſuch a ſentence as this. Suppoſe the duke of *Kingſton* had had children by his marriage, it would be as much their intereſt to eſtabliſh this ſentence, as it would be of intereſt of any other to impeach it; and that ſuch rights as theſe ſhould be determined in a criminal juriſdiction where the parties cannot be heard, I apprehend, is a poſition that never was yet maintained.

Upon theſe principles I hope your lordſhips will be of opinion, that the rule ought to be applied as well to queſtions that can ariſe in criminal juriſdictions as in civil ones. That criminal courts have determined upon theſe principles, there are caſes which have been alluded to, and which are, I apprehend, extremely pertinent. One is the caſe of the king againſt *Vincent*, *Strange* 481, mentioned to be an indictment for forgery in having forged a will. The reporter ſays, forgery was proved, but the defendant produced a probate under the ſeal of the ordinary; and it was held, that that was ſatisfactory proof of the validity of the will. That is a very ſtrong caſe; but that there is no right to determine upon civil matters in ſuch a way as this, or even to prejudice civil matters, is very clear in that Report.

My lords, there is another caſe reported by the ſame author ſir *John Strange* 703, the king againſt *Rhodes*, that came before the *King's Bench*, when ſir *Robert Raymond* was the chief juſtice. That was upon an indictment likewiſe upon a forgery for having forged a will. That will had been proved in the eccleſiaſtical courts. My lords, it appears by this Report, that it was not only a probate in the common form, it was when there had been a long litigation in the eccleſiaſtical courts, and when by a decree of the court of *Delegates* the will was pronounced for. Upon application to the *King's Bench* for a *Habeas Corpus ad teſtificandum*, the court there decreed not to iſſue the writ for this reaſon, becauſe it appeared that there was then exiſting a direct ſentence for the will; and that ſentence, if it had been pleaded in bar to going into the queſtion of forgery, I apprehend, would have been allowed to be concluſive evidence: for the court ſaid, it was not fitting to determine the property on an indictment. It likewiſe appeared, that though there had been a ſentence of the court of *Delegates* pronouncing for the will, that yet there had been an application for a commiſſion of review; ſo that it was within the knowledge of the court that the cauſe was in a means of having a reviſion. But it was underſtood that the ſentence ſtill remained perfectly in force; for your lordſhips know perfectly well the difference between an appeal and an application for a commiſſion of review: in caſe of an appeal, the ſentence is ſuſpended, but not ſo on an application for a commiſſion of review. By the ſtatute of *Henry* VIII. it is provided, that the ſentence of the *Delegates* ſhall be final, and no appeal ſhall be had from them; but it is now indiſputable law that the king may by his royal prerogative, upon a perſonal application, and a ſpecial caſe laid, direct a commiſſion for reviewing the ſentence: but there is no appeal; the ſentence remains the ſame, unleſs the reviewers in their judgement ſhall think proper to reverſe it. In this caſe it appears, that there was then exiſting a full and direct ſentence upon the validity of that will. It was underſtood then that this right had been pleaded by the defendant, and the chief juſtice ſtopped the proceeding, and did not even grant that motion which was then ſent. Theſe two caſes, I am told, have been recognized again in that court in a very late caſe of a man who was executed for a forgery, one *Perry*; and I am told the judge at that trial offered to the priſoner to put off his trial, if he had a mind to make uſe of that plea: but I am told, it was not accepted by the priſoner, and the trial went on. But this I am ſure, no uſe can be made of that caſe to ſhew, that the former determinations were at all impeached by it; becauſe at leaſt, if the probate was not inſiſted on by the defendant, conſequently not over-ruled by the court, theſe caſes then remain in their full force. And I will aſk, in what manner they may be ſaid not to be applicable to the principle we are contending for, that in a criminal court caſes of this ſort ought not to be gone into? Will it be ſaid, that this being a proſecution under a ſpecial act of parliament, the crime conſiſts in having married two perſons, that the marriage muſt neceſſarily come under the conſideration of that court which is to determine? and they cannot by the act of parliament itſelf acquire an original juriſdiction to enquire into the right of marriage. Does not it apply exactly as ſtrong to the caſe I have now alluded to of forging a will? for it is by expreſs act of parliament made a felony of death to forge a will; and it may as well be argued from hence, that every criminal court has by that act acquired an original juriſdiction as to wills. It cannot be argued a moment, that a criminal court has original juriſdiction of marriage. I do not ſay, when it has not been determined before, but that the court muſt neceſſarily enquire into the fact; but that it cannot originally entertain ſuch a queſtion. Now there cannot be a caſe ſtated wherein a queſtion was between the parties upon the validity of their marriage and upon their ſtate of man and wife, to ſhew that it can be determined by a criminal court. If it cannot, I conceive clearly, it cannot be ſaid to have original juriſdiction upon the point, the fraud and colluſion; which, for the reaſon that has been given, it was thought proper to mention, leſt it ſhould be made uſe of upon the other ſide. It will be ſaid perhaps, that there are many inſtances where parties trying to avail themſelves of a judgment, or the ſentence of another court, of the adverſe parties being allowed to ſhew that thoſe ſentences were obtained colluſively: this diſtinction I conceive has been made. If any court ever is permitted to enquire into the queſtion, it muſt be a court having concurrent juriſdiction; and then your lordſhips will ſee the queſtion upon very different grounds; becauſe a court having concurrent juriſdiction has alſo the opportunities, all the methods of enquiring into the original queſtion. They being competent to determine the original point, it makes no conſiderable difference whether it comes before them at firſt, or whether it has before been determined by another court. It will not be contended, I conceive, that a criminal court has any concurrent juriſdiction with the Eccleſiaſtical Court. It clearly cannot be ſo; it can never entertain the abſtract queſtion between parties, whether they are man and wife or no. The only way it can be taken up is incidentally; and if the authorities are good to ſhew, that where an incidental queſtion ariſes, if it has been determined by a court having original juriſdiction, it ought to be concluſive, that will apply to the caſe now before the court. For theſe reaſons, and for thoſe that have been more weightily argued by the gentlemen who have gone before me, I hope your lordſhips will not think proper to recede from the eſtabliſhed and legal principles, or make a precedent on this occaſion. But if whatever has been, was upon the ſtrength of former determinations; and if there is good ground in law to ſay that this ſentence ought to be concluſive to the point to which it is now offered; I truſt your lordſhips will be of opinion that the proſecution ought not to be permitted to go into any evidence.

Doctor *Wynne*.

Notwithſtanding there has been ſo much and ſo ably ſaid upon this queſtion, I hope that the duty I owe to the noble perſon at your lordſhips bar, will plead my excuſe for offering a few words upon the ſame ſide, in ſupport of the ſentence of the Eccleſiaſtical Court, of the effect with a view to which it is now produced before your lordſhips.

My lords, the ducheſs of *Kingſton* is now upon her trial, upon an indictment found againſt her grounded on ſtatute 1 *Ja.* cap. 11, for that being the wife of *Auguſtus John Hervey*, ſhe married the duke of *Kingſton*, the ſaid *Auguſtus John Hervey*, her former huſband, being then alive. The foundation of this whole proceeding therefore is a marriage alledged in the indictment to have been had between the ducheſs of *Kingſton*, at that time Mrs. *Elizabeth Chudleigh*, and Mr. *Auguſtus Hervey*.

That marriage, my lords, is the only fact that can make any criminality in the preſent caſe; and if it ſhall appear to your lordſhips a fact, which has been already enquired into and decided upon; that it has been put in iſſue in that court which alone could properly take cognizance of it; that that court has pronounced its ſentence againſt the marriage then put in iſſue, or any matrimonial contract between Mr. *Hervey* and Mrs. *Chudleigh*, who were the parties to that ſuit; and that this ſentence ſtill remains in force; it is ſubmitted to your lordſhips to be impoſſible that thoſe who are proſecuting this indictment againſt her grace, can be allowed to go into an examination of witneſſes upon that marriage; it being a fact now decided by the legal ſentence of a proper court, and conſequently not the ſubject of that kind of evidence which the proſecutors are, we preſume, endeavouring to offer to your lordſhips upon it, as if it had been a queſtion upon which no ſentence had ever been given.

My lords, the ſentence, upon which we rely, was paſſed in the month of *February* 1769, and it recites all the proceedings had in that cauſe prior to the ſentence, and which are ſufficient, as we apprehend, to found that effect which we contend it ought to have before your lordſhips. The ſentence recites, that a ſuit had been brought by the ducheſs of *Kingſton* againſt Mr. *Hervey* for boaſting that he was her huſband; that Mr. *Hervey* appeared in that cauſe; that he admitted and juſtified the jactitation; and alledged, that he was well warranted in making ſuch jactitation, for that he was actually married to the lady: by that means they were at iſſue upon the fact. The ſentence goes on to ſay, that he had entirely failed in the proof of the marriage which he had pleaded and propounded; in conſequence of which the court pronounces Mrs. *Chudleigh* to be entirely free from all matrimonial contract, and particularly with the ſaid Mr. *Hervey*, *ſo far as to us as yet appears*; and upon that goes on to admoniſh him to ceaſe from farther jactitating in that behalf. The queſtion now for your lordſhips conſideration therefore is, what is the effect of that ſentence? And I contend, that in the way in which this cauſe was proceeded in, it is as deciſive, as abſolute a ſentence againſt the marriage, as the Eccleſiaſtical Court has power to give.

If the party who is accuſed in ſuch a ſuit does not juſtify the jactitation by pleading a marriage, it is otherwiſe; for in that caſe, whether the fact of jactitation is admitted or denied, the ſentence is only upon the jactitation, not upon the marriage. If the jactitation is admitted, and is not juſtified, the party is admoniſhed to do ſo no more: if the jactitation is denied, the only queſtion before the court is, did the party jactitate or not? and if the jactitation is proved, the ſentence is the ſame, *viz.* a monition to ceaſe from doing ſo for the future. But if the party cited confeſſes the jactitation, and juſtifies it by pleading that he or ſhe was and is actually and lawfully married to the other party who has brought the ſuit, it is no longer a cauſe of jactitation, it is as much and as directly a marriage cauſe as a cauſe of nullity of marriage, or a cauſe for reſtitution of conjugal rights. It is as abſolute and deciſive proof of this, in my humble apprehenſion, that if the party cited in a cauſe of jactitation pleads and proves a marriage, the court does not in that caſe diſmiſs, and ſay, The party it is true jactitated, and had a ground for jactitating, therefore we diſmiſs: no, the court pronounces for the marriage. And I take it to be moſt clear, that ſuch a ſentence having been pronounced in any eccleſiaſtical court, if the party cited ſhould immediately pray reſtitution of conjugal rights, the court will grant its monition grounded upon that ſentence, that the parties who were proved to have been lawfully married, ſhould cohabit and perform the duties of their marriage. It will not I preſume be contended, that any court can deal ſo very unequal a meaſure of juſtice between parties, as to ſay, If a marriage is proved, we will pronounce for it; and yet in a cauſe of exactly the ſame nature, if a party pleads a marriage, and fails in the proof of it, we will not pronounce againſt it. The ſuppoſition is abſurd and ſhocking to common ſenſe; and it is impoſſible that ſuch a cauſe as a cauſe of jactitation could ever have been in uſe, if the party who brought it might loſe his cauſe, and be engaged in a marriage he was deſirous to avoid, but could never obtain any ſentence againſt the party jactitating, that would have any legal effect. It is impoſſible, with great deference to your lordſhips, that ſuch doctrine ſhould ever have obtained; but the truth is directly the reverſe, and in all courts where theſe ſentences againſt a marriage in a cauſe of jactitation have been produced, they have been allowed to be as deciſive as any ſentence in an eccleſiaſtical court in a marriage cauſe could be. In the caſe of *Jones* and *Bow*, reported in *Carthew*, it is expreſly ſaid, that it was a cauſe of jactitation. In the caſe of *Claws* and *Bathurſt*, which has been mentioned to your lordſhips, it was a cauſe of jactitation; and I rather rely upon that caſe, becauſe it appears by the report of it in the book intitled *Caſes in lord* Hardwicke's *time*, p. 11. *H. l.* 7. *Geo.* II. that it was attended by as able a civilian as any of his time, doctor *Lee*, afterwards dean of the *Arches:* he argued in that cauſe, that a ſentence againſt a marriage in a cauſe of jactitation is an abſolute and deciſive ſentence. And it appears from the Report, that he quoted another caſe, which was that of *Melliſent* and *Melliſent*; in which it had been ſo held in the court of *Delegates*, which your lordſhips know is a court of appeal in eccleſiaſtical cauſes, in which there are both judges of the common law and civilians. The caſe which was laſt alluded to, and which was in the Prerogative Court, your lordſhips will allow me to ſtate a little more fully, becauſe it will ſhew the opinion of the great judge who now preſides in that court. It was upon the right of adminiſtration to one Mrs. *Gertrude Brown*. The queſtion was between *Stephen Brown*, who alledged himſelf to be the huſband, and the lady viſcounteſs *Mayo*, the daughter of the deceaſed by a former huſband. The marriage between *Brown* and Mrs. *Aylemore*, which was the deceaſed's former name, was not denied; but lady *Mayo* inſiſted, that at the time of the marriage with Mrs. *Aylemore*, Mr. *Brown* had another wife at that time living, whoſe name was *Eleanor Cutts*. Mr. *Brown* to that replied, that he had brought a cauſe of jactitation in the Conſiſtory Court of *London* againſt Mrs. *Eleanor Cutts*, and that ſentence had been pronounced exactly as in the preſent caſe, and that he was free of all matrimonial contracts with ſaid *Elizabeth Cutts*. Lady *Mayo* then offered an allegation, in which ſhe pleaded, that the ſentence in ſuch cauſe of jactitation had been obtained by colluſion; and annexed to that allegation ſhe exhibited many letters between *Stephen Brown* and *Elizabeth Cutts*, by which it appeared, that after the date of the ſentence they had correſponded together; that he had acknowledged himſelf to be her huſband in ſeveral of theſe letters, but told her it would be exceedingly inconvenient to his affairs, and entirely deſtroy his claim to the adminiſtration of Mrs. *Aylemore*, which was of ſome conſiderable value to him, if his marriage with Mrs. *Cutts* was known, and therefore deſired her to be ſilent, and not give him any further trouble: that was the effect of lady *Mayo*'s allegation. The moment that allegation was brought into court, the proctor for *Brown* deſired that the proctor for lady *Mayo* might be aſked, whether he confeſſed or denied the ſubſcription of the officer who authenticated the copy of the ſentence given in the cauſe of jactitation? which being confeſſed, and the ſentence by that means regularly proved, the judge ſaid he could go no farther; he could not enquire upon what grounds that ſentence was given, but would give a time to the party, if ſhe thought it for her intereſt to apply to the Conſiſtory Court of *London*, and ſee whether that ſentence could be reverſed; but it was held, that ſo long as it remained in force, it was deciſive upon the queſtion of the marriage, and abſolutely binding upon the judge of the Prerogative Court.

This being the caſe then, the queſtion for your lordſhips conſideration now is, what effect the ſentence given in the Conſiſtory Court of *London* in 1769, in the cauſe of jactitation of marriage brought by the ducheſs of *Kingſton*, then Mrs. *Elizabeth Chudleigh*, againſt Mr. *Hervey*, ſhould have in the preſent cauſe before your lordſhips? My lords, it would be a very unpardonable waſte of your lordſhips time, at this hour of the day, for me to take up a moment of it in arguing, that marriage is by the law and conſtitution of this country of eccleſiaſtical cognizance. There cannot be a doubt, that if there be any impediment to the marriage of two people living together as man and wife, that if one of the parties denies either the fact or validity of the marriage, that if one of the parties refuſes to perform the duties of it by cohabitation, that if one of the parties treats the other with intolerable ſeverity, that if a perſon boaſts of a marriage which he cannot juſtify, or if ſome kind of contract or ſolemnity paſſed between parties which may occaſion a doubt whether it amounts to a lawful marriage or not; in every one of theſe caſes the Eccleſiaſtical Court has cognizance to decide upon the queſtions that ariſe; and it is a denial of juſtice to refuſe it, and would be a juſt ground of appeal to a ſuperior court.

It is true, that in ſome caſes where a marriage is brought not directly, but collaterally and conſequentially in queſtion, as where it is a queſtion of legitimacy in order to make a title to an inheritance, it may originally commence in the temporal courts, and ſometimes is finally determined there; as in the caſe of what is by common law called ſpecial baſtardy, that is, where there is no doubt about the marriage, but about the priority or poſteriority of the birth of the party who is claiming the inheritance to that marriage; there, it being a mere matter of fact, whether the perſon was born before marriage or after, it is proper for the jury to determine; and there is no need of the interpoſition of the Eccleſiaſtical Court at all. So in other caſes, where the matter begins as a queſtion upon an inheritance. A perſon makes a claim to an inheritance as being the lawful ſon of *A.* and *B.* If the parties to the marriage or one of them be dead, the application muſt be made originally in this caſe to the temporal courts, and they will proceed in it, and will either determine it finally, or direct a caſe to the ordinary to certify upon the marriage, according as they find it neceſſary to do, and according as any queſtion ariſes upon the legality of the marriage or not. But even in this caſe, which is merely a queſtion upon a right to an inheritance, and not between parties to a marriage, but between parties claiming under a marriage, if one of them produces a ſentence formerly given upon the marriage by the Eccleſiaſtical Court in the life-time of the parties to ſuch marriage, the moment that ſentence is produced, the court of common law is eſtopped; and notwithſtanding the original parties to that ſentence are dead, the parties to the ſuit upon the inheritance muſt ſtill have recourſe to the Eccleſiaſtical Court to repeal the ſentence formerly given upon the marriage, before the temporal court can proceed a ſtep further: and if this ſentence of the Eccleſiaſtical Court is not ſet aſide, the judgment of the temporal court muſt be agreeable to that ſentence. The caſes of *Bunting* and *Leppingwell*, and *Kenn*'s caſe, reported by lord *Coke*, are deciſive upon this point: and it would, I ſhould conceive, in framing your opinion upon the credit due to the doctrine laid down in theſe caſes, be worth one moment's conſideration at what time the lateſt of them was determined. *Kenn*'s caſe was in the fifth of king *James* the firſt. Your lordſhips know extremely well, that was a time when the different juriſdictions of the temporal and eccleſiaſtical courts were not ſo completely ſettled, or at leaſt that ſettlement was not ſo completely acquieſced in, on the part of the eccleſiaſtical courts then, as it has been ſince: they did frequently deſire to arrogate to themſelves more juriſdiction than the temporal courts were willing to allow; and the conſequence of that was, they were very frequently withſtood. This produced a complaint to the privy-council in the 3d of king *James* I. when archbiſhop *Bancroft*, in the name of the whole clergy, exhibited a ſet of articles againſt the judges of the realm (as lord *Coke* expreſſes it, 2d *Inſt.* 601.) intitled, 'certain articles of abuſes which are deſired to be reformed in granting prohibitions.' Theſe articles were delivered to the judges, who in the 4th of king *James* made their reply to them; in which they juſtified the proceedings objected to by the archbiſhop in every particular, and that not without ſome conſiderable degree of warmth and reſentment. Now, with great deference to your lordſhips, I ſhould conceive, that a reſolution ſolemnly and unanimouſly made by the two chief juſtices and five other judges of the common law in the very next year after ſuch a diſpute as this had been carried on between the two juriſdictions, cannot well be ſuſpected of partiality to the Eccleſiaſtical Court: and lord chief juſtice *Coke*, who was one of the court, was not a judge that would at any time have ſtood up for their encroachments; and therefore there is not the leaſt room to apprehend, that there was any undue or improper degree of authority attributed by that reſolution of the judges to ſentences of the eccleſiaſtical courts.

My lords, this caſe of *Kenn*, which is reported 7 *Coke*, 43, has been already opened to your lordſhips: but it being in my apprehenſion extremely material in this cauſe, containing the whole learning that is to be met with in the book upon the ſubject, and going the whole length, as I humbly ſubmit to your lordſhips it does, that it is our buſineſs to contend for in behalf of the noble perſon at the bar, your lordſhips will not perhaps think it miſpent time in me to ſtate it more particularly. It was a caſe in the court of *Wards*, in which *Thomas Robertſon* and *Elizabeth* his wife were plaintiffs, and *Florence* lady *Stallenge* defendant. The caſe was, that *Chriſtopher Kenn de facto* took to wife *Elizabeth Stowell*, and had iſſue by her *Martha*; ſoon after this, there appears to have been a ſuit brought in the court of *Audience*, in which the judgment given was in theſe words: *prætenſum contractum et matrimonium inter* Chr. Kenn *et* Eliz. Stowel *in minore ætate eorundem aut eorum alterius habitum fuiſſe: eoſdemque* Chr. *et* Eliz. *tam tempore ſolemnizationis dicti matrimonii quam etiam continuo poſtea, eidem matrimonio diſſenſiſſe, ac eo prætextu hujuſmodi matrimonium irritum et invalidum fuiſſe: necnon antedictos* Chr. Kenn *et* Eliz. Stowel *ab dicto matrimonio ſeparandos et divorciandos fore pronunciamus, eoſque ſeparamus et divorciamus, iiſdemque* Chr. *et* Eliz. *libertatem ad alia vota convolandi concedimus per hanc ſententiam noſtram definitivam.*

My lords, after this *Kenn* married another wife, *Elizabeth Beckwith*; and after this it appears that *Elizabeth Beckwith* brought a ſuit before the commiſſioners eccleſiaſtical to enquire again into the validity of the marriage between *Chriſtopher Kenn* and *Elizabeth Stowell:* there that marriage was again pronounced againſt, and the marriage of *Chriſtopher Kenn* with *Elizabeth Beckwith* was affirmed. Then *Elizabeth Beckwith* died, and *Chriſtopher Kenn* married *Florence*, by whom he had iſſue *Elizabeth*, and then died. At laſt the queſtion came on between the iſſue of *Chriſtopher Kenn* by *Florence*, and *Martha* the iſſue of ſaid *Chriſtopher Kenn* by his firſt wife *Elizabeth Stowell*, who deſired ſhe might be permitted to aver againſt the ſentence formerly given againſt the marriage between *Chriſtopher Kenn* and *Elizabeth Stowell*, declaring that ſhe could prove, that the whole was founded on an abſolute falſehood; and that thoſe parties, who are declared by the ſentence of the Eccleſiaſtical Court to have been married in their minority, and to have diſſented to the marriage in the moment it was ſolemnized, and ever after, had cohabited as huſband and wife for ten years, and haid ſſue *Martha*, the party before the court. This the ſaid party averred, and undertook to prove in the court of *Wards*, in order to avoid the effect of the ſentence of the Eccleſiaſtical Court againſt the marriage between her father and mother. But it was reſolved by all the juſtices and barons, that the ſaid ſentence ſhould conclude as long as it remained in force. And in anſwer to the averment that the ſentence was founded upon falſe facts, they ſaid, that though the eccleſiaſtical judge ſheweth the cauſe of his ſentence, yet foraſmuch as he is judge of the original matter, the loyalty of matrimony, we ſhall never examine the cauſe, whether it were true or not: for of things the cognizance whereof belongeth to the Eccleſiaſtical Court, we muſt give credit to their ſentences, as they give to the judgments in our courts. In that ſame caſe it was, that lord *Coke* quoted the caſe of *Corbett*, and there there had been no ſentence in the Eccleſiaſtical Court: that originally began upon the queſtion of a right to an inheritance; and the party who claimed the inheritance was adviſed to bring a ſuit in the Eccleſiaſtical Court then againſt a woman who jactitated, as he ſaid, of an undue marriage with his elder brother. The party againſt whom this ſuit was brought in the Eccleſiaſtical Court applied for a prohibition, and the temporal court granted it; for they ſaid, There is no ſentence of the Eccleſiaſtical Court in this caſe for you to reverſe, no ſentence has been given; therefore we will enquire, as far as we ſee we can do without interfering in matters of mere eccleſiaſtical cognizance, reſpecting the loyalty of the marriage; and we may direct the ordinary to certify hereafter, if there is a neceſſity for it; but there is no need to apply to the Eccleſiaſtical Court in the preſent ſtate of the caſe.

In exact conformity to this principle, it was reſolved by the judges of the common law in the caſe of *Bunting* and *Leppingwell*, 4th *Coke*, 29, Foraſmuch as the cognizance of the right of marriage doth belong to the Eccleſiaſtical Court, and the ſame court hath given ſentence in this caſe, the judges of our law ought (although it be againſt the reaſon of our law) to give faith and credit to their proceedings and ſentences, and ſo always have the judges of our law done: and ſo it was reſolved, that the plaintiff was legitimate and no baſtard.

This is the light in which the ſentences of the eccleſiaſtical courts, given in matters properly within their cognizance, were conſidered in the courts of common law at the time when the caſes I have juſt referred to were determined; and there is ſuch a train of caſes exactly conformable to them down to very modern times, which have been already quoted, and therefore I will not trouble your lordſhips with repeating them, that I cannot help thinking it muſt be looked upon as a point abſolutely ſettled and at reſt.

But, my lords, not to reſt the matter merely upon authority, however ſtrong, if your lordſhips conſider the grounds upon which theſe determinations were made, I apprehend they will be founded, not only in juſtice, but in abſolute neceſſity; and that the confuſion would have been ſo infinitely great, if, admitting different courts to take cognizance of different matters, their ſentences ſhould not be allowed to take effect when they were given, but the matter might be examined over again, and a different ſentence given in another court, the former ſentence remaining unrepealed, that there would be no poſſibility of enduring ſuch a practice. Conſider for a moment what effect it would have. Suppoſe a man to have brought a ſuit for jactitation of marriage againſt a woman in the proper eccleſiaſtical court; that ſhe ſhould plead her marriage by way of juſtification, and obtain a ſentence for it: the man dies inteſtate after that, and ſhe applies to the Prerogative Court for an adminiſtration as the widow: the next of kin of the deceaſed appears there, and denies her to be the lawful widow; in proof of which ſhe produces the ſentence: is the Prerogative Court to give credit to this ſentence or not? If it is to give credit to it, (as it does daily) the reaſon is, becauſe it binds univerſally as long as it is in force; for, though they are both eccleſiaſtical courts, there is no more privity between the Prerogative Court and the Conſiſtory Court of any dioceſe, than between the Prerogative and the court of *King's Bench*. The Prerogative Court has the mere cognizance over probate and adminiſtration; and therefore if univerſal credit is not due to the ſentence of the court which pronounced for the validity of the marriage, the Prerogative Court muſt in the caſe ſuppoſed go into the queſtion over again, whether the party deceaſed and the party claiming to be his widow were married or not married. The Prerogative Court is an eccleſiaſtical court, and proceeds upon the ſame rules, ſo far as they are applicable; it proceeds in the ſame manner by allegation and by written evidence; the judge is a perſon bred in the ſame profeſſion; and the practicers are the ſame with thoſe that practiſe in the Conſiſtory Court of *London*; and therefore there is a probability that the Prerogative Court in this caſe might agree with the judge of the Conſiſtory in opinion that the marriage was a good one, and conſequently decree the adminiſtration to the party praying it as the widow. What would be the conſequence of that? Why, the party would have had two law-ſuits inſtead of one, and have got by them two pieces of paper called ſentences for her marriage, and letters of adminiſtration, but ſhe would not be a bit the nearer getting poſſeſſion of the deceaſed's effects. For theſe ſhe muſt apply to a court of common law; and there, according to this doctrine, the firſt perſon ſhe is obliged to bring an action againſt will be at liberty to ſay, Who are you?—The adminiſtratrix and widow.—No, I deny that: it is true, you have obtained a ſentence for your marriage and an adminiſtration from the Prerogative Court as the widow; but thoſe ſentences were founded upon falſe facts: therefore I object to them, and deſire there may be a third ſuit, to have it inquired into in this court, whether there was a real marriage or not. Now, ſuppoſing that in this third ſuit a jury ſhould be of a different opinion from the two former courts, what would be the conſequence? Why, that the party who brought a ſuit for a debt would be non-ſuited: ſo that here would be a legal adminiſtration ſubſiſting (unleſs the court in which the action was brought could repeal it and grant a new one, a power which I believe no temporal court has ever yet exerciſed) but the hands of the adminiſtrator would be abſolutely tied up, the effects could never be adminiſtered, the debts of the teſtator could never be called in, the eſtate could never be diſtributed. Your lordſhips ſee plainly that the confuſion would be ſo extreme, if this doctrine was to prevail, that no error in a ſentence, however apparent, nor any inconvenience ariſing from it to particular perſons, however great, can be a ſufficient cauſe for any court to examine into the merits of a ſentence given in a matter of which itſelf has no legal cognizance; and that there is the utmoſt wiſdom in thoſe reſolutions which declare, that there is an implicit credit due from all other courts to the ſentences of courts having the proper juriſdiction over the matter in which the ſentence has been pronounced.

My lords, the caſes that I have hitherto mentioned and alluded to have been all in civil cauſes. Will it be ſaid, that the queſtion now before your lordſhips, being in a criminal cauſe, that varies the caſe? and, that although a ſentence of the Eccleſiaſtical Court would be binding and concluſive evidence in a civil cauſe, yet in a criminal cauſe it would not have the ſame effect? My lords, the ſame effect I can very readily agree that, according to my poor notions of law and juſtice, it would not have; but I ſhould think it would have ten times greater: and I cannot conceive it poſſible, that it can be held in any caſe, or in any country in the world, that a ſentence, which would be held to be concluſive evidence to avoid a civil demand againſt a perſon, would not be held to be concluſive evidence and defence againſt a criminal proſecution: I cannot conceive that to be poſſible. *In pœnalibus cauſis benignius interpretandum eſt*, is a maxim of univerſal law. Undoubtedly it is the buſineſs of all criminal judicatures to enquire ſtrictly into crimes; to puniſh thoſe acts which the law has made criminal, and which are legally proved; but courts of law do not ſtrain points in order to make crimes, and inflict puniſhments; it never was ſo contended: and I do conceive that many inſtances might be enumerated by thoſe who are converſant in the practice of the criminal law, which I am not in the leaſt, in which parties proſecuted are indulged with peculiar privileges. I believe that they are not bound by their firſt plea. If a party has been ill-adviſed in his plea, he is bound down by that in a civil cauſe; but in criminal proſecutions the priſoner may plead over and over again, and is allowed to avail himſelf of every nicety in the law to avoid conviction.

Upon theſe grounds therefore I hope it will appear to your lordſhips to be moſt clear, that the ſentence of the Eccleſiaſtical Court always has been eſteemed and muſt be allowed to be final, to be the only evidence that can be received concerning the fact upon which it has been pronounced, and that the fact is no longer the legal object of enquiry by any other court. I do apprehend this to be ſo clearly and fully eſtabliſhed, that I can ſcarce conceive that the gentlemen will deny it; but I apprehend and do expect that they will endeavour to find a diſtinction. And they will ſay, Though we ſhould admit your rule, that the ſentence of an eccleſiaſtical court is binding ſo long as it ſubſiſts in general, yet if that ſentence was obtained by colluſion and fraud, it is otherwiſe; and if it can be proved to have been ſo obtained, it will immediately loſe its effect. I expect we ſhall be ſo told; and I do admit, that to maintain our preſent point, which is, that the ſentence is concluſive evidence, we muſt ſay that it is a rule without any exception; we muſt ſay, that colluſion in obtaining the ſentence would not give your lordſhips any juriſdiction to enquire into the fact: and I do, with great ſubmiſſion, contend before your lordſhips, that no court which has not an abſolute and an entire juriſdiction over a fact, as much as the former court had, can take cognizance of a matter that has been already decided upon in that former court, upon a ſuggeſtion or even proof that colluſion was uſed in obtaining the former ſentence. I may, and I am afraid I ſhall, talk very ignorantly reſpecting thoſe caſes in which the courts of common law take cognizance of matters which have been already decided upon by other courts, upon proof that the deciſion was obtained by fraud and colluſion of the parties at that time before the court. I own I am by no means maſter of that ſubject; but I apprehend they are only in ſuch caſes where each court, ſuppoſe the court of *King's Bench* and *Common Pleas*, or any other, has an entire concurrence of juriſdiction; where there was an option in the parties to commence the ſuit originally either in one court or the other, and where the effect of the ſentence of the two courts would be perfectly equal. In ſuch a caſe, if after ſentence given in one of thoſe courts application ſhould be made to the other to rehear the matter, on proof that the former deciſion was not fairly obtained, this might be a juſt ground for the court to which proof of the fraud is offered, to ſay, We will hear the matter over again, which we had a right to have heard as well as the other court had, had it not been that the cauſe was commenced with them: but I apprehend no court can do this, the ſentence of which, when it is given, will not have the ſame legal effect to the full as the ſentence of the former court. Nor can it be ſaid that this court, high and auguſt as it is, or any other court of criminal juriſdiction, can give a ſentence upon a marriage, which will have all the effects that the ſentence of the Eccleſiaſtical Court will have. Strip the queſtion of its circumſtances, and let it be aſked ſimply, Has the houſe of lords a power to try the validity of a marriage? Every body will ſay at once, It has not. Allow me to conſider what would be the conſequence if your lordſhips were to take cognizance of this matter, and were, notwithſtanding the ſentence of the Eccleſiaſtical Court, upon the ſuggeſtion of colluſion, or any other ſuggeſtion, to ſay, We are not barred by it, we will go into it; and that the party tried under ſuch circumſtances ſhould be convicted of polygamy: what would be the conſequence of that? Would it ſet aſide the ſecond marriage? I take it moſt clearly it would not. Suppoſe that after the wife had been convicted of polygamy for marrying *B.* in the life-time of *A.* her former huſband (a ſentence againſt her marriage with *A.* having firſt been obtained in the Eccleſiaſtical Court) ſhe ſhould by any means become entitled to a fortune, by legitimacy or otherwiſe, would not *B.* have a right to demand the legacy, or any other effects that came to the woman ſubſequent to the conviction? I ſubmit to your lordſhips, he certainly would. Suppoſe *B.* to die inteſtate, might not the wife, notwithſtanding ſuch a conviction as this, pray the adminiſtration to his effects? and if her intereſt as widow was denied, as having been the wife of *A.* at the time ſhe married *B.* and ſhe in reply to this ſhould produce the ſentence in the Eccleſiaſtical Court againſt her marriage with *A.* bearing date prior to her marriage with *B.* the court could not refuſe to grant adminiſtration to her. Suppoſe that after the conviction the parties to the ſecond marriage ſhould continue to cohabit, and ſhould have children, would not they be entitled to the inheritance as the legitimate iſſue of the ſecond marriage? I take it, that under the authority of the caſes of *Bunting* and *Leppingwell*, *Kenn*, and the reſt that have been ſince determined conformably to thoſe caſes, there cannot be a doubt that they would, if a queſtion ſhould ariſe upon the right to the inheritance in a court of common law, ſo long as the eccleſiaſtical ſentence againſt the firſt marriage remained in force: in ſhort, the conviction would have no operation at all upon any civil effect of the ſecond marriage. The conſequence therefore of proceeding to convict for polygamy for a ſecond marriage, in a caſe where there had been a ſentence of the proper eccleſiaſtical court againſt the firſt, would be, that a woman who had been convicted of felony for marrying, might under that criminal act (as it would then be pronounced to be) derive to herſelf all the privileges and advantages that accrue to a wife in the fortune of her huſband by a lawful marriage, and convey a title to her iſſue to the greateſt honours and eſtate in the kingdom. Theſe are ſuch glaring contradictions and abſurdities, as I ſhould with great deference apprehend that neither your lordſhips, nor any other court of juſtice, would give occaſion to, without the utmoſt reluctance. There is a caſe or two which have not yet been mentioned, and which appear to me to be extremely material, to ſhew the extraordinary and unuſual ſteps that have been ſometimes taken by courts, and in caſes extremely ſimilar to the preſent, to avoid a contrariety of ſentences of courts having different and diſtinct juriſdiction. In the caſe of *Boyle* and *Boyle*, in the *King's Bench* in 1687, reported 3d *Mod.* 164. a libel was admitted in the Spiritual Court againſt a woman *cauſa jact tationis maritagii.* The woman prayed a prohibition to the Eccleſiaſtical Court; and the ſuggeſtion was, that this perſon, who now libelled againſt her in a cauſe of jactitation, had been indicted at the ſeſſions in the *Old-Bailey* for marrying her, he having a wife then living; that he was thereupon convicted, and had judgment to be burnt in the hand; that therefore they had no right to proceed, and therefore a prohibition was prayed. Serjeant *Levinz* in that caſe moved for a conſultation, becauſe no court but the Eccleſiaſtical Court can examine the marriage. Upon the contrary it was ſaid, that if a prohibition ſhould not go, then the authority of theſe two courts would interſere, which might be a thing of ill conſequence: that if the lawfulneſs of this marriage had been firſt tried in the court chriſtian, the other court at the *Old-Bailey* would have given credit to their ſentence, and upon this ground and this principle merely, that there might be a contrariety of ſentences, which would be miſchievous. The court went certainly a great way, for it prohibited the Eccleſiaſtical Court from proceeding in a marriage cauſe *inter vivos*, of which it has the cleareſt and moſt uncontroverted juriſdiction.

My lords, another caſe was that of *Furſman* and *Furſman*, which began in the Conſiſtory Court of *Exeter*: it was a cauſe of reſtitution of conjugal rights brought by the woman. The libel was admitted; and then there was an appeal to the court of *Arches*. The judge pronounced for the appeal, and was proceeding upon the merits of the cauſe; but upon the 4th of *November* 1727, he was ſerved with a prohibition. And the ground for obtaining this prohibition was, that *Sarah Furſman*, pretending to be the lawful wife of the ſaid *Furſman*, had indicted him for bigamy in marrying another wife, and failed in proof of her own marriage; whereupon the ſaid *Furſman* was acquitted; and therefore it was ſaid the Eccleſiaſtical Court ſhould not proceed. Now, my lords, if a prior judgment given by a court, in a matter in which it can have only an incidental partial juriſdiction, is a ſufficient cauſe for ſtopping all ſubſequent proceeding in the ſame caſe, even in the court which has the entire ordinary juriſdiction over the queſtion, on account of the ill conſequence that would enſue from the interference of the authority of the two courts; ſurely, by all parity of reaſoning, in a caſe where it appears that the court, which the law and conſtitution have entruſted with the entire juriſdiction over the matter in queſtion, has already taken cognizance of it and pronounced its ſentence, the court of incidental juriſdiction will give credit to ſuch ſentence, and conform its own ſentence to it.

If the ill conſequences ariſing from claſhing and contradictory judgments of different courts may be allowed to have any influence upon your lordſhips judgment in this matter, there is no need to rack the invention for circumſtances that might happen: the caſe before your lordſhips need but be plainly ſtated, to ſhew thoſe inconveniencies in the ſtrongeſt light. The ſentence of the Eccleſiaſtical Court pronouncing and declaring the noble priſoner to be free from all matrimonial contracts with Mr. *Hervey*, was given in *February* 1769: ſoon after, ſhe married the duke of *Kingſton* under the diſpenſation that is uſually granted for the marriage of perſons of that rank. Under this marriage the duke and ducheſs cohabited between four and five years as huſband and wife; at the expiration of which the duke of *Kingſton* died, having firſt made his will, by which he gave the moſt affectionate and moſt honourable teſtimony of his conſidering her as his wife. At laſt, in *July* 1775, comes a bill of indictment, which is to ſet the ſentence of the Eccleſiaſtical Court entirely at nought, and to brand this open and ſolemn marriage, confirmed by a cohabitation and reputation of ſo many years, with the name of a felony.

My lords, if this indictment ſhould be proceeded upon, and the fact of the firſt marriage found differently from what appeared to the chancellor of *London* at the time of pronouncing his ſentence upon it, the confuſion, the ſcandal (I think I may venture to call it) that would ariſe from the contrariety of the two ſentences that would then be pronounced, and both ſtill in force, would be ſuch, that I cannot conceive that any court of juſtice would hazard it, upon any ſuggeſtion or apprehenſion of error in the former ſentence, or fraud in obtaining it, and which was irremediable by any other means, or any other the moſt ſtriking or plauſible argument that could be urged to induce them to it. But the plea of the neceſſity of doing an extraordinary act to ſet aſide an improper ſentence, or the effect of ſuch a ſentence, is certainly leſs applicable to the Eccleſiaſtical Court, than to any other court known in this kingdom; and leaſt of all is it applicable to their proceedings in marriage cauſes. There is a courſe of appeal in the eccleſiaſtical courts, a deliberation in their proceedings, that is unknown to any court in this kingdom; from the archidiaconal court (if the cauſe be originally inſtituted there) to the conſiſtory of the dioceſe; from thence to the metropolitical court, which is the court of *Arches*; from thence to the king in his court of *Chancery*; from which a commiſſion of *Delegates*, to hear appeals, iſſues *ex debito juſtitiæ:* in every one of theſe courts the parties are not bound down to what has been given in evidence in the court below: it is not merely error in law, but error in fact likewiſe may be corrected upon appeal in the Eccleſiaſtical Court; and if there are any facts material to the point in iſſue, that have not been pleaded and examined to in the inferior court, they may be pleaded and given in evidence in the Court of Appeal; and ſo down to the laſt court. Beſides this, in every one of theſe courts it is not a matter confined to the two parties that inſtitute the ſuit, and therefore may carry it on colluſively; for in any period of the cauſe a third perſon, that has any intereſt in the matter in queſtion, if he ſees that the two original parties are colluding, or that one of them is negligent, or if he has any other reaſon to be diſſatisfied with the manner in which the buſineſs is conducted, he may intervene for his intereſt, and the court muſt *ex debito juſtitiæ* admit him to do ſo; he may give in a plea, if he intervenes before the cauſe is concluded; he may examine his own witneſſes, and act in all reſpects as a party in the cauſe. What poſſible human means of providing againſt colluſion and ſurprize is omitted out of this method of proceeding! But, my lords, even this is not all; for when the cauſe has run this great length, application may be made to his majeſty in council, who, if he is adviſed that there is a ground for it, has a power *ex gratia* to grant a commiſſion to review the whole matter over again. From this view of the method of proceeding in eccleſiaſtical courts, I apprehend it will appear to your lordſhips, that they are not ſo ill provided with means either to avoid, or to reform errors in their judgments, as to ſtand in need of the extraordinary interpoſition of other courts, in any matters that are properly within their juriſdiction; but leaſt of all is this neceſſary in a marriage cauſe, for a marriage cauſe is never at an end: let the cauſe have been argued ever ſo often, let it have been ſifted with the moſt ſcrupulous exactneſs and attention, let there have been one or more appeals, let every ſtep have been taken that can be taken to give a final and concluſive judgment, ſtill the ſame party may come before the court, and ſay, The court has been impoſed upon; I deſire this matter may be examined over again. The court, upon ſuch application, would and muſt take cognizance of it.

I will trouble your lordſhips with quoting but one authority for this, which is that of *Sanchez* in his treatiſe *de Matrimonio*, *lib.* 7. *diſp.* 100. *c.* 1. who lays it down in theſe poſitive and explicit terms: '*Id in matrimonio ſpeciale eſt, ut ſententia in conjugali cauſa lata, quacunque circumſpectione præmiſſa, ſive bis ab ea provocatum fuerit confirmataque ſit, ſive lapſus terminus ad appellandum ſit, nunquam tranſeat in rem judicatam, ac proinde non ita efficacem auctoritatem ſortiatur, quin retractanda ſit, quoties compertum fuerit eam errore quodam latam fuiſſe.*' And the reaſon aſſigned for making this material and ſingular diſtinction between marriage cauſes and all other cauſes is, that in general the conſent of the party who does not appeal from a ſentence which is given againſt him, gives force and authority to the ſentence, though there might otherwiſe be a ground for him to complain of it. But, ſays the author before quoted, '*ſententia per errorem lata in cauſa conjugali, tranſiens in rem judicatam, foveret peccatum, ſeparando veros conjuges, vel uniendo eos qui tales eſſe nequeunt: at nullum vinculum quantulumcunque multiplicatum, poteſt firmare actum, ex quo peccatum conſurgit.*'

The ſame doctrine is laid down in a multitude of other writers upon the canon law, of which there are waggon loads; but they are unanimous in eſtabliſhing the maxim, '*ſententiam in cauſa matrimoniali nunquam tranſiere in rem judicatam*;' which I am ſure your lordſhips will not hear denied or diſputed by the other ſide.

From hence it will appear to your lordſhips, how little ground there is for that notion which ſeems to have got abroad, that the proceedings of the eccleſiaſtical courts in cauſes of jactitation, or any other cauſes, are ſuch as tend to looſen the bonds of matrimony (which both in a civil and a religious light without doubt is the moſt eſſential bond of ſociety) and give parties an opportunity of diſſolving it at their pleaſure. The court in theſe, as in all other caſes, muſt determine *ſecundum allegata et probata*, according to the evidence before it: but where is the encouragement given to parties to collude, or what ſecurity can they have under a ſentence obtained by fraud, when that fraud may at any future time be detected, by bringing forward that evidence which was before withheld, and, upon proof that the former ſentence was erroneous, another of a direct contrary tendency will be given?

My lords, the marriage, which is the only fact in diſpute in the preſent caſe, has many years ago been put in iſſue in the proper manner in the proper court, and a ſentence given againſt it as deciſive as any that court can give in a marriage cauſe: upon truſt and confidence in that ſentence it was that the act was done for which the noble priſoner is now accuſed before [illegible] lordſhips; the ſentence is produced, remaining in full force; and, for the reaſons that have been urged, we humbly hope your lordſhips will be of opinion, that it is the only legal evidence that can now be given reſpecting the fact upon which the accuſation is founded, and that your lordſhips will therefore receive it in bar of any other.

Then the lord high ſteward returned back to the chair.

Lord Preſident of the Council. My lords, I move your lordſhips to adjourn to the chamber of parliament.

Lords. Ay, ay.

Lord High Steward. This houſe is adjourned to the chamber of parliament.

The lords and others returned to the chamber of parliament in the ſame order they came down, except the lord high ſteward, who walked after his royal highneſs the duke of *Cumberland*; and, the houſe being thus reſumed, reſolved to proceed further in the trial of *Elizabeth* ducheſs-dowager of *Kingſton*, in *Weſtminſter-hall*, to-morrow at ten of the clock in the morning.

Tueſday, April 16. *The Second Day.*

THE lords and others came from the chamber of parliament in the ſame order as on *Monday*, except the lord high ſteward, who walked after his royal highneſs the duke of *Cumberland*, and the peers were there ſeated, and the lord high ſteward in his chair.

Lord High Steward. My lords, the houſe is reſumed. Is it your lordſhips pleaſure that the judges may be covered?

Lords. Ay, Ay.

Then the ſerjeant at arms made proclamation for ſilence as uſual; and the ducheſs of *Kingſton* being conducted to the bar,

Lord High Steward. Mr. Attorney-General, you may proceed.

Mr. *Attorney-General.*

My lords, I find myſelf engaged in a very ſingular debate; upon a point perfectly new in experience, analogous to no known rule of proceeding in ſimilar caſes, founded on no principle, none at leaſt which has been ſtated.

The priſoner, being arraigned upon an indictment for felony, pleaded *not guilty*; upon which, iſſue was joined. In this ſtate of the buſineſs ſhe hath moved your lordſhips, that no evidence ſhall be given or ſtated to prove that guilt upon her, which ſhe hath denied and put in iſſue.

The only caſe cited in ſupport of ſo extraordinary a motion, that of *Jones* and *Bow*, *Carth.* 225, bears no relation or proportion to it. In the trial of an ejectment, the defendant, admitting the plaintiff's title to be otherwiſe clear, avoided it by a ſentence againſt the pretended matrimony of his mother with Sir *Robert Carr*; after which both parties married with other perſons; a ſentence, unimpeached in form or ſubſtance, againſt his own mother, from whom he was to derive title to his ſtate; deciſive conſequently as a fine with non-claim or any other perfect bar, and ſubmitted to accordingly; for the plaintiff was called, and did not appear. Here, if the ſentence ſhould ever come properly under examination, it will appear to differ in all thoſe reſpects.

In the mean time, inſtead of defending, this motion is only putting queſtions to your lordſhips, hypothetically, for opinion and advice how to order the defence. If this ſentence be, as they argue it, a definitive and precluſive objection to all enquiry, the priſoner ought to have pleaded it in bar, and to have put the proſecutor upon dealing with her plea as he ſhould be adviſed; or ſhe may ſtill rely upon it in evidence of not guilty. But without placing any ſuch confidence in it themſelves, they call upon your lordſhips to make it the foundation of an order to ſtop the trial.

My lords, to ſay that this is wholly unprecedented, goes a great way to conclude againſt it. To ſay that ſuch a rule would be inconſiſtent with the plea, and repugnant to the record as it now ſtands, ſeems deciſive. After putting herſelf for trial upon God and your lordſhips, ſhe beſeeches you not to hear her tried. But I ſhall not content myſelf with this anſwer; becauſe, as your lordſhips have thought proper to hear counſel in ſupport of this extraordinary motion, I am bound to ſuppoſe it a fit ſubject for argument, and to lay before your lordſhips my thoughts upon it as they occur.

Before I go into particular topics, I cannot help obſerving with ſome aſtoniſhment, the general ground which is given us to debate upon. Every ſpecies and colour of guilt, within the compaſs of the indictment, is neceſſarily admitted. So much more prudent it is thought to leave the worſt to be imagined, than even to hear the actual ſtate of her offence. Your lordſhips will therefore take the crime to be proved in the broadeſt extent of it, with every baſe and hateful aggravation it may admit; the firſt marriage ſolemnly celebrated, perfectly conſummated; the ſecond wickedly brought about by practiſing a concerted fraud upon a court of juſtice, to obtain a colluſive ſentence againſt the firſt; a circumſtance of great aggravation. When *Farr* and *Chadwick* defended a burglarious breaking and entering, under a pretence of an execution, upon a judgment fraudulently obtained againſt the caſual ejector, it was thought to aggravate their crime, and they ſuffered accordingly. I allude to the caſe in *Kelyng*, 43.

My lords, I take the ground ſo given me with this reſerve, not that I wiſh to have her crime implied, from the conduct ſhe is adviſed to hold here, to all purpoſes and concluſions; but that the neceſſity of the argument obliges me to aſſume it, as plainly and diſtinctly confeſſed, while this ſentence is urged as an irrefragable bar to the trial, whatever may be the degree of her guilt, however ſuch a ſentence may have been obtained, and whether it tends to aggravate that guilt, or to extenuate it. The propoſition looks ſo enormous, that it requires great abilities to give it any countenance, and the moſt irrefragable argument to force the concluſion.

I muſt alſo remind your lordſhips again, that the ſentence has been read in this ſtage of the proceeding, by the conſent of the proſecutor, and under the expreſs reſervation of his right to object to the competence of it, as evidence on the iſſue joined, unleſs he ſhould think fit to make it part of his own cauſe; at preſent it ſtands admitted merely as the ground of this previous motion. The ſentence being colluſive, is a nullity. If fair, it could not be admitted againſt the king, who was no party to the ſuit. If admitted, it could not conclude in this ſort of ſuit, which puts both marriages in iſſue. The objections ariſe from the general nature of the ſentence propounded, which is never final; from the parties, who could not, by their act, bind any but themſelves, or thoſe who are repreſented by them, or at moſt thoſe who might have intervened in the ſuit; from the nature of the preſent indictment, which puts the marriage directly in iſſue; from the circumſtances peculiar to this ſentence, which prove it to be colluſive.

Without adverting much to thoſe particulars, the learned counſel for the priſoner affected to lay down an univerſal propoſition, that all ſentences of peculiar juriſdictions are not only admiſſible, but concluſive evidence; and referred to many caſes, of which I ſhall controvert nothing but the application.

The caſe of *Burroughs* and *Jamineau*, 2 *Str.* 733, is nothing to this purpoſe. That was a ſuppoſed contract by accepting a bill of exchange at *Legborn*; which acceptance was void by the peculiar laws of that country, becauſe the drawer had failed without aſſets in the hands of the acceptor; and was pronounced to be ſo by a competent court in *Legborn*. The plaintiff inſiſted upon it, becauſe, if the acceptance had been made here, it would have bound; but, according to the law of the place where it was made, the acceptance did not conſtitute a contract. The plaintiff might, if he had been adviſed otherwiſe, have defended that ſuit; he acquieſced in the deciſion.

Courts of *Admiralty* ſit between nation and nation. They proceed *in rem*, and they bind the property, not only againſt the apparent poſſeſſor, but all the world; or elſe the very exiſtence of the court would be ſubverted. Any body may claim; and proper monitions iſſue for that purpoſe: therefore, in the caſe of *Hughes* and *Cornelius*, the plaintiff failed in his action of trover; although the verdict found his property, and conſequently the ſentence of the *French Admiralty* erroneous; becauſe the court had no ſuch juriſdiction over that ſentence. For the ſame reaſon, in *Green* and *Waller*, the ſentence of the *Admiralty* could not be gain-ſaid. There is no appeal but to the ſword.

The ſame principle governs as to ſeizures in the *Exchequer*; where any perſon may come in and claim; which if they neglect, they tacitly aſſent to the condemnation. So of ſeizures tried before the commiſſioners of *Exciſe*.

So in the caſe of *Moody* and *Thurſton*, 1 *Str*. 481, where an act of parliament gave an action (on a certificate of commiſſioners that money was due from an agent to officers of the army) the agent could not defend, by controverting the truth of the certificate. It was contrary to the act, and he might have been heard before the commiſſioners.

Where a ſoldier had complained of his major for undue correction to a court-martial, which diſmiſſed his petition, he could not maintain an action, for he had been heard in a court competent and final to that purpoſe.

No temporal remedy lies to recover poſſeſſion of a benefice forfeited by deprivation, while the ſentence of a court competent to declare the forfeiture remains in force.

The ſame rule holds as to derivative claims. Therefore the judgment of *ouſter* againſt a mayor is good evidence againſt the corporator, who claims under him.

Thoſe who enter into collegiate eſtabliſhments agree to ſubmit themſelves to the laws and magiſtrates appointed by the founder; and conſequently cannot reclaim againſt them. This was all which was determined in *the King* and *New-College*, and many other caſes which might have been referred to under the ſame head. In moſt, if not all the caſes cited, the parties had actually been heard before the proper tribunal.

The office of granting probate and committing adminiſtration is a ſpecial authority committed to the eccleſiaſtical courts, where all, who claim intereſt, may be heard; ſo there can be no defect of juſtice. Therefore, in a vaſt abundance of caſes from *Noel* and *Wells* ſoon after the Reſtoration, to *Barnſley* and *Powell* in lord *Hardwick*'s time, the temporal courts have refuſed to take cognizance of the right of perſonal repreſentation. All the caſes under this head prove no more.

Caſes were alſo cited to prove, that iſſues joined upon the lawfulneſs of marriage, profeſſion, general baſtardy, and ſo forth, muſt be tried by the biſhop, and to infer that his juriſdiction is excluſive; and the ſtatute of 9 *H.* VI. *c.* 11, was cited to prove, that it is final not only to parties and privies, but to ſtrangers. The effect of that ſtatute is rather to prove, that all the world are, or may be, parties or privies. The only public object of it is to provide ſufficient notoriety to make them privy in fact, as well as in law. It provides a great variety of proclamations, to the end 'that all perſons, pretending any intereſt to object againſt the party 'which pretendeth himſelf to be *mulier*, may ſue to the ordinary, to 'whom the writ of certificate is or ſhall be directed, to make their allegations and objections againſt the party which pretendeth him to be '*mulier, as the law of holy church requireth.*' For the reſt, the ſtatute ſeems to have been an act of violence and fraud, by the powerful pretenders againſt lady *Audley*. The miſchief, they affected to dread, could not happen. A certificate is utterly void, unleſs made upon proceſs, at the inſtance of the parties. The certificate of *mulierty* binds the parties to the ſuit (as in all reaſon it ought, while ſuch a trial is tolerated) but nobody elſe: and ſo it had been often decided before; and yet the ſtatute provided that every ſuch writ and certificate at the ſuit of lady *Audley* ſhould be void. On the other hand, no ſuch iſſue as profeſſion, baſtardy, or lawful matrimony, could be tried by the biſhop between ſtrangers; and when tried by the country, it bound only thoſe who were parties to the trial and attaint. Nor was an infant bound to anſwer a plea of general baſtardy. But whether the concluſion was too extenſive or not in theſe caſes, ſtill it was only in reſpect to a civil right, and tried by a competent juriſdiction, ſitting for the expreſs purpoſe of deciding upon it, the juriſdiction being created and eſtabliſhed by the writ.

Sentences, which are given by the biſhop or his official of his own mere authority in matrimonial cauſes, have the leaſt pretence of all others to bind or influence any queſtion which may ariſe afterwards in judicature. Such cauſes puniſh no crime, try no right, proceed to no civil effect. They proceed *pro ſalute animæ rei*, to reform ſome enormity or neglect in religious life; *in qua* (ſays *Covarruvias* in his epitome of the fourth book of the *Decretals*, *par.* 2. *c.* 8, *ſ.* 12, *n.* 1.) *de maximo ſacramento agendum eſt.* The proceſs is, *ſimpliciter*, *de plano*, *ſine ſtrepitu et figurâ judicii. Clement*, *lib.* 2, *t.* 1. *ſ.* 2. From the very nature of ſuch a cauſe, it muſt follow, that the judgment cannot be final. No conſent of parties, or omiſſion to appeal, or repeated affirmation of the ſame judgment, gives it any force. *Quia ſententia illa tranſiens in rem judicatam foveret peccatum, ſeparando veros conjuges, vel uniendo eos qui tales eſſe nequeunt. At nullum vinculum, quantulumcunque multiplicatum, poteſt firmare actum, ex quo peccatum conſurgit.* Sanch. de Matrim. *lib.* 9, *diſputat.* 100. In the ſame diſputation *Sanchez* ſays, *poteſt etiam judex, ex officio, parte invitâ, procedere ad retractandam hujuſmodi ſententiam; imo ad id teneri judicem probat textus; quia ſui intereſt peccata auferre. Hinc deducitur, certâ regulâ preſcribi minime poſſe, quoties audiendus ſit volens prædictam ſententiam impugnare.* He illuſtrates the doctrine, by obſerving, that in *coſts*, which is a *civil intereſt*, a matrimonial ſentence is binding. *Ratio eſt aperta: ſententia enim matrimonii ideo non tranſit in rem judicatam, ne foveretur peccatum, ſuſtinendo matrimonium irritum, aut diſſolvendo validum; quæ ratio in expenſarum condemnatione ceſſat; et ideo ſortitur naturam aliarum ſententiarum, quæ in rem judicatam tranſeunt.* *Gaill*, in his *Obſervat.* 107, and *Obſ.* 112, holds exactly the ſame language.

The ſame rule obtains, for the ſame reaſons, in all ſentences *pro ſalute animæ*. A ſentence is inconcluſive (ſays *Vulteius* in his treatiſe *de Judiciis*, *lib.* 3, *c.* 12, *ſ.* 38.) *ex qualitate cauſæ; puta, quod eſt matrimonialis, vel alia quæcunque, in quâ animæ periculum verſatur. Scaccia*, a very authoritative writer on the effect of ſentences, in his book *de Sententia*, *gloſſ.* 14, *queſt.* 2. *n.* 44, obſerves as a general rule, *ſententia, in quâ vertitur animæ periculum, nunquam tranſit in rem judicatam.* The ſum of their maxims is given by *Oughton*, *tit*. 205. which is taken almoſt literally from *Conſett*, and by him extracted from the books of practice.—'Altho', generally, witneſſes are not 'admitted after publication, yet in a matrimonial cauſe they are, even 'without oath, that they are come to the knowledge of the parties after 'publication. And, ſuppoſing that ſentence has paſſed againſt the plaintiff, that he has failed in proof of his libel, and the defendant is acquitted; yet the plaintiff may either in the ſame cauſe, or in another, 'raiſe a new ſuit againſt the ſame perſon, not only on a new or ſecond 'contract, but on the former, and produce proofs known or unknown 'to him before: and he is not bound by the *exceptio rei judicatæ*, or 'that the former ſentence has paſſed *in rem judicatam*; becauſe a ſentence 'given in a matrimonial cauſe never paſſes *in rem judicatam*, and has many 'privileges. When the church is deceived in promulging ſentence 'againſt matrimony, the ſentence may be revoked by new proofs, and 'even by the ſame; and the reaſon is, to eſchew ſin and danger to the 'ſoul, if a wrong ſentence ſhould prevail.'

So far as it appears to us is therefore no idle form of words, but an expreſs reſervation of a neceſſary power to alter the ſentence whenever it ſhall appear to the biſhop that a different rule of life is neceſſary *pro ſalute animæ rei.*

The miſtake ſeems to have ariſen from conſidering the biſhop as a court of civil judicature, and his ſentence as pronounced upon the trial of a civil right. In this perverſe view, thoſe maxims are abſurd, and thoſe rules merely vexatious, which, tried by the real nature and end of a matrimonial ſuit, are founded in piety and zeal for the diſcipline of religion. In all civil cauſes the maxim is univerſal, *expedit reipublicæ, ut finis aliquis ſit litium.* In proceedings *pro ſalute animæ*, the reaſon of the thing is altogether on the other ſide.

Even in the moment of ſtating theſe ſentences to be concluſive, one of the learned counſel could not forbear to give your lordſhips a lively repreſentation of the frivolouſneſs of their proceedings and the vanity of their decrees. The doctors have been at the pains to write (ſays my learned friend) ſome waggon-loads of volumes to prove, that theſe matrimonial cauſes proceed to no end, and terminate in nothing. All parties, all privies to the ſuit, all who have intereſt in the matter of it, may prevent its effect by intervention, by citation to hear the decree reverſed by original libel. The ſketch was drawn with a great deal of humour, bordering upon ridicule: a vivacity natural enough within the walls of their own college. *Vetus illud Catonis admodum ſcitum eſt; qui mirari ſe aiebat, quod non rideret Haruſpex, Haruſpicem cum vidiſſet.* Yet it ſeemed rather aſtoniſhing, that ſo very judicious an advocate ſhould think this picture of futility the beſt recommendation of the ſentence to your lordſhips as an abſolute concluſion upon all your proceedings. Here all the world ſhall be bound by that judgment, which the court, who pronounced it, hold for no judgment, and will ſuffer to bind nobody. But ſuch was the neceſſity of the argument: to give it any effect, they were forced to aſſume, that this ſort of ſentence is the judgment of a civil judicature upon a civil ſubject, which is not true; and to give it effect, againſt others than parties, they were forced to admit, that ſuch others may ſet it aſide; which is true, only becauſe it is no ſuch judgment.

In ſupport of this looſe propoſition, they cited from our own books ſeveral caſes, in which the temporal courts ſuffered themſelves to be concluded by ſuch ſentences.

If it were neceſſary or allowable at this day to reaſon againſt ſo many authorities, I ſhould incline to think, that thoſe caſes proceeded upon the miſtake I mentioned before, namely, that the Eccleſiaſtical Court try and pronounce upon the civil right of marriage, or ever mean to do ſo, except when authoriſed by writ of the king's courts. But for the purpoſe of the argument, I will ſuppoſe that they do; even then the effect of all the caſes will amount to no more than this. Firſt, the Eccleſiaſtical Juriſdiction has (excluſively) conuſance of the right of marriage. Secondly, the Secular Juriſdiction has conuſance of the temporal intereſts which are incident to marriage, and, in order to decide upon them, muſt try the fact of marriage as part of the queſtion. Thirdly, but the judgment of the Eccleſiaſtical Juriſdiction on the principal, *viz.* the right of marriage, wherever it occurs, is final upon the trial of the incident. Fourthly, this concluſion extends to all who were parties or privies, or who, in notion of law, have committed laches in not intervening or reclaiming. This I take to be the utmoſt extent of the caſes cited.

The earlieſt caſe referred to was *Corbett*'s, *Fitz. tit. Conſultation*, *pl.* 5. Sir *Robert Corbett* had iſſue *Roger* by his wife *Matilda*; in whoſe life he married *Letitia*, and had iſſue *Robert*. *Roger* ſued in the court chriſtian to avoid the ſecond marriage, but was prohibited, for that court had no original juriſdiction. 'Otherwiſe,' ſays *Cateſby*'s *Juſtice*, 'if my father and mother were divorced, married to others, had iſſue, and died, 'then I grant well, that I ſhall have my ſuit originally in the court 'chriſtian, becauſe I cannot have my action in the temporal law, as 'heir, during the divorce; and alſo the divorce is a ſpiritual judgment, 'which ſhall be reformed in the Spiritual Courts.' So it was doubted, whether 'the brother of a monk, who abandoned his habit and vows, 'could, as heir, libel to try his brother's profeſſion, and hold him to

‘ obedience; for he might have his action by the temporal law, and object his profeſſion.’ But it was agreed, ‘ that if the monk had been deraigned for falſe or unjuſt cauſe, the brother might have citation to revoke his deraignment.’ If this proves the effect which a ſpiritual ſentence upon the principal matter, the right of marriage, or profeſſion, has in caſes where theſe come incidentally into queſtion, it alſo confines the extent of that effect to thoſe perſons who may reſcind the principal ſentence; and proves the reaſon of it, namely, that they are not wronged by the concluſion, becauſe they may always be heard againſt it.

The next caſe was *Bunting* and *Leppingwell*, 4 *Co.* 29. *a.* and *Moor* 169; which was thus found by ſpecial verdict. *Thomas Twede* married, *de facto*, *Agnes Adinghall*, but under the impediment of a pre-contract between her and *John Bunting*. *Bunting* ſued in the court chriſtian on this pre-contract, obtained ſentence for celebration *in facie eccleſiæ*, married her, and had iſſue two ſons, *Charles* and *Robert*. *Richard* the father of *John*, gave lands to *Robert*, for life only. *Robert*, miſtaking his title, ſettled them on *Emma* his wife, and died. *Charles* brought an ejectment, as heir to *Richard*, his grandfather. It was objected that *Twede* had been no party to the ſuit in the court chriſtian. But *Twede* might have intervened, or reclaimed, all his life long. So might *Emma*, if it could have availed her to prove her huſband illegitimate, which would have deſtroyed her title. But *Twede* had abandoned his pretenſions. The ſentence was ſubmitted to by *Agnes*. The marriage was ſolemnly celebrated, and remained uninterrupted during life. The queſtion was between two iſſues. It required little argument to ſuſtain the legitimacy.

The next was *Kenn*'s caſe, 7 *Co.* 68. *Cro. Ja.* 186. An *Engliſh* bill was brought in the court of *Wards*, praying leave to traverſe an office, whereby *Elizabeth* was found the infant heir of *Chriſtopher Kenn*, and whereupon the wardſhip had been granted to *Florence*, the mother of the infant. *Chriſtopher Kenn* had married *Elizabeth Stowell*, by whom he had iſſue *Martha*, who left iſſue *Elizabeth* the plaintiff, his heir at law, if the marriage had ſtood; but in the firſt and ſecond of *Philip* and *Mary*, the court of *Audience* pronounced the marriage void for want of age, and gave ſentence of divorce. *Chriſtopher Kenn* married *Elizabeth Beckwith*, in the 5th of *Elizabeth*. She libelled him for jactitation before the commiſſioners for eccleſiaſtical cauſes, alledging his former marriage. *Elizabeth Stowell* intervened for her intereſt. The firſt marriage was a ſecond time pronounced void, and ſentence followed *ad exequenda conjugalia obſequia*. After the death of *Elizabeth Beckwith*, *Chriſtopher* married *Florence*, by whom he had the ward. This matter was referred to all the judges, who pronounced the ſentence concluſive, ſo long as it ſhould remain in force. And lord *Coke* relied upon *Corbett*'s caſe, the doctrine of which has been explained before. The point had been twice tried with *Elizabeth Stowell*, the grandmother of the plaintiff, and the ſentences remained open to litigation, but ſubmitted to.

The caſe of *Jones* and *Bow*, *Carth.* 225, it has been obſerved before, was of exactly the ſame ſort. The plaintiff claimed under the iſſue of ſir *Robert Carr* by *Iſabella Jones*, between whom a ſentence had obtained againſt the pretence of marriage, which then ſtood unlitigated.

In *Jeſſum* and *Collins*, 2 *Salk.* 437, there was a ſentence againſt the plaintiff in the Spiritual Court, at the ſuit of the defendant, on that very contract for which he brought his action on the caſe, without diſputing the ſentence.

The caſe of *Hatfield* and *Hatfield* was alſo cited; a judgment of your lordſhips in the year 1725. No authority is more concluſive than the judgment of ſuch a court, when the point decided is well underſtood: but nothing is more uncertain than the ſtate of a point drawn from the printed caſes, where each party takes care to ſtate, at leaſt, a probable caſe; and in the multitude of the reaſons, good perhaps in law, if they were true in fact, it is difficult to divine what the houſe went upon. If this judgment depended, as the counſel for the priſoner contended, upon the goodneſs of the marriage, it carries the matter no further than abundance of other caſes; namely, that the ſentence of a court chriſtian, while nobody conteſts it, binds the right of marriage between parties diſputing elſewhere an incidental intereſt under it. There was an attempt to make it prove a colluſive ſentence available, which I ſhall have occaſion to examine hereafter.

In *Cleeve* and *Bathurſt*, 2 *Str.* 960, and *Annaly* 11, the ſentence was againſt the very plaintiff in the cauſe, and remained uncontroverted.

So *Da Coſta* and *Villa Real*, 2 *Str.* 961, or *Mendez* and *Villa Real*, *Annaly* 18, was a ſentence uncontroverted between the ſame parties.

The like obſervation occurs upon Mr. *Hervey*'s caſe.

In *Blackham*'s caſe, 1 *Salk.* 290, the ſentence was not held to be concluſive; and as to lord *Holt*'s doctrine, that muſt ſuppoſe the marriage put in iſſue between the ſame parties; for otherwiſe the ſentence would not have concluded; the court, which grants adminiſtration, having no direct juriſdiction in matrimony.

In *Milleſent* and *Milleſent*, cited by Dr. *Lee* in lord *Annaly* 11, which I take to have been an appeal from the Prerogative Court, a ſentence of the Conſiſtory Court againſt a marriage was, while it remained unlitigated, a bar to the woman, who had been party to that ſentence, from claiming adminiſtration as wife.

Upon all theſe caſes I ſhall repeat but one obſervation; namely, that they bound only thoſe who had been parties to the former ſentence, or who derived under ſuch parties. If they had extended to ſuch as might have become parties by intervention or citation, the ſame principle would equally have borne them out. The general peace and happineſs require, that there ſhould be ſome reſort to hear and determine upon rights; the ſame peace and happineſs require, that litigation ſhould have ſome end. The line ſeems to be fairly drawn, where every claim to every right has had the full opportunity of being heard. But, among all the caſes cited or referred to, I believe none is to be found, where a ſentence has been taken for concluſive againſt perſons, who neither had, nor could poſſibly have agitated it.

It is not enough therefore to eſtabliſh the propoſition, that ſuch ſentences bind all who have or could have interpoſed, unleſs it had been ſhewn that the king could have interpoſed, for the publick good, in order to ſee that no fraud ſhould be practiſed, which might tend to defeat the execution of his laws or police: but it is not pretended that the king can interpoſe in ſuch cauſes.

It is not enough that a court of excluſive civil juriſdiction, pronouncing upon the principal right, binds all the derivative or incidental intereſts. It ſhould be ſhewn, that ſuch a court binds alſo to criminal concluſions: now this I take to be impoſſible, becauſe, on the very ſtate of the propoſition, the court has no criminal juriſdiction.

It has often been attempted in argument to ſhew, that their courts have no more than a cenſorial juriſdiction in their proceedings *pro ſalute animæ, et reformatione morum*; and to infer from thence that their judgments ought not to bind in queſtions touching civil rights; as in *Mendez*, and *Villa Real* in *Annaly:* but our courts have taken the fact to be otherwiſe, and conſidered their ſentence as a judgment upon the civil right, which is the reaſon why it binds all incidental intereſts in other courts of civil juriſdiction. The true reaſon why ſuch judgments have no effect in a criminal court, ſeems to be this: that there is nothing in common between the juriſdictions, ſo that they can never claſh. A judgment in a civil ſuit will bind to all its conſequences, although every fact, upon which it proceeded, ſhould be evidently falſe; and though a criminal court ſhould have found a crime upon an oppoſite ſtate of the caſe. An action and an indictment for a treſpaſs may have contrary iſſues, and yet both muſt ſtand: ſo it would be if the crime were aſſigned in the very falſhoods by which the civil court was deceived; as in indictments for perjury or forgery. A judgment upon a deed, after verdict on *non eſt factum* pleaded, is no bar to an indictment for forging or publiſhing, or ſwearing to the deed. The caſe would be the ſame in reſpect to a will of lands eſtabliſhed by verdict, or to a will of perſonality after probate.

It was in this laſt inſtance they attempted to ſhew, that the authority of the Eccleſiaſtical Court had been interpoſed between publick juſtice and the crime of forgery. For this purpoſe they have cited the caſe of *the King* and *Vincent*, 1 *Str.* 481. It is very ſhort: ‘ indictment for forging a will relating to perſonal eſtate; and on the trial the forgery was proved; but the defendant producing a probate, that was held concluſive evidence in ſupport of the will.’ Now the ſupport of the will was not in queſtion. It was proved in common form, which is not binding, even in the Spiritual Court. 1 *Ro.* Rep. 21. More particulars of this caſe may probably be known to ſome of your lordſhips; but I cannot find any. Stated thus, it certainly requires a great deal of conſideration, before it be admitted as law. Here the queſtion was, not whether the ſentence ſhall have credit in reſpect of the underſtanding which the ſpiritual judges have in the rules and courſe of their own law, but whether a probate, granted of courſe, on the oath of the very party charged with the forgery, ſhall be a full and concluſive bar to the proſecution. This is too monſtrous to be left upon the authority of a ſhort and ſingle caſe, without condeſcending to explain what conſiſtency with publick juſtice, what reſpect to common ſenſe, will allow the crime of forgery or perjury to be defended by the allegation of that very fraud which the indictment meant to puniſh; not ſtating any trial or judgment upon it, but merely that it had been practiſed. If the pretended executor had repelled the objection of forgery, even in that court, it would have borne ſome countenance at leaſt; but the fraud paſſed without examination, where, in the nature of the proceeding, none could be had.

The other caſe, in 1 *Str.* 703. of *the King* and *Rhodes*, proves nothing, for it was merely a queſtion of direction, whether the court would proceed to try the forgery of an inſtrument, while the property to be affected by it remained *ſub judice.*

This is a matter of great conſequence to publick juſtice; at the ſame time, it is the ſort of caſe which muſt happen frequently. The fraud was commonly practiſed in the late war upon the ſailors; and, if this rule had exiſted, could never have been puniſhed: but it was frequently puniſhed; and although, where no point of law aroſe, it is difficult to recover caſes at the *Old-Bailey* or on circuits; yet an accidental publication of caſes in the *Old-Bailey*, without any apparent ſelection, has produced three or four inſtances. One *Stirling* was convicted and hanged for forging a will; and, ſo little were either proſecutor or court appriſed of this notion of law, the probate made part of the evidence againſt him. He had regiſtered it (as it was neceſſary) in the *South-Sea-Houſe.* I am not anxious to ſtate theſe caſes with more particularity; becauſe I cannot bring myſelf to imagine it will be entertained as a ſerious opinion, that the mere perpetration of a crime may be pleaded in bar to a proſecution for it. This is certainly not for the intereſt of juſtice, nor for the honour of the Spiritual Court; becauſe it would take away from that juriſdiction one guard againſt falſhood and fraud, of which every other is poſſeſſed.

Thus much concerning the general propoſition, that ſentences in the eccleſiaſtical courts, upon civil rights within their conuſance, have concluſive force upon publick proſecutions for crimes; although it be confeſſed withal, that the publick has no means to intervene or review thoſe ſentences, and although the civil effect of ſuch ſentences is not touched by the event of ſuch publick proſecutions. If this ground fails, there is an end of the preſent motion: but there is another view, in which it has been urged upon your lordſhips, which ſeems to turn out more deciſively againſt it.

Whatever may be ſaid in the inſtances of forgery, perjury, and other frauds upon the ſpiritual court, where the criminal court may ſeem to impeach the foundation of their ſentences, without aſſuming any juriſdiction in the matter of them; in this caſe it is impoſſible to alledge, that the criminal court is not fully competent to decide upon the whole matter of the indictment; particularly on both the marriages there ſtated as conſtituting the crime.

The learned gentleman who ſpoke ſecond for the priſoner, informed your lordſhips, that this crime was formerly puniſhed by the canon law, and in the Eccleſiaſtical Court; and inſiſted, that transferring the puniſhment

ment of it from the eccleſiaſtical to the temporal juriſdiction ſhould not prejudice any defences which the party might have ſet up in the firſt court.

In order to make that obſervation bear, ſome proof ſhould have been added, that this ſentence would have barred ſuch a ſuit, however promoted, *exceptione rei judicatæ.* Then, ſuppoſing this juriſdiction no better than concurrent, this court might have been barred, *pari ratione.* But your lordſhips have already had the trouble of hearing it eſtabliſhed, but too much at length, from their books, that no ſuch exception would lie in their law.

The ſame thing is no leſs true in our law, where the court can, by any means, take conuſance of the right of marriage. Thus in dower, where the *Common-Pleas*, by writing to the biſhop, can well try the lawfulneſs of the marriage, a ſentence is no plea. This was ruled in the caſe of *Robins* and *Crutchley*, 2 *Wilſon* 118, 127. The demandant counted as of the endowment of *Robins:* the tenants pleaded, that ſhe was not accoupled to *Robins* in lawful matrimony. The demandant replied, that on the 12th *February* 1754, ſir *William Wolſeley* libelled her as his wife, in the Biſhop's Court of *Litchfield*, for adultery with *Robins*; that ſhe pleaded a marriage with *Robins:* that the cauſe was removed into the *Arches*; that *Robins* died; and that afterwards ſentence paſſed for the marriage with *Robins*, which then remained in force. The tenants demurred; and had judgment. The demandant cited many of the caſes your lordſhips have now heard, to prove, that a ſentence, by a court of direct juriſdiction, ought to conclude another, which has but incidental conuſance of the ſame matter. But theſe were not thought ſufficient to avoid another trial of the ſame marriage in a court, which, by writing to the biſhop, might well decide upon the lawfulneſs of it. It is clear, that the ſentence would not have concluded in the trial before the biſhop.

Nay, the very ſtatute, on which the indictment is framed, proves the ſame thing. It excepts the caſes where the former marriage is diſſolved, or declared void by ſentence, or was contracted under age of conſent; all which would otherwiſe have been triable under an indictment for felony.

In order to prove, that any ſentence in the Eccleſiaſtical Court would bar an indictment upon the ſame matter, the caſe of *Boyle* and *Boyle* was cited. It is reported in 3 *Mod.* 164, and in *Comberbatch* 72. In that caſe a prohibition was awarded to ſtop the trial, in the Eccleſiaſtical Court, of a marriage there claimed by a woman, in anſwer to a ſuit of jactitation; which marriage had been found bad on an indictment for polygamy, for which the man was convicted and burnt in the hand. The reaſon aſſigned, here, for this judgment was, for fear the ſpiritual court ſhould not take notice of the judgment pronounced in the temporal court. But this would have been extremely irregular; particularly if by the courſe of the Spiritual Court ſuch a judgment would have been concluſive. Prohibition never goes upon an apprehenſion, that the Spiritual Court will do wrong; but where their rules of trial are contrary to the common law, as in preſcription, or requiring two witneſſes to a releaſe; or when they exceed their juriſdiction, by holding plea of temporal matters, as debts, freehold, or temporal offences. The reaſon for granting this prohibition was, becauſe the court chriſtian could not take any conuſance of a matter adjudged in the temporal court; which thereupon became temporal. So in the caſe of *Webb* and *Cook*, *Cro. James*, 535, 625, prohibition went to the court chriſtian at *Norwich*, for entertaining a libel for defamation, in ſaying, that one had a baſtard, who was adjudged the putative father: 'for that judgment, 'being under the authority of the ſtatute law, ſhall not be impeached 'in the Spiritual Court, or elſewhere; and all are concluded to ſay the 'contrary.' Upon the authority of this caſe, the ſame point was ruled again in *Thornton* and *Pickering*, 3 *Keb.* 200. The Eccleſiaſtical Court has no conuſance of crimes. In the caſe immediately before that of *Boyle* and *Boyle*, prohibition went to ſtop a ſuit there for writing a libel; becauſe an indictment will lie for it. In *Serle* and *Williams*, *Hob.* 288, this matter is fully treated. The ordinary has no power, even over clergymen, in a crime or offence touching the crown. Purgation itſelf was by permiſſion, and could not be adminiſtered, if the temporal court delivered *abſque purgatione faciendâ*; nor between the conviction and ſentence; nor before it. In all theſe caſes prohibition would lie. And in every other caſe, if after trial of a felon they prove or diſprove any thing againſt a verdict, prohibition lies. So in *Higgon* and *Coppinger*, ſir *William Jones*, 320, prohibition went to ſtop a libel for calling one a ſodomite. 'For, as they cannot find the principal offence, it not being 'ſaved to them by the ſtatute, they ſhall not hold plea of the defama-'tion. And, where any thing determinable by the Eccleſiaſtical Court 'is made felony, or treaſon, and the power of the Eccleſiaſtical Court 'is not ſaved to it, there they ſhall not meddle with the offence, or the 'defamation, which ariſes out of it.' The true reaſon therefore, why they were prohibited in the principal caſe, was, becauſe the plea depending before them was out of their conuſance.

Another caſe was cited, where prohibition went to the Conſiſtorial Court of *Exeter*, after acquittal upon an indictment for polygamy; but I have not been able to find it.

More perverſe inferences were never extorted from any caſes, than from theſe. A court of *oyer* and *terminer* is to determine without hearing, for this ſpecial reaſon, that it will be final. A court of direct, complete, and excluſive juriſdiction, is to be bound and governed by one of no juriſdiction, either direct or indirect, on the matter. A court, which decides once for ever, is to be bound by one which never decides. The ſentence remains open for further examination; let it therefore be adopted without examination, in order that it may never be examined.

But, to confeſs the truth, all which I have hitherto ſaid ſeems to have been unneceſſary. This might have been pertinent argument, if there had really been a ſentence to combat: but there is none. It has been virtually, if not expreſsly admitted, that, for the purpoſe of deciding upon the preſent motion, your lordſhips muſt take it for granted, that the ſentence is colluſive and fraudulent in every view, and to every degree, which imagination can repreſent: for your lordſhips will not put us, in this ſtage of the buſineſs, to take ſeparate iſſues upon every ſuggeſtion which may be made for the priſoner. In truth, her counſel have argued it ſo; expreſsly contending, that a colluſive ſentence ſhall bind the judgment of the houſe.

But what kind of caſe has been made, or attempted? What authority has been cited, that a colluſive ſentence ſhall prejudice others, than the parties to it? In every book I have ſeen, it is treated as a mere nullity. The only difference between no ſentence, and a colluſive one, is, that in the firſt caſe, you plead *nul tiel record*, generally; in the laſt, you plead, that it was obtained by covin; conſequently it is waſte paper. If the court was informed of the covin, it would commit the parties for the contempt, and cancel the record. This could only be done upon the idea of the whole proceeding being a nullity.

In the 44 *E.* 3, 45. *b.* in aſſize of novel diſſeiſin, by a dowreſs, the tenant admitted her title to dower; but diſputed her aſſize, becauſe ſhe had been endowed by one, who abated upon his poſſeſſion by covin with her. She argued, that the abator gained a fee-ſimple, whereby he might lawfully endow her; that recovery of dower againſt an abator is ſufficient, and that endowment *in pais*, to one who has right, is equal to recovery. The tenant replied, that ſuch endowment was but diſſeiſin; therefore his entry was congeable; and that the recovery would have been in the ſame plight. All the judges held clearly, that 'if one has action to cer-'tain lands, and by his aſſent and covin the tenant is ouſted, and he, 'who has the action, brings it againſt the diſſeiſor, he, who is ouſted, 'ſhall have aſſize; and the poſſeſſion of him, who recovered, ſhall be 'adjudged by abatement, and not by recovery; becauſe he was a diſſeiſor. '*Et hoc adjudicabatur coram* Knivet.'

The ſame point is laid down in many books; and in 3 *Co.* 78, it is taken as a general rule, 'that the common law ſo abhors fraud and covin, 'that all acts, as well judicial as others, and which of themſelves are 'juſt and lawful, ſtill, being mixed with fraud and deceit, are in judg-'ment of law tortious and illegal.' Nay, it takes away the privilege of coverture and infancy; for the act is merely void. In the caſe in *Coke*, the fine (a judicial act) was held for none, by reaſon of the covin. So *Farr* and *Chadwick* were both hanged for burglary, though they entered by an *habere facias poſſeſſionem*; becauſe it iſſued upon a fraudulent judgment. This was thought to heighten the offence.

The principle of the rule applies equally to the judgments of the Eccleſiaſtical Court; and ſo the rule was applied in *Dyer* 339, where a revocation of letters of adminiſtration was held void for covin. Thus too in *Garvan* and *Roach*, 1 *Veſ.* 157. Lord *Hardwick* ſays of ſentences in the Eccleſiaſtical Court, that colluſion will overturn the whole.

It would be idle affectation to cite all the caſes on this head, which indexes would furniſh. The books are full of them, from the annals of *Edward* the ſecond to the Reports of ſir *James Burrow.* Indeed there never was a period of time, in which this maxim was ſo continually in the mouth of the court, as the laſt. *Bright* and *Eynon*, and abundance of caſes more might be cited to prove this. The court ſeems to have thought it the principal and moſt capital part of its duty, the *nobile officium judicis*, to ſuppreſs and extinguiſh every ſpecies of fraud.

My lords, the language of the civilians and canoniſts is exactly the ſame. *Scaccia*, in his book *de Sententiâ*, *Gloſſ.* 14, *Queſt.* 12, ſtates this poſition, *ex vulgatâ regulâ, rem inter alios actam aliis non nocere.* Upon this he makes many limitations; upon all of which he adds, amongſt others, this ſublimitation; *quando ſententia eſſet lata per colluſionem: fraus enim, et dolus nemini patrocinari debent, in alterius præjudicium*; *et ideo ſententia, lata per colluſionem, habetur pro non ſententia*; *et aliis non nocet*; *quamvis, ſublatâ colluſione, noceret.* The ſame thing is laid down by *Covarruvias*, in his *Practical Queſtions*, *cap.* 15. *n.* 2. He quotes this text of the Digeſt. *Si hæreditatis judex contra hæredem pronunciaverit non agentem cauſam, vel colluſione agentem, nihil hoc nocebit legatariis.* In *Heraldus de re judicata*, *lib.* 1. *cap.* 2. *n.* 1, the ſame rule is given upon the ſame authority.

Nay, their courts will receive an allegation againſt a judgment at common law, that it was by covin; and rightly too; for it is a nullity; and the authority of the court, in which fraud is practiſed, is never in queſtion. In *Lloyd* and *Maddox*, *Moor* 917. One ſued in the court chriſtian for a legacy. The executor pleaded recovery in debt, which exhauſted aſſets. The legatee replied, that the recovery was by covin. This allegation was admitted; and the *King's Bench* refuſed to award prohibition. Here both courts agreed, that to alledge a fraudulent judgment was to alledge nothing; and the inferior juriſdiction was expreſly permitted to try this ſort of nullity in the judgment of the ſuperior.

There is a great abundance of caſes more, which I ſhall have occaſion to cite to your lordſhips, if the actual fraud of the preſent ſentence ſhould ever be diſputed; caſes, in which much weaker grounds of imputation, than thoſe which occur here, have been thought ſufficient to avoid a judgment.

But, my lords, what arguments have been uſed on the other ſide upon this part of the caſe?

Firſt, it has been inſinuated, that certain ſtatutes, made againſt covin, account for the many judgments to be found in our books; and prove, that, without ſuch ſtatutes, they could not have obtained. But many of the caſes were before the ſtatutes referred to. The principle, avowed by the judges, is independent of them. They all provide either additional ſanctions againſt fraud, or new precautions againſt the opportunity of practiſing it. And it would be a very miſchievous conſtruction, if a ſtatute againſt a particular fraud were to protect every other.

Secondly, the fraudulent ſentence muſt be ſent back to the court where the fraud was practiſed, in order to be corrected. Why ſo? If the thing alledged againſt a ſentence were error, miſ-judging either the law or the fact, it muſt be reverſed in the ſame juriſdiction, original, or appellate. But the court, in which the ſentence is pleaded, muſt determine on the reality and application of that plea, juſt as it would on any other matter pleaded. Fraud is a fact. The concluſion is, that it puts a total end to the cauſe. The court, in which ſuch cauſe depends, muſt be as competent and perfect a judge of that fact, as the court in which the fraud was perpetrated. I ſay as competent and perfect; becauſe the court, where the fraud has been practiſed, which has overlooked ſuch circumſtances as appear on the very face of theſe proceedings, does not ſeem to me the very place to which one would ſend a queſtion of colluſion to be tried. All the authorities referred to before, and the numerous inſtances of replying fraud to pleas of judgments by other courts, on which it was practiſed, contradict this notion. But caſes are cited on the other ſide. *Kenn*'s caſe, it was ſaid, proves, upon the ſtate of it, that the ſentence was fraudulent. The bill in the court of *Wards* ſtated, that the ſentence was falſe, and with a deal of aggravation. But who ever referred to an *Engliſh* bill for the true ſtate of any caſe? The queſtion, referred to the judges, ſays nothing of the colluſion. The caſe of *Morris* and *Webber*, in *Moor* 225, was alſo cited to prove, that colluſion apparent in an eccleſiaſtical ſentence did not hinder it from concluding in a court of common law. A man, divorced *propter impotentiam*, married another woman, and had children. The laſt circumſtance, it was ſaid, diſproved the cauſe of the divorce; and therefore the judgment was apparently colluſive. But that circumſtance did not even prove the judgment falſe: for one may be *habilis quoad hanc*. The law preſumes the children of a marriage legitimate: but that does not prove the fact of generation to any other purpoſe. If the ground of the ſentence was falſe, it would not follow that it was colluſive. Colluſion was not even alledged in the caſe; and conſequently makes no part of the judgment. In the ſame manner they referred to the appellant's printed caſe, in this houſe, in *Hatfield* and *Hatfield*, for an averment, that the ſentence was fraudulent. But there, as it happens, the ſtate of the caſe diſproves the colluſion: for *Porter*, the defendant in the Eccleſiaſtical Court, was in the appellant's power. They cited alſo the caſe of *Prudham* and *Phillips*, from a moſt inaccurate note in the margin of *Strange*, 961; who certainly knew nothing of the caſe he referred to. The caſe in truth was this: *Prudham* brought *aſſumpſit* againſt *Conſtantia Phillips*. She gave evidence of her marriage with *Muilman*. *Prudham* produced a ſentence of the Eccleſiaſtical Court, annulling that marriage, becauſe ſhe was already married to *Delafield*, who was then alive. She ſaid, that ſentence was fraudulent. But the court, admitting that the objection would have been good in the mouth of a ſtranger, would not ſuffer her to alledge fraud in herſelf, for her own avail. The learned doctors alſo cited a caſe of a lady *Mayo* and a Mr. *Brown*, in the Prerogative Court. There, a ſentence in a matrimonial cauſe being pleaded, the adverſe party alledged, that it had been obtained by colluſion. One learned gentleman ſaid the allegation was *repelled*; the other, that it was *not admitted*. I am informed the laſt is neareſt to accurate; for nothing was done in that matter. The cauſe is ſtill depending. The firſt argument promiſed all that length of erudition, which your lordſhips were favoured with yeſterday: in view to which the judge aſked, whether they had not better agitate the queſtion of fraud where it was committed; an iſſue more natural for the judge to wiſh, than proper for the court to award. The moſt looſe and unconſidered notion, eſcaping in any manner from that able and excellent judge, ſhould be received with reſpect; and certainly will. But it is unfair to him to call this his judgment. If the queſtion were my own, with the choice of my court, I ſhould refer it to his deciſion.

Thirdly, among other reaſons againſt holding plea of the colluſion before your lordſhips, they inſiſted, that it was not worth while; their ſentences are ſo open to repeal at the ſuit of any body, that whoever finds them objected, has nothing to complain of but his own remiſſneſs. Their proceedings are ſo frivolous and ineffectual, their judgments ſo inconcluſive and harmleſs, that nullity, however eſtabliſhed, makes no material difference in them.

Such were their particular arguments. In a more general way, they preſſed upon your lordſhips, with much earneſtneſs, the conſideration of the unhappy caſe, to which they ſaid we would drive the priſoner. The ſentence has deprived her of all conjugal claims upon Mr. *Hervey*; and we acknowledge it to be concluſive upon her, while we inſiſt that it is merely void againſt all the reſt of the world. She is, therefore, according to us, a wife, only for the purpoſe of being puniſhed as a felon. This ſtrange apology was not inſinuated in mitigation of the puniſhment, or to the compaſſion of your lordſhips; but directly and confidently addreſſed to your juſtice. Do not proceed to try the crime, becauſe the purpoſe of committing it is totally fruſtrated; and many other inconveniencies have enſued. In other words, the crime has been detected. Theſe diſappointments, theſe inconvenient conſequences of guilt, are the bars which God, and the order of nature, have ſet againſt it: but they have not been found ſufficient. It demands the interpoſition of public authority, with ſeverer checks, to reſtrain it. Why is ſhe thus hampered with the ſentence ſhe fabricated? Becauſe ſhe fabricated it; becauſe juſtice will not permit her to alledge her own fraud, for her own behoof, nor hear her complain of a wrong done by herſelf.

In ſhort, my lords, the motion is wholly inadmiſſible. It is inconſiſtent with all order and method of trial for us to debate imaginary topics of defence, before hearing the charge, and for the court to reſolve abſtract queſtions upon hypothetical grounds. Is a ſentence pronounced between two certain perſons admiſſible evidence againſt others? Is this ſpecies of ſentence ſo? Is either admiſſible againſt the king—in any public proſecution—in this particular ſort of proſecution? Is ſuch evidence probable only, or concluſive—againſt the parties to it—againſt ſtrangers—againſt the king—and in what caſes? What, if it were obtained by colluſion? What, if by her colluſion? Will it ſerve her? May ſhe offer it ſafely? How much will it prove againſt her? What evidence will do to prove the colluſion?---There is no end of ſuch queſtions. At the ſame time, I was not ſolicitous to prevent any part of the argument. Were it poſſible for your lordſhips to ſtop this proſecution here, I have no deſire to wound the mind of any perſon unneceſſarily, or if ſo painful a duty may be diſpenſed with. But I have rather wondered to hear ſuch hopes as theſe thus far encouraged, or even entertained, on the part of the priſoner, with confidence enough to make it worth her while to avow, in this ſtage of the buſineſs, that ſhe had rather have every thing preſumed againſt her, than hear any thing proved; and to diſcloſe to your lordſhips, not an anxiety to clear her injured innocence, but a dread of the enquiry; a wiſh to ſubmit, in ſilence, to the charge. Was this her ſolicitude to bring the queſtion here? Of what avail would it be to any body, in any condition, to appear in any court, and defend thus? But, in ſuch a court, before ſo venerable an audience, to hear nothing pleaded againſt a charge of infamy, but a frivolous objection to entering upon the enquiry!---unleſs topics ſtronger, more pertinent, and pointed could have been urged, I am exceedingly ſorry, upon every account, that the time of your lordſhips has been thus taken up, and that we did not go directly into the examination of the matter before you.

Mr. *Solicitor-General.*

My lords,

There are two queſtions at preſent before your lordſhips: the one turns upon the effect of a ſentence obtained from the Eccleſiaſtical Court in a caſe of jactitation of marriage, which the counſel for the priſoner have maintained to be a concluſive bar to the inquiry now inſtituted in a court of criminal juſtice: the other is, whether that argument ought to be admitted in this period of the proceeding.

My duty requires me, in the firſt place, to ſubmit to your lordſhips ſome objections to admitting that ſentence in anticipation of the charge, after a plea of *not guilty* to the indictment.

The plea, which is the defence upon the record, denies the charge; but the argument contends, that the charge ought neither to be ſtated nor proved. To proceed firſt to conſider the merits of a defence without a charge eſtabliſhed either by proof or admiſſion of the party, is at leaſt a very great novelty in a criminal proceeding, and a very wide deviation from the ancient courſe of trials; and it is a preſumption of ſome weight, that a mode of trial, which has prevailed for ages, is not founded in folly nor injuſtice.

In the regular and ordinary courſe, a priſoner who has any ſpecial matter to alledge, which ought to bar the enquiry into the crime, muſt ſtate it in the form of a plea of the indictment. Upon the plea of the party every court of criminal juriſdiction muſt form a judicial determination: a pardon, a former acquittal for the ſame charge, are defences which preclude an inquiry into the crime; but the party can only inſiſt upon ſuch defences by pleading them, the court can only take cognizance of them when pleaded.

The preſent proceeding would oblige the court to try the validity of the charge, by firſt hearing the defence; in the courſe of that hearing, not only the ſtate of the charge is ſuppoſed, but a reply to the defence by new facts is alſo taken by ſuppoſition; and, ſhould ſuch a method be permitted, your lordſhips would be placed in a ſituation very different from the exerciſe of judicial authority: for courts of juſtice are not inſtituted to decide a diſputation upon a theſis of law; their province is to decide upon real fact, not upon general or hypothetical propoſitions; nor can they pronounce the law, till the facts, from whence that law ariſes, are firſt eſtabliſhed.

The counſel for the priſoner are obliged to ſtate their argument thus: ſuppoſe, ſay they, the firſt marriage to have been ſolemnized, but a ſuit to have been inſtituted to impeach that marriage; in that ſuit, a ſentence pronounced againſt the marriage; ſuppoſe that ſuit and ſentence to have been fraudulent, yet even ſuch a ſentence ought to be concluſive, and to bar all inquiry into the crime of a ſecond marriage. The only anſwer, which I ſubmit to your lordſhips ſuch an argument at preſent demands, is, that a court of juſtice cannot ſuppoſe the fact of the marriage, nor the ſuit to impeach the legality of it; no ſuppoſition can be formed, whether the proceeding in that ſuit was fraudulent or was fair, the ſentence real or colourable; the parties muſt agree upon the facts before the court can be aſked to decide the law; if they do not admit the facts upon record, it remains for both parties to prove what they think material; then, and not till then, it is the duty of the court to pronounce the law.

No precedent has been quoted to ſhew, that a ſimilar proceeding was ever admitted in a court of criminal juriſdiction. One caſe only was faintly alluded to, by the learned gentleman who ſpoke firſt yeſterday. The caſe of *Jones* and *Bow*, cited from *Carthew*; where the reporter ſays, that, 'by way of anticipation to the evidence that the plaintiff 'was about to give, the defendant produced a ſentence of the Eccleſiaſtical Court in a cauſe of jactitation; a debate aroſe upon the effect of that ſentence, and the court being of opinion that the ſentence 'was concluſive, the cauſe between the parties ended.'

That cauſe was an action of ejectment to try the title to an eſtate. A proceeding by ejectment is well known to be entirely fictitious. In a ſuit founded upon a legal fiction to try a queſtion of right, where the judgment is not concluſive on either party, there may be no miſchief in preſſing forward to the concluſion without an exact attention to forms. The caſe therefore does not prove, that in a civil action, where judgment is given upon the mere right, ſuch proceeding could have been allowed: but a criminal proceeding requires ſtill more preciſion than a civil ſuit, and a deviation from the forms would very ſeldom be favourable to the accuſed. If the priſoner is not confined to the defence pleaded, neither would the proſecutor be confined to the matter of the charge; the judge and the jury would mutually encroach upon each other: nor could there be a more dangerous ſource of error and confuſion, than to permit a mixed conſideration of law and of fact, of hypotheſis and of argument, to be introduced into criminal trials. The only plea to the preſent indictment is, *not guilty*: the argument your lordſhips have heard ſuppoſes, that ſuch a plea ought not to have been put in; that there is a more prudent and cautious method of defence which you are deſired to hear upon ſuppoſitions, without the form or ſubſtance of a plea.

The counſel for the proſecution are bound to oppoſe this experiment. It would ill become them, acting in the character of a public accuſer, to advance any doctrine which they did not believe to be founded in law, or to ſuppreſs an objection to a proceeding which, as it is novel, cannot paſs into a precedent without great danger and miſchief. Should that objection prove, that the argument, which in this ſtage of the buſineſs the counſel in defence have been permitted to urge, is inadmiſſible, your lordſhips will however have no reaſon to regret the delay it has occaſioned, nor to deem that time miſ-ſpent, which has been employed in the preſent enquiry, ſince the object of it, though fruitleſs, has been directed to the relief of a party accuſed. Suppoſing then the debate upon the effect of the ſentence urged in bar of the trial to be proper at this time, I ſhall proceed to the conſideration of the argument.——The propoſition advanced is this; that in an indictment upon the ſtatute of *James* I. for marrying a ſecond huſband, living the firſt, a ſentence of an eccleſiaſtical court, in a cauſe of jactitation of marriage, pronouncing, that it does not as yet appear to that court that there hath been a firſt marriage, is a concluſive evidence that no ſuch marriage ever was had.

In order to make out this propoſition, the counſel contend, firſt, that it is an univerſal rule, that the decrees of courts, having competent juriſdiction, bind all perſons, and conclude in all caſes, in any manner touching the matter decided: ſecondly, they maintain, that the ſentence of the Eccleſiaſtical Court in queſtion is a deciſion: they urge in the third place, that the rule firſt laid down admits of no exceptions, but applies with more force to criminal, than to civil caſes. In the laſt place they inſiſt, that ſuppoſing this ſentence to be the effect of fraud, colluſion, and agreement between the parties to the ſuppoſed ſuit in the Spiritual Court, it is notwithſtanding concluſive upon all other courts, and the fraud can only be examined in that court whoſe juſtice has been thus enſnared.

My lords, I have ſtated fairly the argument on the other ſide, which reſts on theſe four propoſitions; and, were I only engaged in a diſputation with the learned gentlemen upon a mere theſis in law, I ſhould be inclined by a denial to inſiſt upon better proofs than have been offered in ſupport of theſe propoſitions. I feel myſelf however under a very different impreſſion of duty, as one of the counſel for the proſecution. The priſoner may take every advantage that the law will allow; from us your lordſhips have a right to expect every conceſſion that juſtice requires. I ſhall therefore admit (as far as in my conſcience I think them admiſſible) the ſeveral propoſitions urged by the oppoſite ſide, ſtate with as much fidelity as I can the true limitations of the doctrines advanced, and aſſert no point but what I hold to be clear law, ſupported by undoubted authority.

It is contended, in the firſt place, to be a univerſal rule, that ſentences of courts of competent juriſdiction are binding upon all other judicatures, in which any inquiry ariſes into the matter determined: that propoſition I conceive to be much too largely ſtated. The rules and principles that I have learnt upon that ſubject, I will very briefly ſubmit to your lordſhips, not meaning to argue, but only to ſtate them.

It is a general maxim of law, that the ſentence of a competent court binds the parties, and all perſons deriving any right under them; as to third perſons, it neither prejudices nor benefits them.

Another maxim, equally true, is, that a ſentence of a court having competent juriſdiction, if it comes collaterally before another court in another ſuit, ſhall be preſumed juſt till the contrary appears. One court has no authority to direct the judgment of another; but it is a fair preſumption, that what hath been decided, hath been juſtly decided; it is, however, but a preſumption, and in moſt caſes it obtains only till the contrary is proved.

I admit at the ſame time, that there are caſes, in which that preſumption may amount to a concluſion. Where the ſentence has been pronounced *in rem*, by a judicature having a peculiar and excluſive juriſdiction over the ſubject-matter of the cauſe, the effect of ſuch a deciſion is not to be controverted in any other civil ſuit. Theſe propoſitions are founded in the conſent of all lawyers, who have treated of general law, and are proved by a ſeries of judicial authorities: to quote them would lead into an unneceſſary detail upon a part of the argument, which does not immediately apply to the deciſion of the point in queſtion.

The caſes cited on the other ſide agree with the diſtinction I have mentioned. A ſentence of a court of *Admiralty* upon the forfeiture of a ſhip; the judgment of the court of *Exchequer* condemning goods as forfeited; are each of them concluſive upon this principle, that the ſentence is *in rem*, the court has pronounced upon the property itſelf. The caſes quoted of ſentences of an eccleſiaſtical court, are all in matters of which that Court has the peculiar and excluſive cognizance. The Eccleſiaſtical court has the ſole juriſdiction of caſes teſtamentary, and of caſes matrimonial, to a certain effect; if therefore a queſtion ariſes, who is intitled to the perſonal eſtate of a man deceaſed with or without a teſtament, the probate of the will, or a grant of adminiſtration, gives the title to the property in queſtion; the effect of it cannot be conteſted in other courts collaterally and incidentally, becauſe no other court has power to controvert the act, no other authority can confer the title to the thing in diſpute. Such ſentences are *in rem*.

The caſe is very different, where the deciſion is upon a perſonal contract, or any matter ariſing out of the various civil relations of perſons, in which the original cognizance of the cauſe might have come before the court. Where that deciſion is offered as an evidence of right, there the judgment of the foreign court can only have effect ſo far as it is juſt; no authority belongs to it but from its internal juſtice; for the court in which it is produced owes no obedience to the court which pronounced it, and is equally competent to give the law to the parties. The effect of the ſentence is beneficial, however, for the party who has obtained it; becauſe the juſtice of it is preſumed, the truth of the facts on which it proceeded is admitted without proof, and the adverſe party is obliged to demonſtrate the falſhood or iniquity of it.

In ſupport of this diſtinction, I will only mention to your lordſhips one authority of a late date, which I ſelect from a multitude of caſes, not merely becauſe it is a determination in the laſt reſort, but becauſe the rule of law is ſtated in the judgment. The caſe I allude to was decided by your lordſhips on the 4th of *March* 1771, upon appeal from the court of *Seſſion* in *Scotland*, by *Sinclair* againſt *Fraſer*. The queſtion there was, what ſhould be the effect of a judgment obtained by the appellant in *Jamaica?* The perſon, againſt whom that judgment was directed, was ſued upon it in *Scotland*. It happened, that the court of *Seſſion* refuſed to give any effect to it, and held the party bound to prove the ground, the nature, the extent of his demand. From that determination an appeal was taken to your lordſhips, the judgment of the court of *Seſſion* was reverſed, and the words of the order of reverſal were, 'that the judgment complained of be reverſed;' and declare 'that the judgment of the court of *Jamaica* ought 'to be received as evidence *prima facie* of the debt, and that it lies on the 'defendant to impeach the juſtice of it, or to ſhew that it was irregularly 'and unduly obtained.'

My lords, the authority that I quote to your lordſhips will have conſiderable effect in a ſubſequent part of the argument: at preſent, I only urge it as a proof, that though in caſes where the ſentence is *in rem*, where the court has a peculiar and excluſive juriſdiction to determine the title to the thing in queſtion, the preſumption in favour of the judgment is admitted to be concluſive; yet where the judgment is applied to perſonal rights, to matters of which other courts have equal cognizance, the party againſt whom it is urged is at liberty to impeach it, to ſhew that it is not juſt, or that it has been irregularly and unduly obtained.

This being the diſtinction in civil caſes, the queſtion ariſes, how far theſe rules are applicable to criminal ſuits? what effect ought the ſentence of any civil court to have as a bar to the juſtice of the ſtate in the trial and puniſhment of crimes?

The counſel for the priſoner argue, that if the civil right is deſtroyed by the ſentence of a competent court, to examine into the crime is an abſurd inquiry; where there is no relation, there is no duty, and there can be no breach of it. Is this ſo? Is it then competent to a party by any act, deſtructive of the civil relation, to aboliſh the duties of that relation? Perſons may deprive themſelves of the benefit of any civil right, may diſpenſe with the advantages of any relation of life, may be intitled to claim neither as wife, mother, nor child; but can they abſolve themſelves from the duties that belong to the natural relation? Can they, by their own act, abſolve themſelves from the ſacred duties of thoſe civil relations which, in a ſtate of ſociety, are natural relations?

My lords, the propoſition I contend for is ſo far from abſurd, that the contrary of that propoſition would involve in it the moſt manifeſt abſurdity: the civil intereſt is important only to the parties themſelves. Whether an eſtate belongs to one perſon or another, whether a party is intitled to rank and diſtinction, to whom related, whoſe wife ſhe is? the queſtion is of great indifference to ſociety: but if the eſtate, the relation, the rank, is obtained by criminal means; if the ſituation which a perſon chuſes to relinquiſh is attended with duties, the advantage, but not the duties, may be waved; the peace and order of ſociety muſt be maintained, and no violation of them can paſs with impunity.

If there is an univerſal propoſition of law, I take this to be ſo, that no determination between party and party can preclude public juſtice from inquiring into the criminal tendency of their actions. Daily experience proves this in the moſt trivial inſtances. An action is brought for an aſſault, the party fails in it, there is a verdict againſt him; it does not prevent a proſecution by indictment, upon the very ſame fact, againſt the very ſame party. In ſuch an indictment was it ever pleaded, that an action had been brought againſt the party for that alledged treſpaſs and beating, and that he had been acquitted upon that action? The learned and reverend judges will inform your lordſhips, that there is not a ſitting or an aſſize without ſome inſtance of this ſort. A queſtion may ariſe in an action upon property, to which of two perſons a thing, an horſe for example, belongs. It is decided to belong to *A.* and not to *B.*: would that deciſion bar an indictment againſt *A.* for ſtealing the horſe? It is no anſwer to public juſtice, that he has acquired that property, when the object of the criminal inquiry is, whether he has committed a crime in acquiring it.

The propoſition advanced on the other ſide, that a ſentence in a civil ſuit is concluſive in a criminal proceeding, was not ſo much preſſed upon any deduction of argument, as aſſerted on the authority of a caſe cited from *Strange*'s *Reports*; in which it was ſaid to have been determined, that the grant of the probate of a will by the Eccleſiaſtical Court was a bar to an indictment for felony in forging that will.

In the firſt place, your lordſhips will give me leave to aſk, does it enter into the imagination of any lawyer, that the ſame rule would take place with regard to a will of real eſtate? Had ſuch a will been produced in judgment, the witneſſes to it examined, the validity of it canvaſſed, a judgment in favour of it, even a decree of the court of *Chancery* eſtabliſhing it, I do preſume it will not be maintained, that all thoſe proceedings would prevent a proſecution for the forgery of that will. The ſame thing might happen in the caſe of a deed; a deed may have been eſtabliſhed by a decree; the property of an eſtate ſettled by it, irretrievably perhaps; would there be no puniſhment for the crime, if it ſhould be diſcovered afterwards, that that deed was a manifeſt forgery? The eſtate might be held indefeaſibly by the party who had obtained it; but I do not conceive that his having got poſſeſſion of that eſtate, having obtained an advantage of which human laws could not deprive him, would be an anſwer to human juſtice why he ſhould not be puniſhed for the crime by which he had gained that advantage.

It is ſuppoſed, however, that there has been a deciſion, that a probate of a will of perſonal eſtate bars an indictment for forging that will. Is the grant of a probate then an act of ſo high a nature, requiring ſo much judicial accuracy, that it is not to be queſtioned? A probate in common form is not even a judicial act, it is merely official; there is no litigation, no inquiry; the conſcience of the judge is not engaged in it. What is the purpoſe of forging a will of perſonal eſtate? To obtain a probate; for without it there might be a criminal intention, but no prejudice could ariſe to any perſon from that intention: ſhall it be ſaid then, that the accompliſhment of the crime is to afford protection for itſelf? The authority relied on is a note in Sir *John Strange*'s *Reports*, under the name of *the King* and *Vincent*; that a perſon being indicted for forging of a will, upon producing a probate, a probate in the common form was held a bar to the proof of the forgery, and he was by the judge acquitted. This is the whole note. It is a great misfortune that notes, very often taken upon looſe information, are given to the world under reſpectable names. The collections of a lawyer, made only for his own uſe, muſt abound with errors; in publiſhing ſuch collections many of theſe will eſcape; and this is not the only inſtance of miſtake in that collection. I conceive it to be impoſſible at any period, at any time of the day, by the negligence of any judge who might happen to be preſent at the *Old-Bailey*, that a priſoner could have been acquitted of a charge of forgery upon ſuch a defence. I ſay this with confidence; becauſe, in the inquiry that hath been made into the caſes determined, many have been found, where parties have been tried and convicted for forging a will of perſonal eſtate, and the evidence to prove the publication of the forged will has been the probate, produced by the officer of the court, and his teſtimony that the priſoner was the perſon who obtained the probate.

Mr. Attorney-General quoted to your lordſhips the caſe of *the King* and *Murphy*. The priſoner there had the double villainy to turn the charge upon his proſecutor. The trial was attended by counſel who do not uſually go to the *Old-Bailey*; it is ſtated very fully by a ſhort-hand writer at the end of the *State-Trials*. The caſe of *the King* and *Sterling* was alſo mentioned; it is very manifeſt that that unfortunate perſon was unjuſtly hanged, if the caſe in *Strange* is law. *Sterling*'s caſe was this: he was indicted for having forged a will, of which will he had obtained a probate, and under that title had transferred ſome ſtock. The perſon whoſe will he ſaid it was, was alive, and produced as the witneſs againſt him, and of courſe to impeach the probate of her own will. Abſurd as it may ſeem to doubt whether that evidence was competent, if the caſe of *the King* and *Vincent* was law, undoubtedly that witneſs ought not to have been permitted to prove her own exiſtence; ſhe was dead by irrefragable legal argument; but the event was different, and Mr. *Sterling*, notwithſtanding the probate, ſuffered for his crime.

Beſides theſe caſes, there was another in no very remote period, in which a party was tried for the forgery of a will, in *September* ſeſſions 1765, at the *Old-Bailey*. One *Richardſon* and one *Carr* were indicted for having forged a receipt for the payment of money, with intent to defraud a particular perſon, who was a ſeaman, intitled to wages: the common caſes of forgery of wills have been in the caſe of ſeamen. Upon the trial it appeared, that the receipt was given in the name of *Jane Steward*, who was the ſuppoſed executrix of a will of this ſeaman, which had been proved by the defendant *Carr*, upon the oath of the other defendant *Richardſon*. The learned judge, Mr. Baron *Perrot*, who tried them, was of opinion, that the priſoners ought to be acquitted of the charge of forging a receipt for the money; but, being ſatisfied from the evidence that *Richardſon* had forged the will, notwithſtanding it had appeared in the trial before him that a probate had been granted of that will, he remanded *Richardſon* to gaol to take his trial for the forgery of the will. *Richardſon* was accordingly tried in *October* ſeſſions 1765, for forging the will of *John Steward*, a mariner: the officer of the Prerogative Court proved upon that trial, that the will was brought to his office by *Richardſon*, and a probate of that will granted; and upon that proof he was convicted, and executed. The firſt learned judge had remanded him to priſon to take his trial at the enſuing ſeſſions for the forgery of a will, the probate of which was then in court; and upon the ſecond indictment, which was tried by the noble lord who preſides in the court of *King's Bench*, the priſoner was convicted notwithſtanding the will had been proved. Other caſes have been mentioned to your lordſhips to the ſame effect with theſe, which ſufficiently refute that ſingular caſe of *the King* and *Vincent*, the only authority to ſupport the argument, that the ſentence of an eccleſiaſtical court is a bar to an indictment.

Having thus removed the only obſtacle to the propoſition I meant to rely upon, that in a criminal matter a ſentence of a civil court ought not to be concluſive againſt a publick accuſation, I now proceed to a more limited and cloſe enquiry, what effect the ſentence of jactitation ought to have in this proceeding, an indictment for bigamy?

It is of no importance to the preſent enquiry to inveſtigate, by what means the cognizance of cauſes matrimonial and teſtamentary belongs not to the ſovereign of the ſtate, but is given to an order of men dedicated to the ſervice of religion. The fact is, that in the juriſprudence of this country, cauſes matrimonial and teſtimentary are of eccleſiaſtical cognizance. The right to try them is not derived from the king as the fountain of juſtice, nor exercifed by the king's court; but wherever the royal authority interpoſes, it is not as ſovereign of the ſtate, but as ſupreme head of the church. The law did not even interfere to puniſh the violation of the matrimonial rights, and adultery, which in moſt countries of *Europe* is treated as a crime, but was not conſidered in *England* as an offence puniſhable by the magiſtrate, but left to the correction of eccleſiaſtical cenſure. At length however the violation of conjugal duty, accompanied with the circumſtance of an open attack upon the order of ſociety, by a ſecond marriage, was, by ſpecial ſtatute, made a crime: when I ſay made a crime, I do not mean it was made more immoral; but it was made a ſubject of criminal cognizance by the magiſtrate. The learned counſel who ſpoke ſecond yeſterday contended, that this ſtatute gave no juriſdiction to the temporal courts to pronounce upon the legality of the marriage; but that the juriſdiction of the Eccleſiaſtical Court, as to the trial of the marriage, remained ſtill abſolute. It was neceſſary for his cauſe to attempt this argument; but to maintain this propoſition is a very difficult taſk. The legiſlature, fifty years after the Reformation, has declared that the crime of bigamy ſhall be puniſhable as a felony by the magiſtrate. To convict a perſon of that crime, muſt not the magiſtrate try him? Has he not the power to acquit or condemn him? Has he only an authority to inflict the puniſhment, as in old times, when the church delivered over the offender to the ſecular arm? and is the ſentence of the ſpiritual court to guide the conſcience of the judge and jury in the criminal court? The ſentence of the Eccleſiaſtical Court in the preſent caſe is ſaid to be againſt the firſt marriage, and therefore it is urged the priſoner ought to be protected by it; but, if the argument is juſt, it muſt hold equally where the ſentence is for the marriage: it ſounds leſs harſh to contend that a party, declared not to be married in the firſt inſtance by the Spiritual Court, ſhall not be queſtioned for the ſecond marriage. But by the ſame rule we muſt conclude, that if the Spiritual Court had determined for the marriage in the firſt inſtance, and the fact of a ſecond marriage had been proved, it would not have been competent for the priſoner in an indictment for bigamy, ſo circumſtanced, to have made any defence: he is concluded by the ſentence, the judge and jury are bound to believe it, and, upon that ſentence, without examination, to convict and to puniſh.

The effect of the ſtatute I take to be very different: it has created a new offence, and for the trial of that offence the cognizance of the lawfulneſs of marriage is given to the temporal courts. As to all criminal conſequences, that court has cognizance to determine, as well as the Eccleſiaſtical Court, what is and what is not a legal marriage between the parties. That it has ſo, the caſe of *Boyle* and *Boyle*, quoted to your lordſhips for another purpoſe, is a clear proof: that was a prohibition iſſued to the Eccleſiaſtical Court to enter into an examination into that cauſe of marriage, which the court, in trying the indictment, had determined. The other caſe mentioned by the learned doctor is to the ſame effect. The two caſes differ only in this, that in one the party was convicted, in the other acquitted; but the court was of opinion in both, that the Eccleſiaſtical Court could not interfere.

It is unneceſſary however to have recourſe to authorities, for the ſtatute itſelf has decided this queſtion. The legiſlature ſeems to have had it in view, that a juriſdiction being newly given to the temporal courts in the trial of marriage, queſtions might ariſe, as between concurrent juriſdictions, what ſhould be the effect of ſentences pronounced by the Eccleſiaſtical Court. It was a wiſe foreſight in thoſe who compiled the ſtatute, to define in what caſes the ſentences of the eccleſiaſtical courts ought to preclude any enquiry for the crime; and it is defined in the words of the exception, 'that this act ſhall not extend to any per-'ſons divorced by the ſentence of the Eccleſiaſtical Court, nor to any 'perſons where the former marriage has been by the Eccleſiaſtical Court 'declared void and null.' There are two caſes then put by the ſtatute, in which the ſentence of the Eccleſiaſtical Court protects the party againſt a criminal inquiry; ſentence of divorce, and ſentence of nullity of marriage: if therefore the Eccleſiaſtical Court, having competent juriſdiction, has either divorced the parties, or if it has pronounced ſentence of nullity of marriage, the ſentence in theſe two inſtances is concluſive: but the ſtatute has no exception in favour of a ſentence in a cauſe of jactitation. There is no pretence to argue, that a ſentence in a cauſe of jactitation is either a ſentence of divorce, or that ſentence which makes the marriage void and of no effect: no lawyer, no civilian can make that miſtake. What then does the exception prove? Two ſentences of the Eccleſiaſtical Court are recited in it, the third is omitted; and it is a general rule of law, that wherever a ſtatute excepts particular caſes, the exception of thoſe caſes extends the ſtatute to all caſes not excepted. That propoſition is too clear to require authorities to be cited in ſupport of it. The law therefore, which ſays the trial of polygamy ſhall proceed in all caſes, except where a ſentence of divorce, and except where a ſentence of nullity of marriage, has intervened, does virtually ſay, that a ſentence in a cauſe of jactitation of marriage, which is neither of divorce nor of nullity, ſhall not bar the trial. I conceive therefore the ſtatute to have decided this queſtion.

The argument on the other ſide is put in a more plauſible form, by ſtating the defence to be founded upon a fact, of which the ſentence of the Eccleſiaſtical Court is the beſt evidence: there can be no double marriage, it is ſaid, becauſe the ſentence diſproves the firſt marriage. This mode of ſtating the argument makes it neceſſary to examine the nature of a ſuit for jactitation of marriage, in order to ſee what credit is due to the ſentence, when offered as evidence to diſprove the firſt marriage.

A ſuit for jactitation of marriage is, from beginning to end, totally ſingular. Some writers on the canon law derive its origin from the doctrine of pre-contracts, which, by the eccleſiaſtical law, conſtituted a marriage: and till that very miſchievous prejudice was deſtroyed by the late marriage-act, it is not ſurprizing that any attempt to leſſen the evil ſhould meet with encouragement. The form of the ſuit is this: the ſuppoſed huſband or wife complains to the eccleſiaſtical judge, that he or ſhe is a perſon free from all matrimonial contracts or engagements with the adverſe party, and ſo eſteemed by all neighbours, friends, and acquaintance; that the adverſe party, notwithſtanding the knowledge of this, has falſely and maliciouſly boaſted of a marriage with the party complaining; it concludes then, by ſuch falſe aſſertions an injury is committed, and prays that right may be done by declaring the party free from all matrimonial engagements with the other, and by enjoining that party perpetual ſilence. The party defendant may either ſay, I have not boaſted, I deny that fact; or, if he admits that he has boaſted, he is then to go on and alledge circumſtantially a marriage, which the other party denies, under the circumſtances alledged. If the marriage is not proved, then the court pronounces, that, ſo far as yet appears, the party complaining is free from matrimonial contract with the other party, and enjoins perpetual ſilence.

After this ſentence, ſo gravely pronounced, your lordſhips are told by all the learned doctors, and all the books of practice agree, that this injunction of perpetual ſilence continues no longer than till the party chuſes to talk again; and the perſon, to whom he may with the moſt perfect ſafety repeat his aſſertions, is the judge who enjoined him ſilence; for, it is agreed on all hands, that the party may at any time inform the court, that though it did not appear formerly that he was married, he can make it appear now; and ſuch proof is admiſſible.

The forms of all courts had probably a good original, and this ſuit may have been introduced to prevent a greater miſchief; but it is impoſſible to avoid colluſion in ſuch a proceeding, which has no avowed object, but to correct the indiſcretion of a ſuppoſed diſcourſe; and which, as the learned doctors on the other ſide truly ſtate, has no termination; and between the parties themſelves never obtains the beſt effect of a judgment, to put an end to litigation. In modern times, ſuch ſuits have ſeldom been commenced but to favour ſome indirect purpoſe; and were the ſentences allowed to have the effect that is now contended for, were they to be a bar to all criminal enquiry, it might be expected that ſuits, which, as the learned doctors ſtate, may be carried on without end, would very frequently ſpring up.

Nothing can be further from the temper of my mind upon the preſent occaſion, than to uſe a ludicrous argument: but when the uncontroulable effect of ſuch ſentences as theſe, ſo contrived and framed for fraud, was urged yeſterday; and while, to leſſen the objection to them, it was gravely argued, that no great miſchief could happen from the deciſion, becauſe you may reverſe this ſentence to-morrow, that the next day, and a third after that, and that the ſuit was in its nature eternal; an ingenious perſon among the byſtanders was calculating, how many wives a man that had a taſte for polygamy, might marry with impunity; and I think he made it out, according to the probable duration of ſuch a ſuit, that a man between twenty-one and thirty-five might, with good induſtry, marry ſeventy-five wives by ſentences of the Eccleſiaſtical Court, each ſentence ſtanding good till reverſed, and all reverſible by that judicature.

My lords, the argument is ſerious, though it preſents a ludicrous idea; for one conſequence would probably attend a deciſion in ſupport of the authority of ſuch a ſentence. The marriage-act put an end to that terrible diſgrace of a civilized country, *Fleet* marriages: while they ſubſiſted, it was a common practice for indigent women of eaſy virtue to get a *Fleet* huſband to protect them from their debts. If a ſentence of the Eccleſiaſtical Court is to have effect againſt all but the parties, a cauſe of jactitation will ſupply the place of a *Fleet* marriage, and furniſh an huſband by ſentence, whom the lady may remove whenever he proves inconvenient. This is but one inſtance, and in the loweſt claſs of the evils, that would follow from allowing ſuch ſentences to be interpoſed againſt publick juſtice, or the rights of third perſons. What guard can there be againſt uncertain iſſue, uncertain rank, and all the numerous miſchiefs that ariſe from doubt and colluſion, introduced in the relations that form the bonds of ſociety?

Were all conſiderations of the conſequences attending ſuch a deciſion to be laid aſide, the very form of the ſentence argues againſt its being concluſive. What ſays the Eccleſiaſtical Court in that ſentence? 'As far 'as *yet* appears, no marriage is proved.' The verdict upon an indictment will ſay, 'it does *now* appear, that a marriage is proved.' The two propoſitions do not claſh with each other; there is no contradiction in them: to the party it is ſaid, You have not proved the marriage; a publick accuſer does prove the marriage; the juſtice of the country has brought out the evidence of that fact, which the party either did not incline, or was not able to produce. There is no repugnance in the different propoſitions, no incongruity in ſuppoſing that the ſentence may ſtand as between the parties, and yet ſhall have no concluſion either as to the publick, or as to third perſons.

The argument in favour of the ſentence was ſupported by this dilemma. What becomes of this ſentence, if the indictment for bigamy goes on? Is it null, or has it any effect? Is the party a wife, or no wife? I anſwer, to all civil effects no wife; the party has bereaved herſelf of any right to benefit by the relation; to all criminal effects a wife, becauſe that relation, the duties conſequent upon it, and the reſponſibility for the breach of thoſe duties, cannot be deſtroyed by the act of the party. I could quote to your lordſhips other caſes, where the party takes no benefit from his act, where he holds the ſituation only to make himſelf amenable to the juſtice of his country. I refer to a known caſe: a man had committed an act of bankruptcy by colluſion with a creditor, and a commiſſion of bankruptcy was taken out againſt him, the object of which was, to procure a diſcharge from his debts. He choſe to conceal a part of his effects, for which he was indicted upon the ſtatute making it a capital felony for a bankrupt to be guilty of any wilful concealment: it came out clear as the light, that he was no bankrupt, that is, no bankrupt to any civil effect; he could not avail himſelf of that commiſſion of bankruptcy againſt any creditor that had a mind to diſpute it, except the creditor who had colluded with him; but though he was in fact no bankrupt, he was tried and convicted as ſuch.

My lords, after the indulgence with which your lordſhips have been ſo good as to hear me ſo long upon this ſubject, I am ſorry to be obliged ſtill to treſpaſs a little longer upon your patience, when I conſider the fourth propoſition, which certainly is not the leaſt material; that is, that a ſentence, infected with fraud, to which colluſion may be objected, is no bar in any cauſe. My lords, upon that head the principle is ſo plain, that the illuſtration of it will not run into much length, and the authorities are ſo deciſive, that I ſhall only ſtate, and not argue upon them.

A ſentence obtained by fraud and colluſion is no ſentence. What is a ſentence? It is not an inſtrument with a bit of wax and the ſeal of a court put to it; it is not an inſtrument with the ſignature of a perſon calling himſelf a regiſter; it is not ſuch a quantity of ink beſtowed upon ſuch a quantity of ſtamped paper: a ſentence is a judicial determination of a cauſe agitated between real parties, upon which a real intereſt has been ſettled: in order to make a ſentence, there muſt be a real intereſt, a real argument, a real proſecution, a real defence, a real deciſion. Of all theſe requiſites, not one takes place in the caſe of a fraudulent and colluſive ſuit: there is no judge; but a perſon, inveſted with the enſigns of a judicial office, is miſemployed in liſtening to a fictitious cauſe propoſed to him: there is no party litigating, there is no party defendant, no real intereſt brought into queſtion; and, to uſe the words of a very ſenſible civilian on this point, *fabula, non judicium, hoc eſt; in ſcena, non in foro, res agitur.*

The ground then upon which I contend, that a colluſive ſentence is no bar, is ſhortly this; that ſuch a ſentence is a mere nullity. But it is inſiſted, that the court which pronounced the ſentence can alone declare the nullity of it, and, till repealed, it muſt ſtand good and valid. The authorities to which I mean to refer upon this head, will refute that argument, at the ſame time that they prove the general doctrine.

The firſt is my lord *Coke*'s reaſoning in *Fermor*'s caſe, 3 *Coke* 77: he concludes the reſolution of the caſe in this manner: 'Thereupon it was 'concluded, that if a recovery in dower, or other real action, if a remitter 'to a feme-covert or an infant, if a warranty, if a ſale in market overt, if 'letters patent of the king, if preſentations and admittances, that is to 'ſay, if all acts temporal and ſpiritual ſhould be avoided by covin, for 'the ſame reaſon a fine in the principal caſe levied by fraud and covin 'ſhall not bind.' Nothing can be more explicit than theſe words to ſhew, that there is no neceſſity that the covin ſhould be proſecuted in the court in which the judgment was obtained. The caſe of *Lloyd* and *Maddocks* in *Moore*, 917, is a direct and a plain authority: there a fraudulent judgment was ſet up againſt a plea of a legatee in the Spiritual Court. The queſtion in the court of *King's Bench* was, whether the Spiritual Court ſhould be prohibited to enter into the conſideration of the fraud of the judgment, which is certainly not a matter of eccleſiaſtical cognizance; but the court was of opinion, that the covin was aptly examinable in a court chriſtian to that effect, and therefore the prohibition was denied.

My lords, the other authorities are more modern, though not more deciſive upon the point than this. The firſt I mention to your lordſhips is the caſe of *Prudham* and *Phillips*: there is a very bad and a very inaccurate note of it in Sir *John Strange*: the note, from which I cite it, is a manuſcript note of Mr. *Ford*. In that caſe it was determined by lord chief juſtice *Willes*, that a fraudulent and colluſive ſentence againſt Mrs. *Conſtantia Phillips* was binding upon her; but he concludes it was binding upon no other party: the fraud was a matter of fact, which if uſed in obtaining judgment was a deceit upon the court, a fraud upon ſtrangers, who as they could not come in to reverſe it, they could only alledge it was fraudulent. He ſaid in that caſe, that any creditor of hers might reply that it was fraudulent, and avoid the effect of it. The other caſes I refer to are, my lord *Hardwicke*'s authority in the caſe of *Roach* and *Garvin*, 1ſt *Vezey* 159; and in the caſe of *Brownſword* and *Edwards*, 2d *Vezey* 246. In the caſe of *Roach* and *Garvin*, the queſtion was upon the effect of a marriage, ſaid to be eſtabliſhed by the ſentence of a court in *France*. Lord *Hardwicke* enters into the conſideration of it thus: 'The 'queſtion is, whether this is a proper ſentence, in a proper cauſe, and 'between proper parties; whether a marriage is had in fact, or any con-'tract *in præſenti*, as a ſentence in the Eccleſiaſtical Court would be 'concluſive, unleſs there be colluſion, which would overturn the whole.' In the other caſe the ground is exactly the ſame.

From theſe caſes, I conclude it to have been the uniform opinion of all the great judges who ſat in *Weſtminſter-Hall*, from the time of lord *Coke* down to the preſent time (and the courts were never more ably filled) that fraud and colluſion not only vitiates, but abſolutely annuls; and that a ſentence obtained by fraud is, literally, no ſentence at all; therefore the objection of ſuch an inſtrument, of ſo much paper and writing, is the objection of a mere nullity, and can have no effect neither in a civil nor in a criminal ſuit. Having troubled your lordſhips ſo very long, I will take up no more of your time, even to recapitulate the heads of the argument, but haſten to return my humble thanks for the great indulgence I have already experienced.

Mr. *Dunning*.

My lords, I purpoſe to give your lordſhips very little trouble: indeed, I ſhould be without an apology, if I had thought of giving you much, finding, in the ſtation which I hold in this cauſe, the ſubject completely exhauſted; and I cannot but ſuppoſe your lordſhips attention in a great meaſure tired, notwithſtanding the occaſional relief which the entertaining parts of the cauſe have afforded, has given you. I have the leſs inclination to give your lordſhips much trouble, as I feel a degree of ſurprize, that it ſhould have been thought neceſſary for the counſel on the part of the proſecution to give your lordſhips any.

My lords, the ſubject for immediate conſideration is, the competency of obtruding this ſentence, in this ſtage of the cauſe, to ſtop the cauſe here, and to require of your lordſhips to decide it, without any regard to the truth or the juſtice of the caſe: ſuch however it is contended is the effect of this paper, that is offered to your lordſhips under the name of a ſentence of the Eccleſiaſtical Court.

The novelty of the attempt it is not my intention to expatiate upon: it has been truly obſerved to your lordſhips, that ſome prejudice at leaſt may be expected in the minds of your lordſhips againſt an attempt ſo novel; for though I am not ſo blind an admirer of antiquity as to take for granted, that every thing that is new is therefore wrong; ſure I am, I am warranted in expecting your lordſhips concurrence in thinking, that thoſe, who propoſe at this time of day to introduce into the judicature of this country a new practice, ought to be prepared with ſuch reaſons as ſhould compel your lordſhips aſſent. This I think may be fairly inſiſted, upon the head of novelty.

My lords, the gentlemen undertake to maintain, firſt, that this evidence is competent and admiſſible; ſecondly, that it is concluſive; and thirdly, they inſiſt on this concluſion, not only upon the ſuppoſition, that it is a ſentence fairly obtained between real parties, after an adverſe agitation of the queſtion, which it is ſuppoſed to have decided; but though all theſe circumſtances ſhould be totally wanting, and though the contrary of them all ſhould be the truth of the caſe, the ſentence is inſiſted on as equally concluſive. In that extent it is, that the gentlemen have undertaken to maintain this propoſition; and a very conſiderable taſk it ſeems to me they have undertaken. My lords, I conſider the ſentence as read only *de bene eſſe*, merely that your lordſhips may know what the contents of it are, that you may have the aſſiſtance of that knowledge in judging not only of the ultimate effect of it, but of the propriety of receiving it at all in this ſtage of the buſineſs. At the firſt bluſh, to be ſure it ſeems a little abſurd, that your lordſhips ſhould be to decide the cauſe before you have the ſmalleſt knowledge of what the caſe is, that is to be ſtated upon the part of the proſecution. It is certainly neceſſary for thoſe that are to judge of this paper, to know what it is. It is a ſentence in a court, of which your lordſhips heard yeſterday abundant commendation. It was obſervable that thoſe who were moſt laviſh in that commendation, were leaſt acquainted with the practice of that court. The firſt of the learned doctors ſpoke with a very becoming modeſty of the court in which he practiſes. The other explained to your lordſhips the nature of a jactitation ſuit as concluding nothing, being to be revived at any time, and conſequently having no end. It was contended by all the gentlemen, that this court was entitled not only to what on the part of the proſecutor we ſhould have had no difficulty perhaps to have admitted, to co-equality with the courts of temporal juriſdiction, but to ſomething ſuperior; it was contended that there was ſomething in the nature of this ſubject that made it peculiarly the province of that court to judge of and to decide upon: not that they have better means of information, not that they have better rules of deciſion; but from ſomething unexplained in the conſtitution of the court, it was rather aſſumed than attempted to be proved, that to that court excluſively belong matrimonial queſtions, queſtions on the rights of marriage, and even of the facts of marriage. I am perſuaded your lordſhips all go before me in feeling a conviction, that there is not in that extent a foundation for that claim: yet this peculiarity of juriſdiction, and the conſequential neceſſity, in order to get rid of the ſentence, to reſort again to that juriſdiction, appeared to me to be the points principally inſiſted on. Neither of them, I truſt, your lordſhips will think are made out at preſent. I am conſidering the firſt. That to certain purpoſes, and with a view to certain conſequences, the Spiritual Court is the only court in which queſtions of matrimony can be agitated, is moſt true. There alone it is, that the party deprived of, and complaining of the want of conjugal rights, muſt reſort to ſeek them: there it is, where the party ſuppoſed to be injured by a falſe claim of a marriage, when none exiſts, can obtain redreſs for that injury: but, to other purpoſes, and various are thoſe purpoſes in which the queſtion of marriage ariſes, whether it is to be examined into with a view to temporal or ſpiritual advantages, whether it is to be examined into with a view to rights derived from it, or puniſhments for crimes committed in relation to it, to the temporal and not to the ſpiritual courts belongs, I conceive, this queſtion of marriage. My lords, to ſuppoſe otherwiſe would be to deny in fact, that your lordſhips ſit here with any juriſdiction at all; for if it were true in the extent in which it was contended, that to the Spiritual Court excluſively belongs the conſideration and deciſion of the queſtion, marriage or no marriage, it will follow by a neceſſary conſequence, that if there were no ſuch ſentence as the preſent to be thruſt in our way, and to create this temporary difficulty, for ſuch I truſt it will prove to be, if there had been no deciſion in the Spiritual Court at all, your lordſhips would only have been in the poſſeſſion of this cauſe for the purpoſe of writing to the biſhop to know how the fact ſtood, and from his certificate to take your ideas of the queſtion which you are to decide upon. The gentlemen muſt maintain not only that there was not at the common law any thing like a juriſdiction, but that this ſtatute, which means in terms to give a juriſdiction, has not in point of effect given any. I am at a loſs to find a way, conſiſtent with what the gentlemen have maintained, to deliver them from that conſequence. If they inſiſt, that no temporal court has a power to enquire into a queſtion of marriage, it will go to that extent. They have made a diſtinction between thoſe caſes, in which the queſtion is the point of the cauſe, and in which it ariſes incidentally. The queſtion does not ariſe at all, unleſs it ariſes materially: if there be any thing in the diſtinction, let us ſee a little how it will help this argument. Was the marriage the giſt of this cauſe in the Spiritual Court? No: the lady applies to the Spiritual Court, aſſuming that there was no marriage, complaining of an injury, which conſiſts in the circumſtance of a man who was not her huſband taking to himſelf and boaſting (as a man would be apt to boaſt in ſuch circumſtances) of the honour of bearing that relation to her.

This cauſe is not in its nature a queſtion of marriage, but of defamation. If that, which the lady ſuggeſted, had been admitted to be the truth of the caſe, he would have been to excuſe or extenuate his offence, juſt as the nature of his caſe would enable him to do, by either denying that he had boaſted, or ſtating what had led him into it: but this defendant ſays, No: I have held that language, which you call boaſting: I will not diſpute with you the propriety of that appellation: I have called this lady my wife; becauſe, whether it be my good or ill fortune, ſhe is my wife. It is for that reaſon, and that reaſon alone, that I have held this language, which is imputed to me as a crime: I am no criminal in holding this language, for that is my ſituation, and this is my defence. Thus it is, that the queſtion of marriage is introduced into the cauſe: it is inſiſted upon as a defence; as a matter material to her defence it is that the queſtion of marriage in this cauſe ariſes. Is it leſs incidental or more direct than the ſame queſtion ariſing in the ordinary way, in which it ariſes in temporal courts? A perſon, claiming to be the legitimate ſon of his father, commences an ejectment, in which the queſtion of legitimacy turns out to be the only queſtion in the cauſe: it is eſſential to his ſupporting his claim, that the court, who are to judge of it, and the jury that are to decide upon it, ſhould be ſatisfied of the facts, that the claimant is the eldeſt and the legitimate ſon of the father. The point of marriage is not the point of the ſuit directly, immediately, oſtenſibly, and upon the face of the record in that cauſe; but incidentally, materially, and neceſſarily that point becomes a point in the cauſe. Juſt thus, in my apprehenſion, this cauſe ſtands; and, as applied to this cauſe, the gentlemen cannot avail themſelves of the diſtinction between the juriſdiction to be exerciſed incidentally, and to be exerciſed directly, upon the ſubject of marriage. One of the learned doctors repreſented his ideas of this juriſdiction exerciſed in the Spiritual Court, as if it was a juriſdiction to decide upon an abſtract queſtion. I am perſuaded the learned doctor in the uſe of that word meant only to ſay, that in their forms of proceeding, and in ſome of thoſe cauſes which are inſtituted in their courts, the right of marriage, in contradiſtinction to the fact of marriage, was more immediately pertinent than in ſome of the proceedings in temporal courts; which to be ſure it is. In any other ſenſe of the word, the learned doctor uſed it inaccurately; for that court, any more than this or any court, has no juriſdiction to try abſtract queſtions of any ſort. No queſtion ought to be agitated in any court whatever, unleſs it be a real queſtion ſpringing from a real intereſt, and between real parties. To agitate any other queſtion is an inſult to the court. There is a ſenſe in which the court may be ſaid to have agitated this, in the nature of an abſtract queſtion; for it is certainly true, if our inſtructions have any foundation in truth, no one circumſtance of the actual caſe of the parties was before the court, or made any part of their enquiry. I truſt, I ſhall be thought to have done enough at leaſt for the Eccleſiaſtical Court in admitting, that their ſentences are equal to our judgments; that they are not entitled to more, I may ſafely contend, when I am admitting, that they are entitled to as much attention as is due to a decree of a court of equity or a judgment of a court of law. In ſuch an admiſſion, at one time I ſhould have been thought to have gone much too far: I truſt, the learned doctors will forgive me, if I cannot carry my civility any farther. God be thanked we live at a time, when a better underſtanding of the ſubject, and a more liberal way of thinking upon every ſubject, has ſo far aboliſhed the antient differences between the different judicatures in this country, that we and the learned doctors may meet together without quarrelling. Their proceedings in caſes in which it is competent to them to proceed, deſerve the ſame attention and faith as thoſe of temporal courts. This appears to me to reduce the claim, upon the part of thoſe that are to ſupport this ſentence, preciſely to this ſituation; and it is impoſſible to carry it one jot further: it is an opinion of a court, not having ſuperior or excluſive, but having a concurrent juriſdiction of this queſtion; having competent power to decide, and having no powers to exclude another deciſion elſewhere, where, for other purpoſes, criminal or civil, it may come to be diſcuſſed, according to the forms which thoſe different judicatures uſually obſerve in their proceedings, totally unobſtructed or aſſiſted by any attention to what has paſſed in any other judicature: this, I truſt, will be your lordſhips judgment upon the queſtion agitated between us, if it ſhould be material.

My lords, I laid in my claim to object to the admiſſibility of this piece of evidence, upon which, if I ſhould have the good fortune to have your lordſhips concurrence, the ſubſequent conſideration of the effects of it, if admitted, will become totally immaterial. I deny, that this is admiſſible in a court like this, a court of the higheſt criminal juriſdiction in this country.

My lords, it is ſo familiar, that it would be impertinent to that part of the court to which I have the honour to addreſs myſelf, which is more particularly converſant in the forms of proceeding in courts of juſtice, to be labouring to prove, that when a ſubject is examined into in the courſe of a criminal enquiry, under the form of an indictment, or of an information, what has paſſed or may paſs in the courſe of a civil enquiry upon the ſame ſubject and the ſame queſtion, is not only not regarded, but is not admitted. In the inſtance that was put, and many others that may occur to ſome of your lordſhips, it is perfectly notorious, and therefore neither requires argument nor proof, that the practice is certainly ſo. Let a man be acquitted in a court of criminal juriſdiction, it does not preclude a party, complaining of an injury ariſing from that act, which in a criminal court has been preſented as a crime, from ſeeking redreſs for the civil injury; and *vice verſa*, the fate of ſuch an action cannot be enquired into, much leſs cannot it preclude the proceedings in a ſubſequent criminal enquiry, taking its riſe from the ſame act. It has been enquired into in a court of one deſcription, it is now enquiring into in a court of another deſcription.

My lords, one reaſon (there are others, but) one reaſon why courts of criminal juriſdiction do not admit any account of what has paſſed upon the agitation of the queſtion in a court of civil juriſdiction may be, the liability to fraud and colluſion. I am not now arguing upon the fact of colluſion in this caſe: but it is obvious that if this would do, if the ſentence of a court of ſuch juriſdiction, whether eccleſiaſtical or temporal, will preclude a criminal enquiry, the receipt is of ample uſe; and all men may, if they pleaſe, cover themſelves againſt the penal conſequences of their crimes by inſtituting a friendly ſuit. Some ſuch we have known to have been ſo conducted as to eſcape the attention of the judges, who have not found out, till after the cauſe has been decided, that the cauſe has been colluſive. Caſes of this ſort are ſo open to fraud and colluſion, that for this reaſon, if there were no other, the courts of criminal juriſdiction will always reject ſuch evidence. I do not know that caſe has yet exiſted, where any perſon has done ſo ſtrange a thing, as to put it in the power of the court to receive or reject by offering ſuch evidence. Your lordſhips have had cited to you a caſe, which, having been treated as it deſerves, need not be repeated by me; the caſe of *the King* and *Vincent*. If it were poſſible to ſuppoſe that caſe could be law, that ſuppoſition is removed, when your lordſhips are told that a different opinion upon the ſame point has been held by the judges that have ſucceeded in the ſame court, and to whoſe knowledge or ability nobody, that knows who they are, would, I believe, object. The laſt of theſe caſes, *the King* and *Stirling*, I am aware, may be attempted to be diſtinguiſhed, and for what I know the firſt of them may, by ſaying that the queſtion did not occur, the objection was not taken in either of theſe caſes; but your lordſhips knowing before whom thoſe criminals were tried, will believe that no ſuch objection would have eſcaped theſe judges, if it had been founded in law, although no counſel objected to it, or although the criminals perhaps had not the aſſiſtance of counſel; therefore I conſider that caſe as fairly diſmiſſed, and the ſubſequent caſes as carrying an authority upon our ſide that more than overturns it: but I do not conceive, that even this was wanting; for the inſtrument in the caſe of *the King* and *Vincent* has no reſemblance to the ſentence now offered; it was an official inſtrument, neceſſary to give ſanction to a legal right. Letters of adminiſtration, or a probate, may be admiſſible; but it does not by any means follow, that a ſentence like this is admiſſible here: if it be, it muſt be equally admiſſible on all ſides. The gentlemen argue, that your lordſhips ſhould receive it, ſhould act upon it, ſhould conclude upon it. Why? Becauſe it is a ſentence reſcinding the marriage, declaring that there was no marriage; that is the import of this ſentence, and therefore it operates in their favour, and therefore it happens that they produce it. Let me invert the caſe; let me ſuppoſe, that when this lady inſtituted that ſuit, the party, who was the object of it, had ſupported that defence, as we conceive he was very well able to have done, and that in conſequence the cauſe had ended in a declaration or a ſentence, that there was a marriage: in that caſe, would it have been evidence upon the part of the proſecutor? Would it have been attended with thoſe conſequences, which they are claiming for it now upon the part of the perſon proſecuted? Would your lordſhips have endured, that the proſecutor ſhould have come here to ſupport this indictment by no other evidence, than the production of a ſentence in a ſuit like this in the Spiritual Court, by which that court had determined Mr. *Hervey* and the lady he had married were huſband and wife? Can I poſſibly ſtate it to any mind that comprehends it, that does not at the ſame time revolt at the apparent hardſhip and injuſtice of ſuch an idea? And yet is there any thing more true, than that a record cannot be evidence of one ſide, which would not, if it had imported the reverſe, have been evidence, and with equal force, of the other? I conceive it to be one of the fundamental rules to determine what evidence of this nature is or is not admiſſible, that if it could not have been admitted on behalf of the party objecting to it, ſuppoſing its import had been favourable to him, ſo neither ſhall it be admitted on the part of the perſon propoſing it. I truſt I may be warranted in preſuming that your lordſhips think as I do; that in order to ſupport this indictment ſomething more than ſuch a ſentence would be required from us; and that the legiſlature in making this new proviſion meant, that the fact ſhould be enquired into, as all other facts are enquired into; that the relation ſhould be proved by thoſe who were witneſſes to it, by thoſe who can prove the confeſſion of the parties to it, or by thoſe who can give ſuch other evidence as courts of criminal juriſdiction are authoriſed to act upon. Can any thing then be more obviouſly unſuitable to any ideas of juſtice, than that the enquiry ſhould be precluded by a record in favour of one of the parties, which might have been as favourable to the other party, and which, if it had been, would not have been regarded?

If your lordſhips think fit to admit this evidence, and by ſo doing to raiſe a queſtion upon the effects of it, the gentlemen argue with ſome appearance of triumph, that this kind of ſentence is concluſive, for that there are various inſtances, in which ſentences of theſe courts, in which judgments of other courts, have been held concluſive. For this purpoſe your lordſhips are furniſhed with a great ſtring of caſes, ſome of condemnations in the court of *Exchequer*, ſome even from boards of *Exciſe*, ſome from courts of *Admiralty*, ſome from domeſtic and ſome from foreign courts. There has exiſted, and fitly exiſted, ſuch a comity in the practice of one court towards the proceedings of another, that, whether the court be foreign or domeſtic, the courts preſume, that what is done is rightly done, that there has been no colluſion, that there has been no fraud, that the judgment and decree is what it ought to be, the effect of an adverſe ſuit between adverſe parties. Preſuming the effect of ſuch ſentences, ſuch decrees and judgments, in civil cauſes to have been what it has been ſtated to be, it muſt have been upon the ſuppoſition and upon the preſumption that the ſentence or the decree has been fairly and rightly obtained: but if this degree of concluſiveneſs were allowed to it in criminal caſes, if ſuch a ſentence were allowed to be concluſive, where the parties are unprepared in point of evidence to impeach it, and if ſuch were allowed to be the effect of it in ſuch a caſe in courts of criminal juriſdiction, it would obſtruct the courſe of juſtice in a thouſand inſtances, and in effect operate to the repeal of this and many other wholeſome laws. In this inſtance the miſchief would too be great if the policy of this law be queſtionable, if that which we call a crime is an innocent action. If there is no impropriety in the practice now brought under your lordſhips conſideration, if polygamy deſerves encouragement inſtead of a check, then in another character your lordſhips will do well to repeal the act; but do not do it in your judicial character.

My lords, caſes may be ſuppoſed, and we are in a ſituation that authorizes us, nay, not only authorizes but requires us to ſuppoſe, the groſſeſt caſes that our imaginations can furniſh. It is not difficult to ſuppoſe a caſe, in which the directeſt fraud upon the court may be practiſed by means of the groſſeſt perjury, and yet through the colluſion of the parties it may be managed with ſo much dexterity, that it would be impoſſible to get at them; and in all theſe inſtances the effect I am now deprecating would be of courſe let in upon the criminal juriſdiction of this country.

My lords, I am perſuaded your lordſhips will not do this. In what I have ſaid upon this point, I have anticipated in part the queſtion which I ſtated as the third in the order, in which I purpoſed to conſider the argument on the part of the lady at the bar. All her counſel have attempted to contend for the concluſiveneſs of this ſentence; and they all mean, I preſume, to inſiſt upon it as precluding an enquiry into the mode of obtaining it. The other learned gentlemen will excuſe me, if I ſeem to have been leſs attentive to what fell from them, than to the ſecond counſel on the part of the lady. The fact is, I heard him more diſtinctly than thoſe who preceded or followed him. He choſe to conſider this act as not having created a new offence, but as having ſimply varied the puniſhment and mode of trial of a known offence, which exiſted as the law ſtood then. I am at a loſs to comprehend, in what ſenſe this can be conſidered as having not created a new offence. This act declares ſomething to be a felony, which before was no felony. This act creates that to be a felony, enquirable into in the way in which other felonies are by law enquirable into, in a caſe that was before only cognizable as an offence againſt the canon law, and enquirable into in a ſuit which had nothing for its object but the ſpiritual intereſt of the party. I conceive it to be a new offence in the ſame ſenſe, in which almoſt all the ſtatutable offences in this country are new offences. This act has not only created a new offence, but, as I conceive, aboliſhed an old one; for I doubt whether it be now competent for an eccleſiaſtical court to proceed to enquire into offences of this ſort, if it were (as has been ſuppoſed) their practice before this act. By the cuſtom of *London*, a certain ſpecies of defamation is actionable there; and upon that ground the temporal courts proceed in granting prohibitions to ſtay proceedings of the Spiritual Court in ſuch caſes; ſo I apprehend the courts would do here, if the Spiritual Court proceeded *pro ſalute animæ* in a caſe of polygamy. My learned friend aſſumed, that this ſentence would ſtop the proceeding of ſuch a cauſe in the Eccleſiaſtical Court, but referred to the learned doctors to make it out; which the learned doctors, I preſume, not liking the reference, forgot to attempt: ſo it ſtands as a point aſſumed, but not proved, that the Spiritual Court would at this time entertain ſuch a ſuit, and that its progreſs would be ſtopped by ſuch a ſentence. Your lordſhips heard a very pathetic deſcription of the melancholy ſituation in which the lady will ſtand under this ſentence, if this proſecution proceeds, and in conſequence of it ſhe ſhould be treated in the diſagreeable way to which the act expoſes her. She will nevertheleſs, it has been ſaid, after having been puniſhed as a married woman, be totally deſtitute of any advantage in preſent or future of that marriage; ſhe can never claim any conjugal rights, nor (if her circumſtances did not preclude the neceſſity of her ſeeking it) could ſhe compel any maintenance from this gentleman during his life-time, nor can ſhe, if ſhe ſurvives this ſuppoſed huſband, ſupport any claim to his fortune.

My lords, the huſband is in the ſame lamentable ſituation: it is equally incompetent to him, while this ſentence ſtands, to derive any advantage in point of comfort during her life-time, or in point of ſucceſſion upon the death of the lady. It may be ſo; but if it is ſo, it will not be the effect of the judgment your lordſhips will be to pronounce: it is the effect of thoſe practices between the parties which have produced this ſentence, and which have made this their ſituation and their ſtate.

My lords, it will be time enough to conſider this queſtion, when the caſe ariſes. If ever this lady ſhould re-aſſume an inclination to eſtabliſh that relation, which in this ſuit ſhe has thought good to diſclaim; or if it ſhould ever be the pleaſure of the earl of *Briſtol* to connect himſelf again with this lady under the relation of an huſband; it will then be time enough to enquire, what they can or cannot make of ſuch a claim, or what the impediments are, which they will have to remove in order to eſtabliſh that claim. As neither of theſe caſes are very likely to ariſe, it is immaterial to go further into the enquiry of what may probably or poſſibly be the conſequence of them. It occurred to the learned gentleman to conſider, that it was very poſſible he might be led by this train of reaſoning into the conſideration of the effect of the colluſion. Your lordſhips will permit me to remark, that the learned gentleman who ſpoke firſt upon that ſide of the queſtion, choſe to be perfectly ſilent upon this head. He did not ſeem to know that it would be likely to occur to us in the conſideration of this ſentence to ſuggeſt, that it was colluſive; for unleſs it were by an alluſion to the caſe of *Hatfield* and *Hatfield*, the notion of colluſion, as making a part of this queſtion, did not ſeem to have occurred to him. Mr. *Mansfield* ſaw the certainty of the colluſion being introduced into the argument: to obviate it, he uſed three caſes, two that had been mentioned before, and a third he introduced for the purpoſe. The firſt, in the order of time, was the caſe of *Kenn* in my lord *Coke*, which whoever reads, will ſee that the only point determined, and the only point to be determined in that caſe, was, that it was not competent for the party to traverſe an offence that had been found againſt him: all the reſt is that ſort of lucubration which adorns, and in many inſtances improves, the reports of that learned judge of the deciſions of his own time. And this is the uſe that is attempted to be made of this part of the argument; that it was founded in falſhood, and therefore was upon the face of it colluſive. The falſhood was, that the party was in a condition, as it turned out by ſubſequent enquiry, to have made a better caſe than he did make; and from thence it is to be taken for granted, that of purpoſe and deſign he abſtained from making that caſe that he did not make. Your lordſhips know better the nature of buſineſs, than from ſuch a circumſtance to infer a fraud: the beſt-bottomed cauſes often miſcarry for want of that evidence, without which they cannot be ſupported. The next caſe, that of *Morris* and *Webber*, from *Moore's Reports*, ſeems to me to be ſtill leſs material or uſeful to the purpoſe for which it is produced: that was the caſe of a divorce *propter impotentiam viri*. The parties marrying afterwards, fruit of each of theſe marriages was the birth of children. Perhaps it may occur, that that circumſtance did not afford a very deciſive and concluſive proof of the negative of the ground upon which that decree was pronounced: it is not an impoſſible caſe, that what had happened might happen, although the divorce was perfectly well founded in point of fact. But ſuppoſe it were taken for granted, that the child muſt of neceſſity be the iſſue of a man who had been divorced *propter impotentiam*; yet that it muſt of neceſſity be inferred from thence, that this ſentence was colluſively obtained, remains to be made out. I conceive that this caſe, any more than the one that preceded it, does not afford a colour to ſay, that the queſtion of colluſion and the competency of going into the queſtion of colluſion occurred to the court in either of theſe two caſes. In the caſe of *Hatfield* and *Hatfield*, a man, who, under colour of being the huſband of the woman, had taken upon him to releaſe ſome intereſt which ſhe was entitled to, and he claimed to be entitled to in her right, and the queſtion turned upon the effect of that notion: there was afterwards a ſentence between the parties againſt the marriage; whether the means to obtain it were fair or foul, fraudulent or otherwiſe, we are left to gueſs at. Your lordſhips will not, I preſume, adopt all the printed reaſons, good, bad, or indifferent, that are offered to your lordſhips at the cloſe of your printed caſes. Your lordſhips predeceſſors in that caſe could do no otherwiſe than they did: they ſaw, that the deciſion in the court below was right, and upon that ground they affirmed the decree. Now, what was the thing decreed, and the point in controverſy between the parties? The man, while he paſſed for this lady's huſband, took upon him to releaſe an intereſt, which it was not competent for him to releaſe, whether he had or not that character, the ſubject of the releaſe being a legacy, left to her under a will, in ſuch terms as operated to give her in equity a ſeparate intereſt. I need not contend, that in a ſeparate intereſt of the wife the huſband cannot controul or deprive the wife of it by any releaſe of his. A court of equity had decided againſt the party claiming under the releaſe, which, according to the ſettled doctrine of courts of equity, it was equally bound to do, whether the party releaſing had or had not married the woman whoſe intereſts were to be affected by it; and the queſtion (huſband or no huſband) was juſt as foreign to the merits of that deciſion, as any thing that could be talked about in the cauſe. Totally therefore laying out of the queſtion all that had been ſaid upon the ſubject that was not neceſſary to the deciſion of the caſe, the houſe of lords affirmed the decree of the court, becauſe they ſaw it had rightly decided the only point in controverſy between the parties. Theſe then are the caſes, upon the ground of which, and upon the ground of which alone, (for I have not been able to collect a fourth) your lordſhips are deſired to decline doing that in this inſtance, which we contend your lordſhips are bound in juſtice to do; that is, to let us into the enquiry by what means this ſentence was obtained. The gentleman, particularly, who made this uſe of theſe three caſes, could not forget the familiar practice, which he is a witneſs to every day of the year, of impeaching the judgments of the courts of law, whenever they are impeachable upon the foundation of fraud and covin. It never occurred to a court in which ſuch a queſtion ariſes to refer the party who makes a complaint of a judgment ſo obtained, to the court in which it was obtained, or to direct him to inſtitute a ſuit to get rid of it; he impeaches it juſt when it affects him, and not further than as it affects him; beyond that, it is a matter of perfect indifference to him, whether it ſtands or falls; for the purpoſe of doing that, which alone he is intereſted in doing, the party, who would otherwiſe be prejudiced by ſuch a judgment, is conſtantly and daily permitted to ſay, that this was a judgment obtained by covin: this allegation is uſually formed into an iſſue, and if that iſſue is determined in his favour, though the judgment ſtands as to every other perſon, *quoad* him it is avoided in the manner we are ready to avoid this ſentence. It was ſaid, that the reaſon why creditors are permitted ſo to avoid judgments ſet up to their prejudice by executors or adminiſtrators, who ſeek to cover effects in their poſſeſſion by falſe judgments, is, becauſe theſe people cannot be relieved in any other form; it cannot be referred to any other court. I am perfectly content to take that as the principle; then it remains, in order to ſupport this diſtinction, for the learned gentlemen among them to make out, that it is competent to his majeſty to make himſelf a party to this ſuit in the Spiritual Court, or to inſtitute there, by his proper officer, a new ſuit to get rid of this ſentence. The gentlemen have not attempted it; it would be ridiculous; and I fancy I may preſume it will not be attempted: it is not competent, much leſs neceſſary, for the king or his law-officers to go into that court for a purpoſe ſo idle as this. Taking this then to be the reaſon why it is admitted in civil cauſes to creditors to get rid of judgments, by which they are attempted to be injured, by ſhewing that they were colluſive and fraudulent, does it not follow by parity of reaſon, that it is equally proper that the ſame thing ſhould be done here, ſuppoſing that your lordſhips ſhould for a moment forget this to be in a criminal cauſe, in which the reaſons for ſo doing are ſo much the ſtronger? Another diſtinction between this caſe and that was attempted. It was ſaid, this is not the caſe of a third perſon complaining of an injury ariſing by a ſentence, and wiſhing to avoid it ſo far only as it affects him; but it is a ſuit inſtituted for overturning the ſentence. I apprehend it is not ſo; we contend for nothing but to lay this ſentence out of our way, as applied to the preſent ſubject; juſt as you lay out of the way a judgment between *A.* and *B.* where it is attempted to be uſed to the prejudice of *C.* After your lordſhips have convicted this lady, if in the reſult of the enquiry it ſhould be proved, that ſuch is the juſtice of the caſe, I do not know that the verdict or the judgment in this caſe will be evidence upon an enquiry into the ſame facts for another purpoſe. If the reſult of the preſent enquiry is underſtood to eſtabliſh the marriage, and to nullify the ſentence, it is becauſe the ſentence is in its nature, when it comes to be enquired into, really and truly null and void; not becauſe that ſuch is the effect of any operative power and force that belong to your lordſhips conviction. This is not a proſecution for the annulling of that ſentence; this is a proſecution to ſubject the party to the puniſhment which is by law due to the offence charged upon her: it cannot be attended with any other poſſible conſequence. Upon the ſame ground that the ſentence is attempted to be impeached here, it may be impeached every where, except by the parties, who may perhaps have precluded themſelves by their conduct from impeaching it.

My lords, as there are no authorities on the one ſide, it remains for a moment only to obſerve, that there are authorities on the other ſide: as applied to civil caſes, two have been mentioned. The good ſenſe of both the authorities, particularly of one, I ſhould apprehend eſtabliſhes this propoſition clear of all controverſy; for, when in the caſe of the action againſt *Conſtantia Phillips*, of famous memory, it was determined, that whatever objections would avoid a judgment in a court of common law, would be ſufficient to overturn a ſentence in the Spiritual Court, but none other; one ſhould have imagined that the propoſition carried with it ſo much good ſenſe, that all the world ſhould feel it and adopt it. The *Scotch* caſe is by the higheſt authority, and there the true uſe that is to be made of a judgment in another court is aſcertained and limited; it is evidence; it is ſtrong evidence; but it remains to be explained; and ſtill more, it remains to be laid out of the caſe in a cauſe like this, and in a caſe like that of *Phillips*, where there exiſted a ground to impute colluſion and fraud to it. In *Phillips*'s caſe, it was not permitted to her to avail herſelf of that colluſion and that fraud. Why? Becauſe it was a fraud of her own. But the learned judge, when he refuſed to permit her to impeach that ſentence, which ſhe had obtained by colluſion and fraud, adds, according to Mr. *Ford*'s manuſcript note, that, 'as againſt all others, whatever objections would avoid a judgment in a court of law, would be ſufficient to overturn a ſentence in the Eccleſiaſtical Court.' We deſire to overturn this ſentence upon no other grounds, than ſentences and judgments in courts of law are every day overturned by: they muſt continue to be ſo overturned in future, as long as there continues to be any attention to truth and juſtice in the deciſions of courts of judicature. I do apprehend, that your lordſhips will not think, that I take an improper freedom with the ſentence, or the court whoſe ſentence it is, by deſiring that your lordſhips will by-and-by form an opinion of the purity of their proceedings by the ſpecimen that we ſhall give you of them, when we come to ſtate and prove the means by which this ſentence was procured; and then perhaps your lordſhips will ſee no reaſon for raiſing it above the level of other courts, on which we are content to leave it. With your lordſhips permiſſion, I would ſupply an omiſſion I meant to have ſtated in its proper place; the caſe of *Robins* and *Crutchley*. A Mrs. *Robins* commenced an action of dower, claiming a ſhare of the ſucceſſion to her ſuppoſed huſband Mr. *Robins*: this lady had been claimed to be the wife of a ſir *William Wolſeley*. Sir *William* ———, upon the ſuppoſition that ſhe was his wife, had inſtituted a ſuit in the Spiritual Court, probably with an intention to get rid of her, charging her with having committed adultery with *Robins*: in the courſe of that enquiry in the Spiritual Court, it came out to the ſatisfaction of the court, that ſhe was the wife of *Robins* and not of ſir *William* ———. This ſentence was introduced in pleading in this cauſe of dower for the purpoſe of repelling a denial on the part of the heirs of Mr. *Robins*, that ſhe bore any relation to them or to their anceſtor. To that replication there was a demurrer, which brought under conſideration of the court of *Common Pleas* the effect of this ſentence ſo pleaded. The opinion of the court of *Common Pleas* was to allow that demurrer; and though the point decided may perhaps be only this, that that ſentence could not avail the party in that form of pleading; yet I conceive that point muſt be very erroneouſly decided, if the ſentence were of the deſcription which has been attempted to be paſſed upon your lordſhips: for if it had been underſtood to be concluſive and precluſive of all further enquiry, moſt undoubtedly it would have been a proper ſubject to be introduced in pleading as a bar to any farther enquiry. Your lordſhips, by looking into the only report in print of that caſe (Mr. Serjeant *Wilſon*'s) will find, that the learned judges of the *Common Pleas*, who decided it, ſeemed to be agreed in thinking, that it was very far from an eſtabliſhed point, that this ſentence was concluſive, that the queſtion could only be tried upon the iſſue *ne unques accouple*, which your lordſhips know to be the only proper iſſue in a queſtion of dower, and that iſſue muſt be determined by the biſhop's certificate. Now we are told that this ſentence is juſt equivalent to the certificate of a biſhop: this was ſo far from being the opinion of that court, that they leave to the biſhop to judge for himſelf, what regard he would pay to that ſentence on the point which he was to certify.

Doctor *Harris*.

My lords,

It would ill become me at this time, after the points which have been propoſed have been ſo fully diſcuſſed by the gentlemen who have gone before me, to take up much of your lordſhips time.

There are two queſtions, as I underſtand, before your lordſhips.

The firſt of them is, whether a ſentence in a cauſe of jactitation can be given in evidence, as an abſolute bar to a proſecution by the king? and the other is, whether, on ſuppoſition that a ſentence in a cauſe of jactitation can be given in evidence, it will afford a complete defence, ſo that no proofs whatever can be admitted afterwards in order to counteract and impeach that ſentence?

How theſe queſtions come before your lordſhips, whether properly or improperly, is not for me to argue. It is out of my profeſſion to ſay any thing about them; but as the gentlemen on the other ſide have been permitted to ſtate them and argue on them, it is certainly neceſſary that they ſhould alſo be diſcuſſed by the counſel for the proſecution.

In regard to the firſt queſtion, I ſhall not trouble your lordſhips long, becauſe the diſcuſſion of it relates principally to the practice of courts of law, but ſhall more particularly attach myſelf to the conſideration of the ſecond; as I ſhall in ſo doing have an opportunity to ſay a word or two in anſwer to what the gentlemen have urged on the other ſide, who are of the ſame profeſſion, and practiſe in the ſame courts where I have the honour to attend.

In reſpect to the firſt queſtion, whether a ſentence of jactitation is an abſolute bar, and can be offered as ſuch to a ſuit at the proſecution of the king, it is to be obſerved, that anciently the whole cognizance of marriage, with that of the crimes attending it, was veſted in the eccleſiaſtical courts: but thoſe courts being either remiſs in the exertion of their juriſdictions, or, more probably, wanting power to inflict an adequate puniſhment ſufficient to ſtop the growth of the increaſing evil, and the legiſlature, for conſtitutional reaſons, being both unwilling and unable to inveſt them with more authority than they then had, the aid of parliament became abſolutely neceſſary; and the ſtatute of *James* the firſt, on which the priſoner ſtands indicted, was accordingly made; by which it was enacted, that if any perſon being married ſhall marry another, the former huſband or wife being alive, *the offence ſhall be felony*.

Before this ſtatute, the eccleſiaſtical courts had the cognizance of the crime of taking a ſecond wife, or a ſecond huſband, whilſt the firſt wife or firſt huſband was living: but the ſtatute, as I underſtand, takes that branch of the juriſdiction, namely, the power of inflicting any puniſhment whatever on a perſon guilty of polygamy, intirely from the eccleſiaſtical courts; inſomuch, that, if at this time a proceſs was to iſſue from an Eccleſiaſtical Court in order to call any perſon to account for bigamy or polygamy (whichever it may be termed), the party cited might obtain a prohibition from the judges of the temporal courts to ſtop ſuch a ſuit, a ſuit, in the ſame manner as a prohibition may be obtained in caſe of a proſecution in an eccleſiaſtical court for perjury not committed in that court, or for any other crime puniſhable by a ſtatute. Now, my lords, it is evident, that the one court has loſt what the other has gained, in reſpect to the offence of bigamy; ſo that the temporal court, or rather your lordſhips, are able to judge of bigamy, and of every eccleſiaſtical matter incident to that branch of ſpiritual juriſdiction. It may here be obſerved, that a jactitation cauſe is deſcribed in our books of practice to be a *quaſi* defamatory ſuit; and moſt certainly it is ſo, and nothing more, when a perſon libelled againſt in jactitation confeſſes the boaſting; as, when a man cites a woman for boaſting, and ſhe acknowledges the jactitation; for the cauſe ends here, and is ſtrictly of a defamatory nature. But I do not mean to deny, when the defendant undertakes to juſtify, that the cauſe then becomes truly matrimonial; for the ſentence will then neceſſarily be, either that the parties are man and wife, or that the plaintiff's or party agent is free from all matrimonial contracts, *quantum nobis conſtare potuit*, or as far as to us as yet appears. But though a ſentence in theſe words may have frequently been adjudged [as in *Jones* and *Bow*, *Carthew* 225—and in *Clews* and *Bathurſt*, *Strange* 960.] to be binding on the temporal courts in caſes of property, till reverſed; yet it by no means follows, that ſuch a ſentence can amount to an acquittal of the plaintiff from having any farther evidence brought againſt him, the very words, *as far as to us yet appears*, implying the contrary, and evincing that farther proofs may legally be adduced in the proper court. The words of the ſentence ſpeak ſufficiently for themſelves: there is no occaſion to have recourſe to authorities from books. Let it be ſuppoſed for a moment, that the antient juriſdiction remained in the eccleſiaſtical courts, and that they poſſeſſed their former power; is it poſſible to conceive, that a ſentence like the preſent, pronouncing a woman to be a ſpinſter, as far as to the court as yet appears, could be a bar to a ſuit in the ſame or in another eccleſiaſtical court againſt the ſame woman for polygamy? If it could be a bar, it would amount to an acquittal, till the ſentence in the civil ſuit had been reverſed; which would be ſubverſive of juſtice, by making the commiſſion of an undiſcovered crime in one court a ſhelter againſt the puniſhment of that very crime in another. If the doctrine now contended for ſhould prevail, that the offering of a ſentence in jactitation, pronouncing the party agent free from matrimony as far as it as yet appears, is an abſolute bar to a criminal proſecution, there would be an opportunity on every indictment for polygamy to defeat the ſtatute: for in the caſe of a woman marrying two huſbands, if the firſt huſband ſhould conſent to a colluſive ſuit, the wife would have nothing to do but to cite the firſt huſband into an eccleſiaſtical court for jactitation, if ſhe apprehended a proſecution on the ſtatute; and then, either on confeſſion of the boaſting by the firſt huſband, or on his failing to prove his marriage, if he undertook the proof, a ſentence would be obtained, which would intirely defeat the ſtatute. That this houſe ſhould give a countenance to a doctrine of ſuch tendency, is not to be imagined. It would be ſo far to reſtore the eccleſiaſtical courts to their former authority, as to put it in the power of evil-diſpoſed perſons to uſe thoſe courts to the defeazance of the ſtatute, without giving back to the eccleſiaſtical courts a juriſdiction to puniſh the crime of polygamy, which would thus go unpuniſhed: it would be to render thoſe courts in this reſpect hurtful, without affording them an opportunity of being uſeful; and it would in effect be to deſtroy a law in your lordſhips judicial capacity, which had formerly on the matureſt conſideration been eſtabliſhed in this houſe as a part of the legiſlature.

It would now be improper for me to detain your lordſhips any longer on this queſtion, which has been ſo ably and fully diſcuſſed already; and I ſhall truſt, that your lordſhips cannot be prevailed on to declare the ſentence in jactitation concluſive upon this high court, or to ſuffer it to be read judicially as a ſtop to any evidence which may be brought as a proof of the marriage of the lady at the bar with Mr. *Hervey*, now earl of *Briſtol*.

But on ſuppoſition that the ſentence may be permitted to be judicially read, it may be neceſſary for me, in contradiction to what the gentlemen of my own profeſſion have aſſerted, to trouble your lordſhips with a word or two in the briefeſt manner I am able, in order to ſhew, that evidence of a particular kind may be given in all courts, and at all times, to rebut a ſentence in jactitation in disfavour of matrimony, for the purpoſe of relieving an injured party and of puniſhing the guilty.

It is a general rule, which is not to be denied, that reſpect is due from one court in *England* to the deciſions of another, and that comity is due to the deciſions of all foreign courts; and it might be more accurate and more ſtrictly true to ſay in general, that one court in *England* is bound by the judgments and ſentences of another; but the generality of this rule does not exclude an exception, which in reality affords a proof of its generality: for, under circumſtances, evidence of every ſort, parole as well as inſtrumental, may be received in one court to affect a ſentence in another. Fraud in a ſingle perſon, and colluſion, where there are two or more, may be given in evidence in the ſame court in a different ſuit, or in another court, to affect the parties to a ſentence; and of courſe to affect the ſentence or judgment itſelf in ſome degree.

It is true, that by the eccleſiaſtical law, a ſentence in any caſe obtained by colluſion may be declared void in the ſame court in which it was pronounced, by means of a ſpecial ſuit for that purpoſe; and moſt certainly at the ſuit of a perſon having an intereſt, who could not even have intervened at the time when the ſuit was pending; and ſuch was the caſe of lady *Frances Meadows*, who had no intereſt in the years 1768 and 1769, when the ſuit of jactitation was pending: but it does not follow, becauſe a ſentence obtained by colluſion may be annulled in the ſame court where it was pronounced, that ſuch ſentence may not be impeached by any means whatever in another court.

I ſhall not, in proof of what I have advanced, detain your lordſhips with a repetition of the particulars of *Fermor*'s caſe, as reported in the third part of *Coke's Reports*. I ſhall only obſerve, that it was a caſe depending in the court of *Chancery*, in the 44th of *Elizabeth*, before ſir *Thomas Egerton*, the then lord-keeper, in which *Richard Fermor* complained, that *Thomas Smith* the defendant was his tenant, and had levied a fine with proclamations, in order to bar him of his inheritance, by covin and practice. The lord-keeper, conſidering on one ſide the miſchiefs which might ariſe from ſuch practice, and on the other ſide conſidering that fines and proclamations are the general aſſurances of the realm, referred the caſe to the two chief juſtices, *Popham* and *Anderſon*, who, after a conference, thought it neceſſary, that all the juſtices of *England* and barons of the *Exchequer* ſhould be aſſembled: they aſſembled accordingly, and it was at length reſolved by the two chief juſtices and barons of the *Exchequer*, except two, that *Richard Fermor* was not barred by the fine with proclamations. The lord-keeper, ſir *Thomas Egerton*, commended the reſolution of the judges, and agreed with them in opinion.

The precedents and reaſons, on which the above-mentioned opinion was formed, have already been ably related, and are well known to ſome of your lordſhips: it may ſuffice on my part to add, that a fine, the moſt deliberate (for it is five years in completing) and of courſe the moſt ſolemn of all judgments, was not deemed, in the opinion of the lord-keeper and ten of the judges, to be of weight ſufficient to protect a colluding party; but was ſuffered to be impeached by the admiſſion of evidence in another court than that where the fine was levied, in order to afford relief to an injured man.

It is ſaid by lord *Coke* in the ſame Report, that all acts eccleſiaſtical as well as temporal ſhall be avoided by fraud and covin. And indeed if one temporal court is bound in juſtice and law to pay no regard to the judgment of another temporal court under the circumſtances above deſcribed, can any reaſon be given, why the ſentence of an eccleſiaſtical court in ſuch a caſe ſhould be treated with more reſpect by the temporal judges, than they are obliged to pay to the judgments of their own courts?

But to the honour of the temporal courts it muſt be ſaid, that, as far as it is in their power, they lend their aid to the eccleſiaſtical courts in caſe of covin and colluſion, by permitting the eccleſiaſtical courts to try ſuch fraud, even when committed in the temporal courts, as incidental matter.

The caſe alluded to is in *Moore's Reports*, page 917, *Lloyd* and *Maddox*.

Mr. *Lloyd* a legatee ſued *Maddox* the executor of the deceaſed in the Spiritual Court for his legacy. The executor alledged, that all the teſtator's effects had been recovered from him the executor, in a court of common law, by a creditor of the teſtator. The legatee alledged in his turn, and undertook to prove in the eccleſiaſtical court, that the recovery at common law was in conſequence of colluſion or covin between a pretended creditor and the executor. And, upon the admiſſion of this plea in the eccleſiaſtical court, the executor applied to the temporal court for a prohibition, which was denied.

And from this it is evident by neceſſary inference, that the temporal courts muſt have deemed themſelves competent to judge incidentally of covin or colluſion committed in a ſpiritual court, in order to relieve an injured party or ſuitor in a temporal court.

When this liberty taken by one court with the apparent judgment of another, under circumſtances, comes to be conſidered, it ſeems to be founded on the ſtrongeſt reaſon: for when a judgment has been procured by a colluſion of parties, though it muſt ſtand on record, and may not, I grant, be *actually* expunged or taken from the file, but by the court in which it was given; yet it is certainly a mere nothing to thoſe, who, not being *privies*, can ſhew it falſe and covinous. It is a ſentence in which the judge had never an opportunity of doing real juſtice—and is undoubtedly, what it has been juſtly ſtiled by a writer on the civil law, a ſtage-play, a prophane mockery, or any thing but a judgment. It is not to the diſrepute, but to the *honour* of a court, as well as to the benefit of the publick, that ſuch a fraud ſhould be detected. The upright judge muſt of all things wiſh it.——And confident I am, that to diſcover ſuch a profligate proceeding (from which no human wiſdom can protect the greateſt judicial abilities) could never be conſtrued into a breach of comity between one judicature and another; but, on the contrary, muſt be conſtrued by the deceived court as a vindication of its purity, and a reſcue from an attempt to load it with diſcredit.

I muſt now own, my lords, when I was informed that doctors of the civil law were, by the permiſſion of your lordſhips, to attend on the part of the lady at the bar, and a brief was given to me on the part of the proſecutor on that account, that I was apprehenſive of what might be quoted from ſuch miſcellaneous books, as the digeſts, the code, and the decretals, in favour of colluſion, and to ſhew how honeſtly it might be practiſed under particular circumſtances. Nothing however of this kind has been urged; and I have not myſelf, from any inſpection of the titles and text of the civil and canon law, *de colluſione detegenda*, which treat principally of colluſive cauſes between maſters and ſlaves, and between certain of the clergy in order to defraud the laity, been able to gather any other idea than that colluſion between parties to a ſuit is a very high offence; and ſuch a one, I make no doubt, for which colluding parties might now be articled againſt in the Eccleſiaſtical Court, where the inſult was offered, and be puniſhed at diſcretion by eccleſiaſtical cenſures. But a particular diſcuſſion of the nature of the offence committed by parties colluding in a cauſe, how that colluſion is to be treated when diſcovered, and what operation the diſcovered colluſion will have upon the ſentence, is rather to be expected from later writers, and ſuch authors as *Menochius* in his *Conſilia*, or *Scaccia de re judicata*, than from the laws in the text of the civil and canon law.

And theſe authors agree in general in ſaying, *quod lata ſententia per colluſionem habenda eſt pro non-ſententia, et quod aliis non nocet, quamvis, ſublata colluſione, noceret. Nam facta colluſione cum adverſario* [ſays *Scaccia*] *ſententia non prodeſt adverſus tertium*; *vel quia tertius erat citandus, et tunc victori non prodeſt ſententia, etiamſi eam obtinuiſſet ſincere.*

And when an executor [for example] deſirous of proving his teſtator's will, omits to cite one among others of the next of kin; for in that caſe the omitted perſon may, if he thinks it for his intereſt, oblige the executors to prove the will *de novo* at a ſubſequent time, the ſentence eſtabliſhing the will under the proceſs, by which one of the next of kin was omitted, being as to him in the true ſenſe of the expreſſion, *Res inter alios acta*.

The ſame author proceeds by adding,

Vel non erat citandus, quia cauſa agebatur cum legitimo contradictore; et tunc licet, ſi ſententia fuiſſet lata ſine colluſione, tertio noceret; tamen, ſi fuerit lata per colluſionem, non nocebit.

This may be explained by the following ſuppoſed caſe: If an executor to prove his teſtator's will ſhould cite *all* the next of kin regularly, but ſhould collude with that next of kin to whom the management of the ſuit was intruſted, and prevail on him to feintplead, and not put forth his ſtrength on account of ſome private bargain, and by this covin eſtabliſh the will; yet, though the ſentence in this caſe would have bound the legal contradictors, who had been all called, and alſo all other perſons whatever, if there had been no colluſion, it ſhall nevertheleſs not bind the injured part of the legal contradictors, on a proof made of the concerted fraud.

It muſt be allowed, that theſe writers have not (as far as I have been able to obſerve) made mention of the place or court where a ſentence colluſively obtained is to be ſet aſide; and if an actual ſetting aſide or total reverſal is meant, there is no doubt but that this muſt be done in the ſame court where the parties colluded, and in no other.

But if it is only aſked, where and in what court evidence is to be received to relieve an injured perſon, who was not a party to the colluſion? my anſwer is, that it is plain from theſe writers, as well as from reaſon, that it is to be received *in every court*.

The courts of civil law, known to theſe writers, hear in the ſame court and under the ſame juriſdiction cauſes of property, and alſo accuſations which affect the life of the accuſed, exactly in the ſame manner as our *Admiralty*-courts in *England* did before the 28th of *Henry* VIII. And therefore when *Scaccia* and other writers, who entertain the idea of the ſame court having both civil and criminal juriſdiction, ſay that a ſentence obtained by colluſion is to be regarded *pro non ſententia*, their meaning fairly taken muſt be, that ſuch a ſentence would be effectually avoidable, or rather diſregarded *every where*, on a proper proof made of the fraud by which it was obtained.

I am aware that the caſe of *Mayo* and *Brown* was quoted by the advocates on the other ſide, as a late inſtance, in which the preſent judge of the Prerogative Court, Sir *George Hay*, whoſe decrees will always have great weight, was of opinion, that he could not in his court receive evidence of a ſentence having been obtained by colluſion in the court of the biſhop of *London*.

The caſe, in brief, was as follows:

One Mrs. *Ailmer* died inteſtate, and Mr. *Brown*, as her huſband, obtained the adminiſtration of her effects. Lady *Mayo* had proved herſelf to be the daughter of Mrs. *Ailmer*, and had cited *Brown* to bring in the adminiſtration, and ſhew cauſe why it ſhould not be revoked, as unfairly obtained. *Brown* proved his marriage to Mrs. *Ailmer* beyond a doubt; but lady *Mayo* then alledged, that *Brown* had been married to one *Ellen Cutts*, who was living at the time of the fact of the marriage of *Brown* with *Ailmer*. *Brown* anſwered, that *Ellen Cutts* did once make pretenſions to him; but that in a ſuit of jactitation, brought by him againſt her in the court of the biſhop of *London* in 1732, ſhe was enjoined ſilence by ſentence; and he was pronounced free from any matrimonial connexion with her. To this lady *Mayo* replied by plea, that the ſentence had been obtained by colluſion between *Brown* and *Cutts*, and deſired to be ſuffered to prove her allegation.

Many of the arguments were then uſed which have been made uſe of on the preſent occaſion; but the judge did not, as I underſtand, reject the diſtinction between receiving evidence in favour of an injured perſon, and being able to annul the ſentence, and abſolutely deny his authority to admit lady *Mayo*'s allegation, but only appeared to make choice of the method of ſtopping the cauſe in the Prerogative Court till lady *Mayo* had applied to the biſhop of *London*'s court for relief: and in ſo doing he laid great ſtreſs on the note in the margin of *Strange's Reports*, page 981, where it is ſaid, that the chief juſtice of the *Common-Pleas*, in the caſe of *Prudham* and *Phillips*, held a ſentence in the Eccleſiaſtical Court to be concluſive, and would not receive evidence of fraud or colluſion in obtaining it. But it is evident from the very able manuſcript note of the caſe of *Prudham* and *Phillips* by the late Mr. *Ford*, whoſe learning and accuracy are too well known to ſtand in need of any encomium, that the only reaſon why chief juſtice *Willes* refuſed to ſuffer Mrs. *Phillips* to relieve herſelf by giving a proof of colluſion in the biſhop of *London*'s court, was, becauſe Mrs. *Phillips* herſelf was a party to that ſuit in the Eccleſiaſtical Court: ſo that in truth and fact the decree made in the Prerogative Court in *Mayo* and *Brown*, appears to have been founded more on the uncertain authority of the note in the margin of ſir *John Strange's Reports*, than on any other precedent.

Now if a ſuggeſtion of fraud in a ſingle perſon, or colluſion between many, affords a foundation for a court, in which cauſes of property only are decided, to receive evidence that ſuch fraud or colluſion was uſed in obtaining a ſentence in another court which has juriſdiction in caſes of property, it becomes neceſſary, *a fortiori*, that a court, held for the puniſhment of criminals, ſhould admit evidence to ſhew that a fraud or forgery has been committed in a court of civil juriſdiction: and there are ſtrong inſtances in the law of *England* to ſhew, that civil judgments have been regarded not only as of no weight to exculpate in criminal proſecutions, but on the contrary as aggravations.

The caſe of *Farr* in *Kelyng's Reports* is one of many ſtrongly to this purpoſe.

Richard Farr, having an intention to rob the houſe of Mrs. *Stanier*, told an attorney that Mrs. *Stanier* was his tenant, and he could not make her quit his houſe: the attorney proceeded regularly in a cauſe of ejectment; and one *Eleanor Chadwick*, an accomplice with *Farr*, having ſworn falſely that ſhe had ſerved *Stanier* with a copy of a declaration, judgment was obtained, a writ iſſued, the woman was ejected, and her houſe was robbed by *Farr* and *Chadwick*, who had got legal poſſeſſion. *Farr* and *Chadwick* were afterwards indicted at the *Old-Bailey*; and on proofs given of the facts, it was agreed by lord chief juſtice *Hyde*, ſir *John Kelyng*, and Mr. juſtice *Wild*, that though the priſoners made uſe of the law, and the officers of the law, yet as this was done *in fraudem legis*, the courſe they had taken was ſo far from excuſing the robbery, that it heightened the offence by abuſing the law. *Kelyng's Reports*, page 43, 44.

There is a ſingle caſe on the other ſide, *the King* againſt *Vincent*, reported in *Strange*, 481, where it is ſaid, that *Vincent* was indicted for forging a will of a perſonal eſtate, and that the forgery was proved at the trial, but that *Vincent* having produced the probate, it was held to be concluſive in ſupport of the will.

This opinion is ſaid to have been given in the 8th year of *George* I. and no ſubſequent caſe has been quoted in ſupport of it; but numbers of other caſes have been quoted by the counſel againſt the lady at the bar, where the unfortunate priſoners have been found guilty of forging wills, in part upon the ſame evidence (namely, the probate) on which the very fortunate Mr. *Vincent* was acquitted.

Among others cited from the *State-Trials* and *Seſſion-Papers*, the caſe of one *Stirling* has been mentioned; and a ſtronger to ſhew the abſurdity of the doctrine held in *the King* and *Vincent* could not well be imagined.—One Mrs. *Shutter*, being known to have money in the funds, *Stirling* forged a will for her. He gave conſiderable legacies to ſeveral, but to himſelf he gave 30*l.* only as executor; for it was ſufficient for his purpoſe to get poſſeſſion, in order to make her whole fortune his own. He obtained a probate from the Prerogative Court, and endeavoured to receive her ſtock at the *South-Sea-Houſe*, but was diſcovered in the attempt, and indicted for the forgery. The probate was produced in court, and according to the doctrine in *the King* and *Vincent*, the ſight of the probate ſhould have inſtantly occaſioned the acquittal of the priſoner; for though Mrs. *Shutter* herſelf was alive, and appeared in the court, yet witneſſes muſt have been neceſſarily produced to prove her identity; and ſuch evidence, according to the doctrine in *the King* againſt *Vincent*, ought not to have been admitted againſt the probate, which ought to have been concluſive. The priſoner however was convicted.

But admitting for a moment, that the caſe of *the King* and *Vincent* was legally determined, it does not ſeem to apply in the preſent inſtance, unleſs it could be ſhewed, that the proſecutor offered to give evidence of colluſion in obtaining it, and was not permitted ſo to do; for it was ſaid by one of the civilians, that the probate iſſued in that caſe by a decree of the Eccleſiaſtical Court, and not in common form. If it did ſo iſſue, it is to be preſumed, that ſuch decree was made between parties truly adverſe, till the contrary is made to appear; and the contrary was not attempted to be proved. And it muſt be confeſſed, if the parties to the ſuit in the Prerogative Court were truly adverſe, that then the fraud either was or might have been in proof before the original proper court: and this might have afforded ſome colour for ſaying, the man ſhall not be put twice upon his trial for the ſame offence; though ſuch an argument could only have been ſpecious; for when the queſtion in a court of civil juriſdiction is, *will* or *no will*, *deed* or *no deed*, and a forgery is detected, the perſon who committed that forgery muſt be tried for it in another court and by another proceeding, or he will never be puniſhed as the law of *England* directs.

It may be here proper to obſerve, that no one caſe has been mentioned by the gentlemen on the other ſide, where, in any court of civil or criminal juriſdiction, a proof of colluſion in another court had been offered by a proper perſon, and not received or rejected. The caſe of *Hatfield* and *Hatfield* in the houſe of lords, in the year 1727, has been anſwered by all the counſel who have preceded me, by ſhewing that colluſion was not at iſſue in that caſe. And in the caſe of *Kenn*, 7 *Coke*, ſo much inſiſted on by doctor *Wynne*, there is no mention nor the leaſt hint given of fraud, covin, or colluſion. In that caſe, *Chriſtopher Kenn* had iſſue *Martha* by *Elizabeth Stowell*; but he afterwards obtained a ſentence in a cauſe of nullity againſt *Elizabeth Stowell*, as having been married to her *infra nubiles annos*; and the marriage was pronounced void in an eccleſiaſtical court.

Martha, the daughter of that marriage, in order to make good her title to her father's eſtate, was afterwards permitted, and probably thro' ſome miſtake or haſte in the court of *Wards*, and without hearing counſel, to give evidence that *Kenn* and *Stowell* her father and mother were not *infra nubiles annos* when they intermarried. But according to lord *Coke's Report*, the court of *Wards* agreed, that as the eccleſiaſtical judge had decreed the marriage to be void, his judgment ſhould be credited, although the parties were proved to have been of the age of conſent, and although the foundation was falſe on which the ſentence had been grounded; inaſmuch as the court of *Wards* would not examine into the cauſe or reaſons of the ſentence, whether true or falſe.

From all which nothing farther is to be collected, than that a ſentence in the Eccleſiaſtical Court is to have full credit given to it as long as it ſubſiſts unrepealed; and that it is not to be overturned in the ſame court where it was given, or by any other, on account of error and miſtake in law or fact; and this is certain law: but it is to be obſerved, that the parties divorced had been long dead before the ſuit was commenced, and that there is not the remoteſt hint or ſuggeſtion through the whole caſe, that the Eccleſiaſtical Court had been deceived by any fraud or colluſion between the parties litigant.

As to the caſe of *Prudham* and *Phillips*, the counſel for the lady at the bar were certainly led into a miſtake by the note which I have already mentioned, inſerted in the margin of *Strange's Reports*, page 961, and were not aware of the note in Mr. *Ford*'s manuſcript, which is of undoubted authority, and from which it appears that one Mr. *Prudham*, as a creditor, brought an action of debt in 1737, againſt the well-known Mrs. *Tereſia Conſtantia Phillips*.

Mrs. *Phillips* gave in evidence her marriage with Mr. *Muilman*.

Mr. *Prudham* produced a ſentence annulling that marriage, in a cauſe of nullity, on account of a prior marriage with one *Delafield*; and this Mr. *Prudham*'s counſel relied upon as concluſive evidence of the nullity of the marriage with *Muilman*;—and ſo it was agreed, unleſs the defendant *Phillips* might be admitted to ſhew fraud in obtaining the ſentence, and ſo to avoid it, as judgments are daily avoided, by replications of fraud.

‘ Reſolved, on great debate, that the eccleſiaſtical law was part of the law of the land, and that ſentences by their judges were in matters of ſpiritual juriſdiction of equal force with judgments in courts of record and in courts of equity: but that whatever objections would avoid a judgment, the ſame would be ſufficient to overturn a ſentence in the Spiritual Court, but none other. That fraud uſed in obtaining judgments was a deceit on the court, and hurtful to ſtrangers, who, as they could not come-in to reverſe or ſet aſide the judgment, muſt of neceſſity be admitted to aver it was fraudulent.

‘ But that Mrs. *Phillips* had been a party in the cauſe in the Eccleſiaſtical Court, and whether ſhe was impoſed upon, or joined in deceiving the Eccleſiaſtical Court, this is not a time or place for her to redreſs herſelf.’

Now, although Mrs. *Phillips* was not in this caſe allowed to alledge, that the ſuit in the Eccleſiaſtical Court annulling her marriage was colluſive, yet the reaſon on which the court refuſed to allow her ſo to do, namely, her having been a party to the colluſive ſuit, amounts to a full proof, when joined with the other doctrine laid down by the court and related in the caſe, that any perſon not having been a party would at all times be permitted in a court of common law or equity to alledge fraud or colluſion to have been practiſed to his injury in an eccleſiaſtical court.

On the whole therefore it appears beyond a doubt, from the inſtances which have been given, that in civil caſes a ſtranger is admitted in one court to alledge and prove in his defence, that a ſentence to his prejudice has been pronounced in another court by means of fraud and colluſion; and that a proſecutor in a criminal proſecution is conſtantly permitted to do the ſame.

Taking it then for granted, that this in general muſt be conceded, it only remains to inquire, why evidence, if neceſſary, ſhould not be admitted to deſtroy the force of the ſentence in the preſent caſe, in favour of the crown and of the public, who were not parties to the jactitation ſuit between Mr. *Hervey* and the lady at the bar, and yet are intereſted, if it is a crime to marry a ſecond huſband whilſt the firſt is living; or, in other terms, to inquire why a ſentence of jactitation of all ſentences ſhould be ſo highly diſtinguiſhed on account of its worth and ſtability, as to be held forth as an exception to the general rule, and as the only ſpecies of ſentence which ought to be ſo favoured and honoured by being regarded as concluſive.

That the proceedings in the Eccleſiaſtical Court are often rather of longer duration than could be wiſhed, is not to be denied; and that this principally ariſes from the number of poſſible appeals under particular circumſtances from the firſt hearing of a cauſe to what in general caſes may be termed the laſt, is equally true.

When a ſentence [for example] given in a cauſe of jactitation, in which marriage was at iſſue, has paſſed through all the ſtages of appeal, the cauſe is ſtill liable to be opened *de novo* in favour of matrimony, as if nothing had been done. Was this poſſible prolixity of proceeding, and were theſe opportunities of appealing, an impediment and ſafeguard againſt colluſion (as one of the doctors has gravely alledged them to be) I do not deny that a cauſe of jactitation muſt of all cauſes ſtand faireſt to be the moſt immaculate and moſt free from the ſtain of fraud. But, when it anſwers the purpoſe of parties to collude, is it to be preſumed that thoſe, who could begin a cauſe colluſively, would ſcruple to carry it on from one court to another, till they came to the end of their journey, if it was neceſſary ſo to do to obtain their end? The truth however is, that ſeveral appeals are not abſolutely neceſſary; and that, when there is colluſion in a cauſe, there is either no appeal, or an oſtenſible one only, which is always ſubducted within a convenient time; and the gentlemen beſt know, whether an appeal from the ſentence relied on in the preſent caſe was ſubducted or not. A ſentence in jactitation pronounced in diſfavour of matrimony is defined to be tranſitory, and not final; and this definition ſeems to be founded, as abſurdities ſometimes are, on a tenet of religion.---The religion I mean is that, which after having been received in this kingdom for a long ſeries of years, was afterwards and now is with reaſon proteſted againſt. In this religion it is maintained, among other condemned doctrines, that marriage is a ſacrament, and not to be diſſolved: and although it nearly amounts to a certainty, that the rites of matrimony are not now quite ſo ſtrictly regarded in *England* as they have been heretofore, and that his majeſty's ſubjects of almoſt every deſcription, from the loweſt to the higheſt, have ſhewed an utter abhorrence of this doctrine of the church of *Rome*; yet it is not to be wondered at, that the antient canoniſts, who were to a man of the religion I have juſt mentioned, and had the framing of the code eccleſiaſtical, ſhould ſo fabricate or bend the law, as to render it the ſupport of marriage by every poſſible method, and ſhould lay it down as a maxim, that a ſentence in a marriage cauſe ſhould never, in their language, paſs into *rem judicatam*, or become a final judgment, but be eternally open and liable to reviſion and reverſal, notwithſtanding it may have been eſtabliſhed by appeal upon appeal, and even by the judges of the common law in a court of *Delegates* under the king's ſpecial commiſſion, and afterwards by the lord-chancellor, who may have refuſed a commiſſion of review. *Clarke's Praxis*, *title* 205.

To render the privilege of a jactitation cauſe, in which the proof of marriage has been attempted but not perfected, ſtill more extenſive, the general ſafeguard againſt perjury has been entirely taken away in this ſpecies of ſuit; for the publication of the depoſitions is no obſtacle to freſh examinations, and new witneſſes may continually be admitted in favour of matrimony, even after the former depoſitions have been inſpected, and without any proof made that ſuch witneſſes are lately come to the knowledge of the producer; which is a proof expected and required in all other cauſes whatever, and a rule never departed from.

Clarke, in his book of Practice, is expreſs to this purpoſe, and uſes the following words: *licet generaliter non admittuntur teſtes poſt publicationem, admittuntur tamen in cauſa matrimoniali ſine juramento, quod teſtes noviter ad notitiam pervenerunt. Tit.* 205. It is allowed too in this ſpecies of cauſe, that not only the party ſilenced, but that any other perſon, intereſted to eſtabliſh the matrimony, may take up the cauſe in the ſtate in which it was left in the ſame court, and proceed, as I apprehend, in another court, and invocate or illate the proceedings.

The *pars citata*, or defendant, is alſo at liberty to go into another court in a new matrimonial cauſe; as for example, in a cauſe of reſtitution of conjugal rights: *licere parti citatæ aut in eodem judicio, aut coram alio judice (non obſtante quod citatio emanavit in cauſa jactitationis) contra actorem inſtituere cauſam matrimonialem.* See *Clarke's Praxis*, *tit.* 195, 205.

This ambulatory, indeterminate, ſtate of a ſentence in jactitation muſt certainly, in the apprehenſion of any man not a lawyer, be a very improper circumſtance to be urged in order to render this ſpecies of ſentence given in one cauſe an abſolute bar to proceeding to judgment in another cauſe of a civil nature, and more particularly to make it a bar in a cauſe of a *criminal* nature in another kind of juriſdiction. Taking things therefore as they are, and having proved the law reſpecting this extraordinary ſpecies of ſentence from the books of practice which deſcribe it, can any good reaſon be aſſigned why ſuch a ſentence ſhould be concluſive in the preſent caſe, and ſhould not be reviſed and revoked, if occaſion ſhould require it, in the high court before which we now are?

This ſentence never paſſes into a *rem judicatam*, or final judgment---it is ſubject to be reviſed in any other court having juriſdiction than that in which it was firſt given. The act of *James* I. by which the marrying of a ſecond huſband or ſecond wife, whilſt the firſt is living, is made felony, has, by creating the felony, plainly transferred that branch of the eccleſiaſtical juriſdiction, which before puniſhed polygamy, to thoſe courts where criminals are tried; and to remove even the appearance of any difficulty which might have ariſen on the right of the proſecutor to offer the ſentence, the counſel for the lady have themſelves deſired leave on her part to bring it before the court, and have actually introduced it:---can it therefore be poſſible that this high court ſhould not think themſelves authorized by a complete juriſdiction in every reſpect, ſpiritual as well as temporal, to give the proſecutor, on the part of the crown and of the public, the liberty, under all the circumſtances of this caſe, of offering a proof of the nullity of the ſentence, by pointing out from the proceedings themſelves, if neceſſity ſhould require it, the marks of fraud with which they abound; or, what is rather to be expected, to give the proſecutor the liberty of adducing evidence in a more direct manner, both oral and inſtrumental, to prove the marriage of the lady at the bar with Mr. *Hervey*, the preſent earl of *Briſtol*; by which the colluſive proceedings before the Eccleſiaſtical Court, and the truth of the principal accuſation, will at one and the ſame time be plainly demonſtrated?

Lord Preſident of the Council. My lords, I move your lordſhips to adjourn to the chamber of parliament.

Lords. Ay, ay.

Lord High Steward. This houſe is adjourned to the chamber of parliament.

The lords and others returned to the chamber of parliament in the ſame order they came down; and the houſe, being thus reſumed, reſolved to proceed further in the trial of *Elizabeth* ducheſs-dowager of *Kingſton*, in *Weſtminſter-Hall*, on *Friday* next, at ten o'clock in the morning.

Friday, *April* 19. The third day.

THE lords and others came from the chamber of parliament in the ſame order as on *Tueſday*; and the peers being ſeated, and the lord high ſteward in his chair,

Lord High Steward. My lords, the houſe is reſumed. Is it your lordſhips pleaſure the judges may be covered?

Lords. Ay, ay.

Then the ſerjeant at arms made proclamation for ſilence; and the ducheſs of *Kingſton* was conducted to the bar.

Lord High Steward. Mr. *Wallace*, you may proceed with your reply.

(REPLY.)

Mr. *Wallace*.

My lords,

I muſt beſpeak your lordſhips indulgence to examine and diſcuſs the great variety of arguments and conſiderations, which the counſel on the part of the proſecution have thought proper to enter into, and ſubmit to your lordſhips. I ought in the firſt place to take ſome notice of the charge of novelty imputed to myſelf, and thoſe who aſſiſt me, in the attempt to introduce the ſentence of the Eccleſiaſtical Court, before the cauſe has been opened, or the evidence on the part of the proſecution ſtated to your lordſhips.

It might perhaps be thought a ſufficient anſwer to obſerve, that no indictment ever yet has been preferred on this ſtatute, where the Eccleſiaſtical Court had given a ſentence upon the ſubject. The proſecutor of this indictment has had the boldneſs to ſet at defiance the proceedings in the Eccleſiaſtical Court; and, in direct oppoſition to a ſentence pronounced there, to prefer in a court of criminal juriſdiction a charge of felony; for although criminal proſecutions are and muſt be in the name of the crown, yet in moſt caſes they are carried on by private individuals; and your lordſhips particularly know, in the preſent caſe, there is a private proſecutor, and one who might have applied on the ſcore of intereſt to the Eccleſiaſtical Court, to have had that ſentence re-examined.

With reſpect to the novelty of the proceedings, the counſel for the noble lady at the bar would have found themſelves ſtanding much in need of your lordſhips pardon, if they had not interpoſed the ſentence at the time it was offered. If they had permitted a cauſe of this kind to have proceeded into evidence (which, from the accounts we have heard, is to be laid before the court by a number of witneſſes, and of courſe muſt have taken up your lordſhips many days in the examination), and after all, the ſentence had been produced and attended with the effect which we hope it will have, what would have been the ſituation of counſel, who had ſuffered ſo much of your lordſhips time to have been miſ-ſpent in the examination of parole evidence to facts which could not be admitted againſt the deciſion offered to your lordſhips?

But in truth it is not new in practice: the caſe alluded to is not only, as it has been termed, a colour, but a juſtification for what has been done. It is true, it was an ejectment, which the gentlemen have properly called a fictitious proceeding. It was for that reaſon the ſentence was not interpoſed, till the evidence was opened; for till then the defendant is ignorant in what manner the plaintiff intends to make out his claim: but as ſoon as it was ſtated, that he derived through a marriage, which had been examined and decided in the Eccleſiaſtical Court, the counſel immediately, without ſuffering evidence to be given, interpoſed the ſentence. In this caſe there is no occaſion to wait for the opening of counſel; for upon the face of the indictment the ſuppoſed marriage with Mr. *Hervey* is ſtated as the ground of the offence: the crime in the indictment charged is a marriage with his grace the duke of *Kingſton*, during the life of Mr. *Hervey*, to whom the noble priſoner at the bar is alledged to have been before married; and conſequently upon the validity of that marriage the queſtion depends. The marriage with the duke of *Kingſton* was notorious in the face of the church, under the ſanction of a licence from the archbiſhop of *Canterbury*, and in the preſence of many witneſſes. The ſuppoſed marriage with Mr. *Hervey* was the ſole queſtion in the Eccleſiaſtical Court: that court has decided againſt it; and as long as that ſentence remains in force, the relation of the parties as huſband and wife is at leaſt ſuſpended, if not abſolutely gone.

The practice every day, where one is in poſſeſſion under a fine, and no claim has been made for five years, is to interpoſe it immediately. I ventured to do it not long ago in the court of *King's Bench* at a trial at bar, where the claimant came out of *Wales* with as long a pedigree as that country could furniſh. When I heard it ſtated, and underſtanding that a great number of witneſſes muſt be called to ſupport it, I offered the fine to the court, before a witneſs was called; which inſtantly put an end to the cauſe. I did not by that incur any cenſure from the court, or blame from the counſel. I thought myſelf called upon in duty to inform the court of it; and a cauſe, which would have laſted three or four days, was ended in leſs than ten minutes.

I truſt, a conduct deſigned to prevent your time being miſ-ſpent upon a fruitleſs enquiry, (for whatever ſhould be the reſult, yet this ſentence, if it has the effect we contend for, muſt render it totally nugatory and immaterial) will not be the ſubject of your lordſhips animadverſion.

Enough, I hope, has been ſaid in defence of the attempt againſt the charge of novelty; but an obſervation was made, to create a prejudice againſt the caſe of the noble lady at the bar, from the conduct of her counſel in this ſtage of the proceedings to prevent an examination of witneſſes, as a proof of their opinion upon the merits of the cauſe. God forbid that any impreſſion ſhould be made againſt the noble priſoner at the bar from the conduct of her counſel! Your lordſhips know, that in the forms of proceeding ſhe muſt throw herſelf upon her counſel, and ſubmit to their management; and no miſtake of theirs will, I truſt, ever turn to her prejudice. I feel an happineſs in ſpeaking to a court incapable of receiving impreſſions from an inſinuation of that kind.

An obſervation was made upon the form of the ſentence, which ſeemed to ſtrike many of your lordſhips, that as far as it appeared to the Eccleſiaſtical Court, the parties were free from all matrimonial contracts and eſpouſals; not poſitively that they were ſo; and therefore as far as the evidence went in that court, and no farther, ought the ſentence to be regarded. Your lordſhips have heard from thoſe that practiſe in the courts of eccleſiaſtical law, from the counſel on both ſides of that deſcription, that it is the conſtant uniform method of drawing up ſentences in cauſes of this kind; that it is a ſentence of validity; that it is conſidered by them as ſuch; but that it is open to further proceedings in that court; that it falls within the maxim which was cited to your lordſhips upon the other ſide, which is not denied here, but admitted, nay mentioned in the very opening of this buſineſs, that *ſententia contra matrimonium nunquam tranſit in rem judicatam*; this ſentence, being againſt a marriage, never paſſes into a definitive judgment of that court; but does it follow, becauſe it is open to further examination, becauſe other ſuits may be inſtituted which may contradict this ſentence, that whilſt it remains unimpeached, till other ſuits are inſtituted, and till a different judgment is given, that the ſentence has no effect; that it is the words of the judge, without having any ſort of conſequence attending of them?

My lords, it is too ridiculous to ſuppoſe a ſuit inſtituted in the Eccleſiaſtical Court, where the proſecutor of the ſuit (or the promoter, in the language of that court) has obtained the ſentence of the court in his favour, that it means nothing at all; that it is mere waſte paper; that he might as well never have commenced the ſuit. Is it poſſible, in a country where the leaſt idea of juſtice prevails, that this ſhould be the caſe? On the contrary, the ſentence of every court of competent juriſdiction has been conſidered in the ſame, and every other court where it has become the ſubject of debate, till impeached, ſet aſide, reverſed, or repealed by the court that gave the ſentence, or by the authority of a court of appellant juriſdiction, to be concluſive.

Your lordſhips have heard from the doctors of the civil law the effect of a ſentence in a ſuit of jactitation of marriage. I took the liberty of ſtating to your lordſhips many caſes referring, where the ſame doctrine had been adopted by the judges of the common law, and conſtantly acted upon without an exception. The proceeding is not, as has been contended, in the nature of an action for words or of ſlander; it has ever been inſtituted upon ſome ſerious claim of marriage, which calls upon the party for an explanation.

Would it be no objection with a lady to a gentleman paying his addreſſes to her, that ſomebody claimed a marriage with him? I believe, my lords, it would at leaſt create a pauſe in the treaty, if it did not abſolutely put an end to it. He certainly would be called upon by the lady or her friends to ſatisfy them, that there did not exiſt a ground for ſuch report. There is no legal courſe to be taken, but by commencing a ſuit of jactitation in the Eccleſiaſtical Court. The proceeding calls in form upon the party who has made the claim to juſtify it. If a marriage be inſiſted on, the parties inſtantly change ſituations; the defendant becomes the plaintiff or actor, and the original plaintiff becomes the defendant, and is called upon to anſwer that claim made in the Eccleſiaſtical Court of marriage, not only to anſwer it in form, but upon oath: the original plaintiff is obliged on oath to declare, whether the allegations of the party reſpecting the marriage are true or falſe. The proofs are firſt made by the party inſiſting upon the marriage; and the judge gives ſentence upon them. The ſuit in truth becomes, and is admitted by the learned doctor on the other ſide to be, to all intents and purpoſes, a matrimonial cauſe; and the judgment is upon the validity and lawfulneſs of the marriage. In that light the proceeding in the eccleſiaſtical courts has ever been received and treated.

But ſuppoſe the ſentence has been received and conſidered as concluſive evidence, it is contended by the counſel for the proſecution to be only in particular caſes, namely, where the perſon againſt whom the ſentence has been given, or one deriving under ſuch perſon, has been a party in the ſuit, in which the ſentence has been offered in evidence; which is not the preſent caſe, as the crown was no party to the ſuit in the Eccleſiaſtical Court.

The diſtinction may be thought ingenious and plauſible; but there is no foundation in law to ſupport it. In the great number of authorities cited to your lordſhips, there is not the leaſt hint of ſuch a diſtinction: the rule is laid down in the moſt general terms, and without an exception, in the caſe of *Hatfield* and *Hatfield* before the houſe of lords. The perſon againſt whom the ſentence was given in evidence, was not a party, nor claimed under any party, to the ſuit in the Eccleſiaſtical Court.

No notice was taken of another caſe which I mentioned to your lordſhips, where the perſon againſt whom the ſentence was given in evidence was no party to the proceedings in the Eccleſiaſtical Court. It was an action againſt Mr. *Thomas Hervey* for a debt contracted by his wife. Mr. *Hervey* had a judgment in that ſuit againſt him: but in a ſubſequent ſuit, after a proceeding had in the Eccleſiaſtical Court, in which it was declared that Mr. *Hervey*, as far as appeared to the court, was free from all matrimonial contracts (juſt as it is in the preſent caſe) the ſentence was received as concluſive evidence upon the fact of the marriage, and defeated the plaintiff.

I am not contending that ſuch ſentences are to be uſed as inſtruments of frauds upon creditors. No; if there is no real marriage, but a man holds out to the world a woman for his wife, and ſhe gets a credit upon that ſcore, he ſhall never be permitted to ſay they are not married: yet where the perſons live ſeparate, where no act of his gives a countenance to the demand, there a creditor truſts the wife upon the ground of a legal marriage; there the Eccleſiaſtical Court deciding upon the marriage is concluſive evidence. That caſe was acquieſced in; no application was made to the court; and I believe all that heard it approved of the deciſion.

A learned friend of mine on the other ſide, after he had as I thought cloſed his argument and ſat down, roſe again to mention a caſe to your lordſhips of *Crutchley* and *Robins*.

It muſt have ſtruck him that it would appear a little extraordinary, after ſo full a diſcuſſion, no caſe had been cited to your lordſhips to warrant or give a colour to the diſtinction attempted.

That caſe, when ſtated, and the reaſons given by the court which pronounced the judgment conſidered, will appear not to have the leaſt application to the preſent. It was a claim of dower by Mrs. *Robins* upon the eſtate of Mr. *Robins* deceaſed, in *Staffordſhire*. The defendant in that caſe, the heir of Mr. *Robins*, pleaded to that claim, that ſhe never was lawfully married to Mr. *Robins*. The only legal mode of trying that fact is by a certificate from the biſhop of the dioceſe: the pleading between the parties is brought to an iſſue; it is the office of the court to direct a writ to the biſhop to certify whether there was a marriage or not; and upon the certificate the judgment is given. Inſtead of ſuffering the court to iſſue a writ to the biſhop, Mrs. *Robins* replied to that plea a ſentence in the Eccleſiaſtical Court, in a ſuit wherein ſhe was by the judgment of that court pronounced the wife of Mr. *Robins*; the defendant put in a demurrer, inſiſting the replication was not admiſſible: and that was the queſtion before the court of *Common-Pleas*.

Did the court of *Common-Pleas* decide, that ſuch a ſentence is not evidence? No: the court of *Common-Pleas* determined, that by law they could receive no other evidence of the fact than the biſhop's certificate; it was the ſole proof which the law in that particular caſe has required for the deciſion of the cauſe, and they could not depart from it. But they went farther in that cauſe: they told Mrs. *Robins* that the ſentence, tho' it could not be received there, might be laid before the biſhop, who was to certify to them the marriage. That is the language of the court of *Common-Pleas* upon the caſe: the biſhop muſt certify the marriage; the ſentence muſt be laid before him, and not before this court. Did the court of *Common-Pleas* decide, as contended, that it was no evidence? No ſuch thing is to be found in the caſe. All the court did, or meant to do, was to inform the plaintiff that ſhe had miſtaken the time and place to make uſe of that evidence; that the law had in that caſe appointed a certain ſpecific proof to be given to the court, and they could receive no other: the biſhop, who was to examine into the matter, might or might not be concluded by the ſentence; the court muſt be determined by his certificate.

My lords, if the biſhop had rejected the ſentence, he would have done what no biſhop ever did before; yet the court muſt be concluded by his certificate; they could not examine into the proofs: nay, if the biſhop by fraud had certified a marriage, the court would have been concluded. So much for that caſe which has been cited; and which is the only caſe the induſtry of the gentlemen on the other ſide could produce upon this part of the argument.

Your lordſhips have been told that, by the general rules of evidence in civil caſes, no ſentence or judgment can be received, unleſs in a cauſe between the ſame parties, or who derive under them. The candour of the gentlemen on the other ſide has admitted two exceptions to the rule: firſt, ſentences or judgments where the proceeding is *in rem*; and ſecondly, in cauſes where the court has excluſive juriſdiction.

I will not ſtate to your lordſhips other exceptions to the rule; the two admitted are ſufficient; the preſent caſe falls within both exceptions, though either would be enough.

In the firſt place, it is a proceeding *in rem:* marriage or no marriage is the point to be determined. It does not come collaterally or incidentally, but directly, in queſtion; and the deciſion of which was the ſole object of the ſuit.

In the next place, it is a ſentence of a court having excluſive juriſdiction upon the ſubject. It is admitted that the Eccleſiaſtical Courts have excluſive juriſdictions in probates of wills, in all teſtamentary diſputes reſpecting perſonal eſtates; and having decided the queſtion, whether right or wrong, upon true or upon falſe grounds, it is not competent to any other court, unleſs in a legal way by appeal, to enter into the matter; but faith and credit is to be given to the deciſion of the Eccleſiaſtical Court. It is alſo admitted, that, till the ſtatute upon which the preſent indictment is founded, the eccleſiaſtical courts had the ſole and excluſive juriſdiction in matrimonial cauſes.

But it is contended, that a concurrent juriſdiction is given by this act to the king's temporal courts: where is the ground of this notion to be found? Was it the intention of the legiſlature to give to the temporal courts a concurrent juriſdiction with the eccleſiaſtical? The intention muſt be collected from the act itſelf. In my own apprehenſion, nothing is more clear than that the legiſlature, at the time of paſſing this act, meant to guard and ſecure the juriſdiction of the eccleſiaſtical courts againſt innovation from the temporal.

The act is general; that whoever ſhall marry a ſecond huſband or wife, living the former, ſhall be deemed a felon, and ſuffer the pains of death. Yet that general enacting clauſe is reſtrained by a proviſo, which demonſtrates the intention of the legiſlature, that the proceedings in eccleſiaſtical courts ſhould remain untouched, and the temporal courts have no juriſdiction in the caſe. The exception runs thus:—Nothing herein contained ſhall extend to any perſon or perſons, that ſhall at any time of ſuch marriage be divorced by any ſentence had or ſhall be hereafter had in eccleſiaſtical courts; nor to any perſon or perſons———

Theſe proviſions ſhew an anxiety in the legiſlature to preſerve the privilege of the Eccleſiaſtical Court, and ſave their judgments from an examination; and ſo far from giving a juriſdiction to the temporal courts in ſuch caſes, the act expreſly declares, that where the eccleſiaſtical courts have given a deciſion, the temporal courts muſt ſtop. The caſe is not within the law; it is not permitted to be examined into.—It is pretty extraordinary that hiſtory gives no account of this act, or the immediate occaſion for paſſing it. The preamble ſtates, ‘that evil-diſpoſed perſons, being married, run out of one county into another, to places where they are not known, and marry there.’ If this was the evil meant to be redreſſed, the caſe of a perſon of rank, obtaining a ſentence in the Eccleſiaſtical Court, and acting under the faith of it, can never fall within the deſcription in the act.

The journals of neither houſe furniſh any lights upon this ſubject. The act was brought into the houſe of commons in *April*, received ſome amendments in a committee there, and ſent to the houſe of lords: it there alſo received amendments; and was returned to the houſe of commons again in *June:* but what the amendments were, or whether the proviſoes were inſerted by the guardians of the rights of the church, as is moſt probable, or came from the houſe of commons, cannot be diſcovered. Suppoſe a ſentence of divorce pronounced in the Eccleſiaſtical Court; would it be permitted to any court, under pretence of fraud, to examine for the purpoſe of making the parties criminals, when the act has declared ſuch a ſentence ſhall not be meddled with; and the parties under ſuch ſentences are excepted in terms out of the act?

Where a ſentence of nullity of marriage is given, it is equally open to future examination in the eccleſiaſtical courts with a ſentence of jactitation. If this be doubted, your lordſhips, from the abilities and integrity of the gentlemen who aſſiſt us, though counſel in the cauſe, will receive ſatisfactory information.

A ſentence of nullity of marriage is excepted by the words of the act: and would it not ſeem extremely inconſiſtent and harſh, that, where a marriage is doubtful, and the eccleſiaſtical courts have declared it null, neither party can by a ſubſequent marriage be in the predicament of a felon; and yet a perſon, who is by the ſentence of that court declared never to have been married at all, and to be free from all matrimonial eſpouſals, is to be a felon? Such a conſtruction on a penal law would be monſtrous.

The intention of the legiſlature is to me as clear as language can make it, that matrimonial cauſes ſhould be ſtill within the ſole juriſdiction of the eccleſiaſtical courts, and that the temporal courts ſhould have no authority to examine into their deciſions, by declaring, that whereſoever theſe ſentences obtain, the party marrying whilſt they are in force, ſhall not be a felon; and yet the former marriage, if it were a legal one, is not done away: it is capable of being revived, and a ſecond marriage would be null and void. And upon another proceeding, if the ſentence ſhould be in favour of the marriage, either party may commence a ſuit for reſtitution of conjugal rights; the firſt marriage would be eſtabliſhed, and a ſecond marriage, pending the ſentence, void; yet the party would not be in the predicament of a felon. This is clear from the act of parliament; and in this ſenſe your lordſhips will give me leave to uſe it, as ſhewing beyond a poſſibility of doubt the intention of the legiſlature. Where then are the arguments we have heard, that the legiſlature meant in this caſe to give the common-law courts ſuch concurrent juriſdiction, as to diſregard the ſentences of the eccleſiaſtical courts? Has the legiſlature ſaid ſo? Has not the legiſlature ſaid the contrary in expreſs terms? Wherever a ſentence is pronounced, that perſon is not to be tried in the temporal courts. Is it competent to any temporal court? Is it competent to your lordſhips, the ſupreme temporal court in the kingdom? Awful and great as this court is, give me leave to ſay, that the rules of conſtruction are the ſame as in the moſt inferior court of criminal juriſdiction. There is not one law for peers, and another for commons, in this country: the law is the ſame for both; it only varies in the circumſtances of the trial: the evidence to prove the guilt or innocence of the party is the ſame in all.

There is no doubt, but the temporal courts may try marriages upon this act, where no ſentence has been given in the Eccleſiaſtical Court; as they do every day upon titles to lands on ejectments: but where a ſentence has been obtained againſt, or in favour of, a marriage in the Eccleſiaſtical Court, the temporal courts are concluded by it.

The concurrent juriſdiction which they contend for, if I underſtand them right, is this: The eccleſiaſtical courts, ſay they, it is true, have a right to try a marriage; but the temporal courts have alſo a right to try a marriage under this act of parliament. The ſentence of the Eccleſiaſtical Court will not ſatisfy them; they will have the evidence; and if they are ſatisfied with the evidence that the eccleſiaſtical courts have thought inſufficient, they will pronounce the crime, and puniſh the offender. Can there be any ſuch poſition warranted by the act of parliament?

If the legiſlature could have foreſeen, that in any period it ſhould enter into the head of any man to ſet at nothing the juriſdiction of the eccleſiaſtical courts, they could not in more poſitive terms have guarded againſt it.

If the gentlemen ſhould be able to eſtabliſh a concurrent juriſdiction in the eccleſiaſtical and temporal courts, they then beg leave to advance a ſtep further, and lay down a rule, which they hope your lordſhips will adopt to intitle them to enter into evidence, that judgments only bind in courts of concurrent juriſdiction, where they are juſt.

I deny the rule in the extent it has been laid down. Have not the courts of *King's Bench*, *Common-Pleas*, and *Exchequer*, a concurrent juriſdiction in civil cauſes? and was it ever heard, when a judgment of one of the courts is pleaded in another, that the propriety and rectitude of the judgment can be examined into? Certainly not: the party is permitted only to deny the exiſtence of the judgment. The caſe of *Sinclair* and *Frazier*, lately determined by your lordſhips upon an appeal from *Scotland*, was cited as an authority for this purpoſe; in which your lordſhips ruled, that a judgment in the court of *Jamaica* ſhould not be enforced, unleſs it was juſt; that is, if the defendant in the cauſe could ſhew it was unjuſt, no court ought to lend its aid to carry it into execution.—My lords, nothing is more right or juſt; but does it apply to the caſe before your lordſhips?

Wherever the aid of a ſuperior court is wanted to give effect to a judgment of an inferior court, or of a court which cannot carry into execution its own judgments, from the parties being locally out of its juriſdiction, that court whoſe aid is prayed ought not to give it, if the defendant can ſhew the judgment to be unjuſt:—they will give ſo much credit to the ſentence of every court as to preſume it right, unleſs the defendant can ſhew the contrary. Not long ago, an application was made to the court of *King's Bench* to inforce the judgment of the juſtices at the quarter-ſeſſions in *Lancaſhire.* An act of parliament paſſed for the incloſure of a common. By that act, as the public roads are directed to be ſixty feet wide, the common was ſmall, ſituate in a very remote part of the country, where very few people came but thoſe intereſted in the lands, and they thought that roads of leſs breadth would very well ſuffice for the occaſions of the country; the commiſſioners under that act of parliament aſſigned, in the name of private roads, what in truth had before been publick, and allotted half the dimenſions required by the act. There was an application to the ſeſſions, who had juriſdiction, by appeal; and they ordered the roads to be opened to the extent the act directed: but when they had done that, they were left without the power of enforcing their order: they could not compel a ſpecifick execution of it. If they had proceeded for a contempt againſt the commiſſioners by indictment, that would have been tedious and uncertain: the proper method was by an application to the ſupreme criminal court of the kingdom, in which the ſuperintendance of all inferior juriſdictions is lodged. A mandamus was moved for in the *King's Bench*, to enforce the judgment of the ſeſſions. The court of *King's Bench* told thoſe who oppoſed the application, We think ourſelves bound to enforce it, unleſs you can ſhew it to be unjuſt: convince the court that the ſeſſions have done wrong, and we will not lend our aid. And on that occaſion a caſe was cited by the learned lord at the head of the court, which happened in the time of lord *Hardwicke.* Upon a decree of the court of Grand Seſſions of *Wales*, where a party had removed out of the juriſdiction of that court, a bill was filed in the court of *Chancery* to enforce the decree of the Grand Seſſions; the defendant by his anſwer inſiſted, that the decree was unjuſt, and ought not to be carried into execution: lord *Hardwicke* was of opinion, that if the defendant could ſatisfy him that the decree was unjuſt, he would not lend his aid to enforce it.

Do we apply to your lordſhips for the aid of the court to carry the preſent ſentence into execution? No; we aſk no favour; we demand nothing but your juſtice: we produce the ſentence: we do not aſk for your aſſiſtance to carry it into execution; it comes in collaterally; and in ſuch caſes, whether in the courts of law or in the courts of equity, the ſentences of the Eccleſiaſtical Court have been conſtantly attended to and been received as concluſive evidence.

But, my lords, though ſentences of the eccleſiaſtical courts have been ever received as concluſive evidence in civil cauſes, yet it is contended, they are not admiſſible in criminal proſecutions. Is it the genius of this country to attend more to the puniſhment of crimes, than to the adminiſtration of juſtice between the parties in civil rights? Is the diſtinction founded in good ſenſe or ſound policy, that the ſentences of eccleſiaſtical courts ſhould not only be received, but be concluſive, in one caſe, and be no evidence at all in the other? Your lordſhips will expect very ſtrong authorities before you liſten to ſuch a diſtinction.

Suppoſe in a criminal proſecution the property of goods ſhould come in queſtion, and a ſentence of condemnation in the court of *Exchequer* was produced, is there a doubt of its being received? Where the proceeding is *in rem*, the ſentence muſt of neceſſity be admiſſible and concluſive in all courts, between all parties, and on all occaſions, and to all intents and purpoſes. Without it there would be contrariety of determinations upon the ſame queſtion; which would be a reproach to the juſtice of the country.

I troubled your lordſhips with a caſe from ſir *John Strange's Reports* to prove, that the ſentence of the Eccleſiaſtical Court was admiſſible and concluſive in criminal caſes: that doctrine is abundantly confirmed by a caſe in the *King's Bench* four years after; *the King* and *Rhodes*. What is the anſwer given to the caſe? The Reporter was a young man, and therefore he is not to be credited; or, his notes of caſes after his death came into the hands of his executors, who knew nothing of law, who publiſh every ſcrap of paper they can find, and give them to the world—to make a volume: ſo the authority is got rid of by an objection to the youth of the Reporter, and the manner of the publication.

If your lordſhips were inclined to liſten to objections of this kind, it would be a curious enquiry, at what period of a lawyer's life he can take a note fit to be reported. I confeſs, I am totally unacquainted with it. Should it be when he is at the bar, a young man, and attending to every thing that paſſes? Should it be, when he is advanced in buſineſs? and when the buſineſs he is concerned in engroſſes his time? If the caſe had happened later, your lordſhips would have been told, ſir *John* was then a man of buſineſs; he did not trouble himſelf about taking notes; they are very inaccurate. If it had been the note of a judge taken upon the bench, I do not know but it might be ſaid of him, what was ſaid of another judge,—judges are apt to ſleep upon the bench.

I had the curioſity to enquire into the circumſtances of the Report. The caſe happened when ſir *John Strange* was about twenty-four or twenty-five years of age; he had been at the bar four years. A note ſo taken, and preſerved to the time of his death, ought not to be ſlightly treated. The obſervation of the caſe being publiſhed by his executors would have been ſpared, had the gentlemen gone to the firſt page of ſir *John Strange's* book; for they would have found by a preface written by ſir *John Strange* himſelf, when between fifty and ſixty, that he had collected theſe caſes, and meant the publick ſhould have the uſe of them; that he had been at the pains of ſelecting thoſe that he thought fit for publication, and of putting them into order. It appears he had given ſome of his notes to a gentleman, whoſe ſervant had clandeſtinely copied and ſold them to bookſellers; and leſt the caſes ſo ſurreptitiouſly obtained ſhould be imperfectly given to the publick under the ſanction of his name, he was at the expence of having his notes tranſcribed under his own eye: and he ſays, 'if they ſhould not be publiſhed in my life-time, they will 'come perfect into the hands of my executors; and of courſe to the pub-'lick.' He practiſed in the firſt criminal court of this country with the greateſt honour and ability; he had never heard in his time that the caſe had been over-ruled or impeached: if he had, his integrity was ſuch, that the caſe never would have appeared in his book; or if he had inſerted it, it would have been accompanied with a note, that damned it, or threw a doubt on its authority.

There was another objection to this caſe: that it muſt have been determined in the time of the dulleſt alderman that ever ſat in that court. Who, my lords, determine caſes of this kind at the *Old-Bailey?* Not the aldermen: they attend indeed; they are fine pictures, handſome furniture; they grace and adorn the court; very reſpectable, of conſiderable trade; but they do not deal in law. If they ever ſtudy law, it is to avoid it; in which they are not always ſucceſsful. The judges of the common law, of the ſuperior courts of *Weſtminſter-Hall*, decide the queſtions which ariſe in trials there.

Your lordſhips have been alſo told, that the authority of this caſe, if ever it had any, was ſoon put an end to in the year 1753, in the caſe of *the King* and *Murphy*; where the probate of the Eccleſiaſtical Court was ſet at nought; it was nothing more than paper and wax, without any effect. The caſe of *the King* and *Murphy* was thrown in by name. A caſe, *the King* and *ſuch a one*, ſhews it to have been a criminal cauſe; but it muſt be from a ſtate of the facts that your lordſhips muſt diſcover the application.

I will let your lordſhips know the ſtate of that caſe. It was an indictment for forging the will of one *Wilkinſon*. Your lordſhips have many of you heard of the great ſucceſſes of ſome privateers fitted out in the year 1746-7, called *the royal-family privateers:* they were very ſucceſsful; and they got very ſoon into many diſputes in the court of *Chancery* and courts of law. Their wages and prize-money were conſiderable. Wicked men were tempted to endeavour to poſſeſs it. A ſailor in a remote part of the world is a being not likely to give himſelf much trouble about money. *Murphy*, who was proſecuted at the *Old-Bailey*, knowing *Wilkinſon's* title to the prize-money, had forged a will of *Wilkinſon*, had got that will proved, and had received from one *Neades*, the agent, part of the prize-money of *Wilkinſon*. All went off very well. *Murphy* ſpent the money. But in a few months after, Mr. *Wilkinſon* was reſtored to life. He appeared before the agent, and demanded his money. Says the agent, We have paid your executor. Says he, That is pretty odd! I will ſatisfy you I have not been dead; and nobody can prove my will till I am dead: I inſiſt upon my money. The fraud was detected; *Murphy* was apprehended, proſecuted, and convicted.

Would the gentlemen have had him ſet up the probate of the will at the *Old-Bailey?* Would they have told *Wilkinſon* to go to the Eccleſiaſtical Court to repeal it? What would *Wilkinſon*, ignorant as he was, ſay? I have heard of probates of wills of dead men, but never heard of probates of wills of living men before: the juriſdiction of the eccleſiaſtical courtd is to grant probates of the wills of the dead, not of the living; an therefore the queſtion could not ariſe.

Another caſe of one *Stirling* was mentioned. *Stirling* found out that a Mrs. *Shutter* had property in the *South-Sea* ſtock, and his ſcheme to poſſeſs it was like *Murphy's*: he forged a will, got it proved, went to the *South-Sea-Houſe*; there he exhibited the probate; they gave credit to the death of the party, and to his being the executor, and they paid the money. The woman, who had nothing elſe to live upon, came to receive her dividend. The clerk ſays, Your executor has proved your will; you muſt be the ghoſt of Mrs. *Shutter*, not Mrs. *Shutter* herſelf. She was not to be put off in that way. The Company found out *Stirling*, and brought him to juſtice. He did not ſay to the court on his trial, Do not believe her; no law ſays you muſt take the evidence of a ghoſt: ſhe muſt go into *Doctors Commons* and reſcind this, before you believe her evidence. No court would bear ſuch an inſult. The juriſdiction of the Eccleſiaſtical Court does not attach, till the party is dead: there is no ſuch thing as a will for the Prerogative Court to give effect to, whilſt the teſtator is living. It was ſaid, the crime conſiſts in obtaining the probate. The will has no legal effect without it. It is not neceſſary, to conſtitute the crime of forgery, that the will ſhould be proved. If the will is exhibited as a genuine will, and the officers of the court (what has happened in many inſtances) ſuſpect a forgery, they ſtop the probate; and many have ſuffered without a probate being granted, the offer to prove the will being a publication of the forgery.

Two other caſes, *the King* and *Fitzgerald*, and *the King* and *Carr* and *Richardſon*, were alſo mentioned to your lordſhips. In neither of theſe caſes was any probate produced or inſiſted upon by the priſoner. One of the gentlemen, who cited the caſes, ſuggeſted that anſwer to them, which was too obvious to be overlooked.

I truſt your lordſhips are ſatisfied, there is no ground in reaſon or authority for the diſtinction attempted between civil and criminal cauſes in the admiſſibility and effect of the ſentence of the Eccleſiaſtical Court.

I am now, my lords, arrived at that point to which the whole artillery ſeems to be directed; that the ſentence was obtained by colluſion.—Your lordſhips have been told, that a judgment by colluſion is *fabula, non judicium*; wax, paper, ink, any thing that you will, but not a judgment: the judge does not act, the judge is impoſed upon; it is of no effect whatever; in no court, in no light, upon no occaſion, can the moſt ingenious imagination ſuggeſt a caſe, in which colluſion does not affect the tranſaction; and being once proved, deſtroys it from the beginning, and as much annihilates it, as if it had never exiſted. This your lordſhips have been told is the clear ſettled law of every court.

I muſt beg leave to deny the doctrine in the extent it is contended for, and to inſiſt before your lordſhips, the colluſion cannot be averred againſt this ſentence, either upon the principles of the common law, or the proviſions of any ſtatute. By the common law of this country, proof of colluſion in ſome inſtances was permitted to reſcind tranſactions: the ſimplicity of the common law, calculated for more honeſt times, was not equal to all the arts of injuſtice which ingenious wickedneſs hath produced.

By the principles of the common law, the perſon permitted to reſcind a tranſaction, on the ſcore of fraud or colluſion, muſt have an intereſt veſted at the time. This is expreſsly laid down by the court in *Twyne's* caſe, reported by lord chief juſtice *Coke*. Where goods are unjuſtly taken, and ſold in a market overt by fraud, to change the property, the true owner may retake them. So where a creditor proſecutes his debtor to judgment, and the debtor ſells his goods to a perſon knowing of the judgment, with a view to defeat the execution, the goods may notwithſtanding be taken by the creditor. In both caſes an intereſt was veſted at the time of the fraud.

Many ſtatutes have been made to ſuppreſs fraud; in *Henry* the IVth's time, in the different reigns of the *Edwards*, and laſt of all in the time of queen *Elizabeth*; the main object of which was to enable perſons who became intereſted ſubſequent to tranſactions founded in colluſion and fraud, to impeach and reſcind them.

It has not indeed been expreſsly inſiſted, that by the common law, independent of ſtatuteable proviſions, all fraudulent judgments were void, and that it was competent to any perſon to defeat them: the authorities I have cited, and legiſlative declarations upon the ſubject, prove the contrary. The ſtatute of 9th *Henry* VIth, *c.* 11. has already been mentioned: from thence it is clear, the certificate of the biſhop, however colluſively or fraudulently obtained, was concluſive between the parties. And in the caſe of baſtardy, a proviſion is made againſt ſuch certificates in future: but in other caſes, as in marriage, to this day, and alſo before the Reformation, upon the parties being of a religious order, the certificate was concluſive, notwithſtanding any fraud or colluſion.——Colluſive judgments upon penal ſtatutes to protect offenders frequently occur in practice; and when they are inſiſted on, the plaintiff has a right to aver ſuch judgments to have been obtained by fraud and colluſion. This does not ariſe from the proviſion of the common law, but from an act of parliament made in the 4th *H.* VII. *c.* 20. The whole ſtatute is material to be attended to. The title of the act is, 'actions popular 'proſecuted by colluſion ſhall be no bar to thoſe which be purſued 'with good faith.' It recites, that if an action popular be commenced againſt an offender by good faith, then the ſame offender will delay the action either by non-appearance or by traverſe; and hanging the ſame action, the ſame offender will cauſe like action popular to be brought againſt him by covin for the ſame cauſe and offence that the firſt action was ſued: and then by covin of the plaintiff in that ſecond action, he will be condemned either by confeſſion, feigned trial, or releaſe; which condemnation and releaſe ſo had by colluſion and covin pleaded by the ſaid offender, ſhall bar the plaintiff in the action ſued in good faith: it is therefore enacted, that in future the plaintiff ſuing in good faith may aver the former recovery to have been by covin and colluſion; but no ſuch averment is to be received after a trial on the point of the action, or on the covin or colluſion.

Here your lordſhips find the origin of averments, that judgments on penal ſtatutes were obtained by colluſion. This act affirms the principle of the common law, that none but perſons intereſted were intitled to reſcind judgments on the ground of colluſion. A penalty given to a common informer is not veſted in any individual, till he commences the action; and conſequently he could not aver colluſion in a former judgment: ſuch judgment was not then *fabula*, or waſte parchment, but of ſuch effect and concluſion as called for an act of parliament to remedy the miſchief.

There can be no greater authority to prove the common law of the land, than a parliamentary declaration upon the ſubject: this act furniſhes a moſt explicit and ſatisfactory one. Your lordſhips will not ſuppoſe an act was made to remedy a miſchief, or ſupply a defect, which did not exiſt. If your lordſhips refer to the acts of thoſe days, you will find them drawn with great preciſion and accuracy, and with great knowledge of the ſubject: I will not ſay ſo much for the acts of the preſent time.

This act muſt evince to your lordſhips, that colluſive judgments in courts of law bound in collateral ſuits. Is it then to be wondered at, that there was no proviſion by the common law reſpecting fraudulent ſentences in the eccleſiaſtical courts, which had the ſole and excluſive juriſdiction in themſelves? But it does not follow, that colluſive practices are to have effect, or the parties go unpuniſhed.

A power is incident to every court to prevent its proceedings from being made the inſtruments of fraud and iniquity, and to puniſh the perſons concerned in the attempt. It may be done upon the information of one intereſted or not intereſted. The court is called upon for its own honour to examine into the buſineſs.

Your lordſhips have been told, that the crown cannot get at the colluſion; that the eccleſiaſtical courts will not attend to the application of the crown. If that were the caſe, it would not follow as a neceſſary conſequence, that the crown ſhould be admitted to alledge colluſion here. But has the attorney-general ſurmiſed to the Eccleſiaſtical Court, that there has been ſuch an impoſition put upon them as is inſinuated? Has the judge of the Eccleſiaſtical Court told the attorney-general, I cannot attend to the ſuggeſtion; no application has been made to the Eccleſiaſtical Court, either on the part of the crown, or by the real proſecutor in this caſe, or any other perſon, though the duke of *Kingſton* and the noble lady at the bar lived together five years under the ſanction of a marriage ſolemnized with the archbiſhop's licence, in the preſence of friends, and known to the world? Does the proſecutor ſay, he is actuated by motives of juſtice, and alledge the ſuppoſed colluſion newly diſcovered?

A caſe happened in the court of *King's Bench*, which is known to many of your lordſhips. Mrs. *Phillips* had married Mr. *Muilman*—Mr. *Muilman* had got rid of that marriage by a ſentence in the Eccleſiaſtical Court, by proving a former marriage with one *Delafield*.—It was then the lady's turn. She meditates getting rid of *Delafield*'s marriage, by proving that *Delafield* at the time he married her had another wife; and ſo the lady was to fix herſelf upon Mr. *Muilman* in order to give effect to her ſcheme. An action was brought for a real demand againſt her in the court of *King's Bench* by a brewer, who had got a note from her for a valuable conſideration: the intent of this was to create a rumour that *Muilman* and ſhe were married. They might have brought this and a thouſand ſuch actions, and no verdict given could be evidence againſt Mr. *Muilman*. But when Mr. *Muilman* heard of this proceeding, and the purpoſe of it, though it could not affect him, he applied to the court of *King's Bench*, not as a party in the cauſe, but informed the court that ſuch a proceeding was had by colluſion, that it was an abuſe of the court, and ought to be rectified. Lord *Hardwicke* was then at the head of that court: he conſidered it as a high contempt of that court: he attended to the application of *Muilman*. An objection had been made by counſel, that *Muilman* was not to be heard. What! ſaid lord *Hardwicke*, to inform the court of a contempt, is he not to be heard? Any perſon as *amicus curiæ* may inform the court of a contempt that has been committed. The court ordered the record to be taken off the file, and puniſhed the parties. If the preſent ſentence was by colluſion, the Eccleſiaſtical Court would eraſe from their records the memorial of the tranſaction at the ſurmiſe of an *amicus curiæ*: and would not the Eccleſiaſtical Court have thought themſelves honoured with ſuch an *amicus curiæ* as his majeſty's attorney-general?

Great, and perhaps deſerved, commendation was beſtowed upon the marriage-act, though, I really confeſs, I did not diſcover the application. Your lordſhips were told, that every woman of eaſy virtue and of indigent circumſtances before that act had an immediate receipt for the payment of her debts by getting married at the *Fleet*. Has the marriage-act been attended with ſuch beneficial conſequences to make all women virtuous, and all women rich? If that be true, it has much greater merit than I conceived belonged to it. Did a *Fleet* marriage diſcharge the woman from her debts? The only change it made in her ſituation was this: when married, ſhe goes to gaol in company with her huſband; whereas if ſingle, ſhe muſt go alone, and truſt to the company ſhe meets there: and as to future debts, ſhe was not liable, becauſe ſhe was a married woman; and at that time the marriage-ceremony, if performed by a prieſt, was valid. But is there any thing in the marriage-act which ſays, that a woman who now marries ſhall not run into debt? It would be very happy for many huſbands in this country, if there could have been an effectual proviſion of that kind. Before the marriage-act, a woman by her marriage in the *Fleet* was not liable to future debts; a woman now by her marriage in the church is not liable to future debts. Has the marriage-act made it a difficult matter in this country to be married? Are there many obſtacles in the way? Is there any delicacy in ſurrogates in granting licences? In truth, it is as eaſy to get married in a church as before in the *Fleet*. Suppoſe a marriage by banns at a diſtance from *London*; the woman comes here and runs in debt; does any body in *London* know of her marriage, though it was in a church? She has as much power to run in debt ſince the marriage-act as before, and as exempt from the payment.

Your lordſhips are told, that a man and woman may to civil purpoſes and to civil duties, by a colluſive ſentence of this kind, become ſeparated, and no longer huſband and wife; but to all the public duties they are huſband and wife: they cannot abſolve themſelves from public duties; there is no power upon earth can do it but the legiſlature of the kingdom; and that the noble lady at the bar is free to all civil purpoſes, but to all criminal purpoſes ſhe is a wife.

I wiſh the gentleman, who uſed this argument, had explained himſelf upon the ſubject; for I proteſt to your lordſhips, I am to be informed that there are other public duties by huſband and wife to be performed, but thoſe in a ſtate of cohabitation: I have no idea of any public duties which the ſtate can exact from a huſband and wife in any other ſituation: and yet, my lords, nothing is more clear, than if a man and woman cohabit together as huſband and wife after a ſentence like the preſent, and whilſt it remains in force, they are puniſhable by eccleſiaſtical cenſures.

Are the public duties alluded to the injunctions found in the act of parliament, that no man ſhall take another wife, or any woman another huſband, living the former? The act does not mean to puniſh all ſuch acts: for in the firſt place the act ſays, that it is competent to any man, without becoming a felon or the object of puniſhment by the act, to marry a ſecond wife, provided his firſt wife is beyond the ſeas for ſeven years together, though the huſband knows ſhe is living; and yet the ſecond marriage is void, and the huſband may be puniſhed in the eccleſiaſtical courts, but not in the temporal.

Suppoſe a gentleman from *Ireland*, for inſtance, ſhould be civil enough to leave his wife, and reſides ſeven years in *England*; though he hears from her by every packet, though he writes to her by every packet, he may marry a woman in *England* without offending againſt the act of parliament. It would be the ſame, if a perſon living at *Dover* could prevail on his wife to go and reſide at *Calais* for ſeven years: he might marry another woman at *Dover* without any peril from this law, though every veſſel brought him accounts of her good health. Is this then that great public duty which the ſtate ſo rigorouſly exacts, that none of its ſubjects ſhall marry a ſecond huſband or wife, living the firſt?

It is well known, that a divorce for adultery does not diſſolve the bonds of matrimony; the relation of huſband and wife ſtill exiſts, and neither party can marry again; and yet the day after that divorce is pronounced, ſhe can marry any man ſhe pleaſes without offending againſt this law. It is not then in this act of parliament we are to find the public duties which the ſtate exacts from a huſband and wife; for in many caſes a ſecond marriage is not puniſhed, or even condemned by it.

Poſſibly the gentleman may urge, that a wife's reſiding abroad for ſeven years may be by colluſion to give the huſband an opportunity of marrying again without committing felony: in ſhort, if your lordſhips yield to this objection of colluſion, it is impoſſible to foreſee to what extravagant lengths you may be carried in ſupport of the propoſition, that the noble lady at the bar is to all civil purpoſes ſingle, but to all criminal purpoſes a wife. The caſe of a perſon who committed a fraudulent act of bankruptcy, on which a commiſſion iſſued, and for a concealment of part of his effects he was tried and executed, has been mentioned. The caſe, ſo far from maintaining the propoſition, is an authority againſt it: the colluſive act of bankruptcy was deemed equivalent to a real one; it bound the bankrupt to all civil and criminal purpoſes; it ſubjected his property to be ſeized for the benefit of his creditors; it ſubjected his perſon to the puniſhment ordained by the bankrupt laws: there is no diſtinction made between civil and criminal purpoſes.

Suppoſe a commiſſion of bankruptcy iſſuing fairly upon a real act of bankruptcy, and a concealment by the bankrupt; and let me ſuppoſe farther, which is not an impoſſible thing, that the commiſſion by colluſion between the aſſignees and the bankrupt is ſuperſeded, as having improperly iſſued, by an order of my lord chancellor, and an indictment ſhould be afterwards preferred for the concealment; would any judge ſuffer a man to be tried as a felon under theſe circumſtances on a ſuggeſtion of fraud in ſuperſeding the commiſſion? Certainly not: I am perſuaded every judge, who now aſſiſts your lordſhips, would tell the proſecutor he had miſtaken the place to examine the fraud; that he ought to have applied to the court of *Chancery*, which has excluſive juriſdiction in bankruptcy; and direct the priſoner to be acquitted.

Fermor's caſe, in lord *Coke*'s *Reports*, was cited to your lordſhips to prove, that acts temporal and eccleſiaſtical may be avoided for colluſion: does that learned judge ſay where ſuch acts are to be avoided? No; but, my lords, to illuſtrate that paſſage he refers to a caſe reported in lord chief juſtice *Dyer*'s *Reports*; and there it appears, that the act of the Eccleſiaſtical Court, which was granting an adminiſtration, had been repealed in the Eccleſiaſtical Court for colluſion. If I wanted authorities to add to thoſe I have cited, I would borrow this to put into the number; becauſe it is a direct proof, that the Eccleſiaſtical Court have a power to ſet aſide their own acts for fraud.

A caſe of *Lloyd* and *Maddox* was cited from *Moore*'s *Reports* to prove, that the eccleſiaſtical courts had a power to examine into the colluſive means of obtaining a judgment in the temporal courts; and ſhall not, ſay the gentlemen, the temporal courts take the ſame liberty with the ſentences of the eccleſiaſtical ? The caſe need only to be ſtated ot ſhew the fallacy of the argument. A perſon claiming a legacy ſues in the Eccleſiaſtical Court, the proper forum for the recovery of that demand : the defendant in anſwer ſays, I have nothing to pay you with. Such a one, a daughter of the teſtator, has ſued me in a court of law for a debt ; has recovered a judgment againſt me. I muſt pay that debt. I cannot pay your legacy, unleſs I pay it out of my own pocket, and nothing can be more unjuſt. The executor is to adminiſter the effects as far as they go, but not to pay the debts out of his own pocket. The legatee in anſwer ſaid, The judgment was by fraud, and the temporal court would not prohibit the eccleſiaſtical from examining into the matter. This is not only within the principle of the common law, the legatee having an intereſt at the time of the fraud committed, but falls within the ſtatute of queen *Elizabeth*, which ordains, that every judgment in any temporal court by colluſion is utterly null and void, as if it had never exiſted ; it is void againſt every perſon having an intereſt ; it is void by force of the ſtatute againſt the crown demanding a forfeiture.

A learned friend of mine, who ſpoke in the cauſe, and who did me the ſingular honour of attending to me, not for what I ſaid, but for what I omitted, obſerved to your lordſhips, that I had avoided entering into the effect of fraud and colluſion upon the ſentence, unleſs by citing the caſe of *Hatfield* and *Hatfield*. I knew it would fall to my ſhare to trouble your lordſhips upon that ſubject ; and to avoid a repetition, I contented myſelf in that ſtage of the buſineſs with relying upon the caſe of *Hatfield* and *Hatfield*, which appeared to me alone ſufficient to anſwer every argument upon colluſion.

It is pretty ſingular, that as *Hatfield* and *Hatfield* was a caſe in equity, and two of the moſt eminent equity-counſel in this kingdom appear for the proſecution, that neither of them thought fit to grapple with that caſe. They found in the principles of the court of equity, that it was not to be anſwered, and therefore prudently paſſed it over to thoſe who ſhould think fit to engage with it. A woman claimed forty pounds a-year, which was veſted in a truſtee for her uſe : but there was another deviſe of an annuity of ten pounds a-year out of lands, and a legacy directly given her. The former huſband releaſed to the heir at law of the ſecond huſband, who had made theſe proviſions for his ſuppoſed wife. She files her bill. The firſt huſband in his anſwer ſtates all the circumſtances of their marriage, the time, the place, the miniſter, and the perſons preſent, to avoid the effect of the releaſe. A ſuit of jactitation is inſtituted in the Eccleſiaſtical Court by colluſion with the ſecond huſband, after proof of the marriage in the cauſe in the *Exchequer*, and ſhe is declared a ſeparate woman, and the widow of the deceaſed. The court of *Exchequer* received the ſentence as concluſive evidence. On an appeal to the houſe of lords, the decree is affirmed.

If it had ſtood merely upon the printed caſes in the houſe of lords, I ſhould conceive your lordſhips could not have entertained a doubt ; but the caſe is mentioned in ſir *John Strange*'s *Reports*, when he was not a young man ; and the ground of the determination is ſtated to be, that the ſentence was concluſive. The caſe is mentioned alſo by Mr. *Viner* in his *Abridgment* ; where he adds, that the houſe of lords held, that a ſentence in the Eccleſiaſtical Court could not be impeached, though the proceedings were feint and by colluſion. This clear and direct authority is to be got rid of and avoided in this manner : Mr. *Viner* is a nonſenſical writer ; you are not to give credit to what he ſays. I ſhould have hoped that gratitude to Mr. *Viner*'s memory would have repreſſed that obſervation : he has ſhortened the hours of the labour of lawyers, and more particularly of thoſe who are in great buſineſs. But to caſes in themſelves irrefragable, with deciſions upon the very point, anſwers cannot be given by argument ; unleſs your lordſhips will dignify thoſe obſervations with the name of argument.

The caſe of lady *Mayo* was cited from *Doctors Commons*, which is very material to the cauſe now before your lordſhips. It was a caſe of fraud and colluſion, diſcovered in the Prerogative Court upon the appeal, which had been practiſed in the Conſiſtory Court of the biſhop of *London*. The fraud was apparent ; he that ran might read it : but what ſaid the judge of the Prerogative Court ? You muſt go into the Conſiſtory Court, where the fraud was committed ; I can give you no relief. There the colluſion muſt be gone into, there redreſs may be had, there the honour of the court will be vindicated. This is the opinion of a living judge, of high character for his abilities and integrity : a greater man perhaps never ſat at the head of that court.

Your lordſhips have been preſſed to give a more favourable attention to the wiſhes of the proſecutor, as the preſent is a criminal proceeding. Is it the principle or genius of this country to be more active to find out and puniſh crimes, than to give effect to civil rights ?

My lords, there is a benignity in the laws of this country to the frailties of mankind. The judges are attentive and zealous that the civil juſtice of the country be ſtrictly adminiſtered, and will not ſuffer any contrivance, chicane, accident, or neglect, to defeat it ; but in criminal proſecutions they are humane, they make great allowances, and are not over-anxious to diſcover criminals. This obſervation is verified by daily practice. In a civil cauſe, if the trial comes on before the plaintiff expects it, if a witneſs be out of the way, if the verdict be in favour of a defendant contrary to the evidence, the verdict is ſet aſide, and a new trial ordered and juſtice done : but in a criminal proſecution, if the verdict be in favour of the defendant, though it ariſes from the abſence of a witneſs, or from any other accident, or it be given contrary to the cleareſt and moſt ſatisfactory proof of guilt, though not one of the jury can ſhew his face without a bluſh, yet the verdict ſtands, and a new trial is never granted. It was even denied in perjury committed in the time of king *William*, where the defendants had the wickedneſs to corrupt the witneſſes for the proſecution to keep out of the way ; for whenever, and by whatever means, there is an acquittal in a criminal proſecution, the ſcene is cloſed and the curtain drops.

I cannot, my lords, ſit down without reminding your lordſhips, that in the courſe of the argument have been cited many determinations in the temporal courts by judges who had no partiality to the eccleſiaſtical juriſdiction, acknowledging their authority, and declaring *unâ voce*, that in all caſes, where they have an excluſive juriſdiction, the ſentence is final and concluſive : there is not an exception to be found in the books. Some of theſe declarations were made, when the judges of the temporal courts were exceedingly jealous of the eccleſiaſtical, and when they were even in a ſtate of warfare.

Does the preſent caſe call upon your lordſhips to break down the boundaries which the conſtitution has fixed between the temporal and eccleſiaſtical courts, or to invade thoſe rules of deciſion which have been tranſmitted from the earlieſt of times ? Is there an authority to warrant your lordſhips in taking ſo extraordinary a ſtep ?

Is it expected, that your lordſhips are to be more jealous in finding out crimes and puniſhing offenders than your anceſtors ? and to accompliſh thoſe purpoſes, that you will diſregard the authorities of the law, the practice of ages, and the ſpirit of the *Engliſh* conſtitution ?

If the matter, inſtead of being clear in favour of the noble lady at the bar, as I conceive it to be, had been only doubtful, I am perſuaded your lordſhips would pronounce an acquittal.

It is the duty and practice of every judge in a criminal proſecution to let the jury know, that, if there hangs a doubt in the cauſe, they ought to give the turn of the ſcale in favour of innocence, and acquit the priſoner.

Can your lordſhips after an argument of three days, in which ſo many reſpectable determinations in favour of the eccleſiaſtical juriſdiction have been cited, lay your hands upon your breaſts and ſay, Here is no doubt ; the ſentence of the Eccleſiaſtical Court, upon the faith of which, and by the advice of a perſon of the firſt knowledge and abilities in the eccleſiaſtical law the noble lady acted, is a nullity and of no avail ; and that ſhe has intentionally violated the laws of her country and become a felon ?

My lords, I will not permit myſelf to ſuſpect any one of your lordſhips can entertain ſuch an opinion ; and I ſit down with the moſt perfect confidence, that by your lordſhips judgment the noble lady at the bar will be diſmiſſed from any farther attendance upon your lordſhips.

Lord High Steward. A noble lord aſks, whether in that caſe you cited, where an action was brought againſt Mr. *Thomas Hervey*, the court upon hearing the ſentence in the Eccleſiaſtical Court refuſed to proceed farther in it ; or whether it was, that the cauſe was then depending in the Eccleſiaſtical Court ?

Mr. *Wallace.* I will give your lordſhips an account from my memory, confirmed by a note taken in a ſubſequent cauſe ; and if there is any doubt upon the facts, I am happy to acquaint your lordſhips, that you will have much better information upon the ſubject from the noble judge who tried the cauſe. Mr. *Hervey* and the lady had lived ſeparate ſeveral years, during which time a creditor, who had furniſhed her with neceſſaries, brought an action againſt Mr. *Hervey*. He denied his marriage. There had not been a ſentence at that time in the Eccleſiaſtical Court. The jury were ſatiſfied with the evidence of the marriage, and found a verdict againſt Mr. *Hervey*.—Another creditor, who had furniſhed neceſſaries for the lady afterwards, brought his action againſt Mr. *Hervey*, and was provided with the ſame evidence which had ſatisfied the former jury : but between the time of the former trial and the trial of this cauſe, a ſuit of jactitation had been inſtituted in the Eccleſiaſtical Court by Mr. *Hervey* againſt the lady, and a ſentence pronounced in his favour, which was offered in evidence. The learned judge conceived himſelf bound by that ſentence, as the judgment of a court of competent juriſdiction : there was no impoſition upon the creditor, no occaſion for an alarm by the deciſion, the debt was not contracted during cohabitation, no act of Mr. *Hervey*'s had induced the creditor to furniſh the neceſſaries to her as his wife, he renounced the relation ; the plaintiff gave credit upon the marriage itſelf, and therefore took upon him to ſatisfy the court that there was a legal marriage : the ſentence of the Eccleſiaſtical Court had determined the point : the judge apprehended that the queſtion was cloſed, and that he was bound to give faith and credit to the ſentence ; and the plaintiff failed on account of the ſentence, though it was afterwards reverſed upon an appeal.

Doctor *Calvert*.

My lords, the queſtion ariſing upon the ſentence which has taken up ſo much of your lordſhips time, ſeems now confined to a narrower compaſs than we at firſt apprehended.

My lords, when the counſel for the noble ducheſs at your lordſhips bar offered the ſentence in the Eccleſiaſtical Court to be read as concluſive evidence, it was deſired by the counſel on the other ſide, that the reſt of the proceedings in that cauſe might likewiſe be read. This raiſed a belief in us, that exception would be taken to the nature of this ſentence in particular, as differing from ſentences in other matrimonial cauſes.

My lords, we apprehended it would be ſaid, as indeed it was by ſome of the counſel on the other ſide, that a proceeding in a cauſe of jactitation, when the iſſue of it was, pronouncing for the jactitation, and the defendant enjoined ſilence (let the proceeding in that cauſe have been what it might), would not amount to a poſitive decree againſt a marriage, but it would be merely a diſmiſſion of the party ; that it would amount to no more than this, that nothing had been proved for the preſent, and that the judgment never would become decretal.

My lords, I take it to be a mere miſtake, to ſpeak of proceedings in ſuch a cauſe in that way ; but however, we have it now, as I underſtand, in conceſſion from the counſel on the other ſide, and we are perfectly agreed about the nature of the ſentence : it has been allowed, it is as complete a ſentence againſt a marriage, as if it had been pronounced in a cauſe of nullity of marriage.

My lords, a conceſſion of this ſort coming from the counſel on the other ſide, your lordſhips will ſee, muſt leave them much embarraſſed : firſt, by their own conceſſions of the effects ſimilar judgments have had in other queſtions ; and likewiſe by the act of parliament, upon which alone this proſecution can be founded.

My lords, it is conceded, that ſome judgments of the eccleſiaſtical courts are final as to matrimony ; but if they concede that ſome are, there is now remaining no objection to this in particular. Your lordſhips will ſee how much this is ſupported by the ſtatute on which the proſecution is founded ;

founded; becauſe the exceptions out of that ſtatute go directly to thoſe ſentences with which it is now allowed this is upon a footing. Can it therefore with any propriety be now urged, that it ought not to be received as concluſive, becauſe there is a poſſibility of ſetting it aſide? This ſeemed aſtoniſhing to the learned gentleman who ſpoke firſt on the other ſide; that, as it is allowed that the court who paſſed that ſentence could at any time upon proper evidence reverſe it, it ſhould be urged in this judicature as concluſive upon your lordſhips. Many inſtances have been given, where ſentences not more final or irrevocable than this have been allowed in the common-law courts. If in a cauſe of nullity, a marriage be pronounced to be void, it would not be contended a moment, but that ſuch a ſentence is within the exception of the act; and no perſon marrying again after ſuch a ſentence could be an object of puniſhment under that act. It is ſurely therefore a very conſiderable conceſſion, and ſufficient to juſtify the reliance we have upon it, that it is a poſitive and direct ſentence againſt the marriage.

My lords, the ground of ſome of the exceptions out of the act of parliament ſeems to be the notoriety of the ſtate of the party, which leaves no room for impoſition on the perſon with whom the ſecond marriage is contracted; for the act has not in view merely the puniſhment of the offence as againſt morality, becauſe the exceptions are ſuch which allow in many caſes a ſecond marriage, though the firſt is really in force. The object therefore of the act of parliament ſeems to be this, that there ſhould be no deceit put upon the perſon: it is expreſſed by the preamble in theſe words: 'Whereas many perſons going from one 'county to another, or into places where they are not known, marry 'again; therefore be it enacted:' but when there has been any proceeding of this ſort, when there has been any queſtion litigated in the Eccleſiaſtical Court relative to that marriage, and when the ſentence of the court is againſt that marriage, I believe it is no ſtrain of the interpretation of that act, to ſuppoſe it is one of thoſe caſes, in which no proſecution of this ſort ought to be carried on.

My lords, the variety of inſtances that have been produced to ſhew, that whenever any ſentence of this ſort has been produced, it has been conſtantly attended to by all civil juriſdictions, will not bear a contradiction; nothing can be more clear. To all the caſes that have been quoted on our ſide, I do not apprehend that any anſwer has been given to affect their authority; what is more, there has been no caſe cited on the other ſide: therefore, if a ſeries of authorities will eſtabliſh any point, it is to be conceded, that in all civil caſes a ſentence thus pronounced by a court having a competent juriſdiction, where the queſtion has come before that court, marriage or not marriage, will be received. The queſtion then will come to this: if it can be eſtabliſhed, that in civil ſuits it would be received, ought it not to have the ſame effect in a criminal proſecution?

My lords, for that purpoſe there have been caſes cited to your lordſhips; that of *the King* againſt *Vincent*, where there was a proſecution for a forgery, and the probate was received as concluſive evidence againſt that forgery.

My lords, in anſwer to that it was urged only, that it was a caſe that was too ſtrong, and they could not give credit to the Reporter. That anſwer ſeems by no means ſatisfactory, eſpecially as it does not meet with ſupport from any ſubſequent authority, ſince none has been quoted that comes up to the point. Two or three caſes have been mentioned; but when they are conſidered, and the circumſtances they were attended with, your lordſhips will find, it does not appear that they come up to the caſe in queſtion. In two of theſe inſtances, the ſuppoſed teſtators were living. My lords, it was a groſs impoſition, and the whole proceeding a mere miſtake, and nothing more. The teſtator came into court to give evidence. To be ſure, a probate under theſe circumſtances could not be attended to; it could not be a probate at all; nor could it be contended, that the probate of the will of a living perſon could be received in evidence. I know the treatment it received in the Court of Prerogative in that caſe, where *Stirling* was executed for a forgery. I enquired, to ſee how that ſtands, and I do not find there were any proceedings to reverſe or revoke the probate; the thing was too abſurd to require a judicial diſquiſition. I was informed, a pen was drawn through the probate, and on the margin was written the word *void.* There were two other caſes mentioned of indictments for forging wills, where it was ſaid that there was a probate exiſting; but it does not appear throughout theſe caſes, that any mention was made of the probate at the trial, or that the exception was taken for the priſoners. We pointed out to your lordſhips the great inconvenience that would ariſe from going on to enquire into queſtions of this ſort in two different judicatures. It was aſſerted——

A Lord. Whether the ſcratch with a pen through the probate, in the caſe of *Stirling*, was done by any order of the court?

Doctor Calvert. Not by any judicial order, I believe. I apprehend it never came judicially before the court. By whom it was done I know not: I am not acquainted with that.

My lords, it was aſſerted by the counſel on the other ſide, that no deciſion of a civil nature could be applied to any criminal queſtion: it was aſſerted, but I did not find that it was ſupported by any principles or authorities.

My lords, we, on the other hand, did ſubmit to your lordſhips, that the inconveniencies ariſing from ſuch different enquiries might be extremely great; for if they produce different judgments upon the ſame point, the perſons, who ſhould be affected and intereſted under them, under ſuch a predicament might find it difficult to know what ſhould be their duty. We pointed out, that in caſe the ſentence now in queſtion remains in force, which I truſt it will, notwithſtanding any judgment that may be paſſed in this court; yet if you ſhould proceed to cenſure the perſon thus ſeparated from the ſuppoſed former huſband, from this contrariety of judgments the greateſt confuſion would ariſe: for you would cenſure the perſon for marrying again, as being the wife of that huſband, of whom it had been directly in iſſue and determined that ſhe was never the wife. This, my lords, appears to us a very conſiderable abſurdity. The only anſwer I heard to that was rather avowing the inconvenience than removing it. When it was aſked, in what predicament would a woman ſtand under theſe circumſtances? it was ſaid, ſhe would be a wife to criminal purpoſes, but not ſo as to civil conſiderations. What the diſtinction meant, I confeſs I do not well underſtand; but it was ſaid, the noble lady at the bar ſhould be conſidered as a wife to all criminal purpoſes, becauſe perſons cannot abſolve themſelves from their public duties. I never underſtood, that with regard to matrimony any party could abſolve himſelf from his private duties neither: I always underſtood it, as far as his own act could affect it, to be an indelible obligation. But what are the duties to the publick, which a perſon in this ſituation ſhould be anſwerable for? A woman by law ſeparated from, and even pronounced not to be the wife of, the ſuppoſed huſband, and to whom ſhe cannot return; I do not know what duties there are, that ſhe ſhould be anſwerable to the publick for. It is contended, that of not marrying again; but this is expreſsly contrary to the meaning of the act itſelf, which provides that in many caſes, even where the former marriage remains in force, yet a ſecond marriage ſhall not be criminal: as in the caſe of a ſeparation *a menſa et thoro* there is no doubt, that the parties remain man and wife as much as if they had never been divorced; nay, it is ſo merely a temporary ſeparation, that there is no occaſion for a judicial proceeding to bring them together again; for whenever the parties chuſe to cohabit, they may live together, and are as completely man and wife as if no ſeparation had happened. It has been obſerved, that ſome inconveniencies, which were removed by the late marriage act, might be introduced again under theſe ſuits of jactitation: it is certainly ſomewhat unintelligible how theſe ſuits could be applied to thoſe purpoſes. The grievance mentioned is this, that ſingle women contracting debts did, before that act of parliament, procure themſelves to be clandeſtinely married to perſons with whom they never intended to cohabit, but merely with a view fraudulently to protect themſelves againſt their creditors. Now, can it be argued, that by going into the Eccleſiaſtical Court, and obtaining a ſentence in a cauſe of jactitation, that end would be anſwered? What! when a woman wants a huſband to protect her from her debts, ſhall ſhe get herſelf fraudulently releaſed from her huſband? It ſeems it would have quite a contrary effect, and cannot anſwer the purpoſe for which it would be intended. If any of the excellent regulations made by that act are in danger of being infringed upon by undue practices, it were worthy the legiſlature to attend to it, and provide againſt them; but a court of juſtice cannot for ſuch reaſons depart from ancient and eſtabliſhed modes of proceedings: and in this caſe theſe conſiderations ought not to have the leaſt weight, becauſe there is not any ground for the apprehenſion. In the proceedings in this criminal court, therefore, your lordſhips ought to receive theſe ſentences upon the very ſame principles, or indeed broader than a civil court: for who ſhall pretend to ſay, that in a civil queſtion parties may avail themſelves of ſuch a ſuit? But where a perſon is brought merely to anſwer for a crime, and for the purpoſe of puniſhment, who ſhall ſay, that it is conſonant to the principles of law that ſuch a defence ſhould not avail? So rigorous a determination in criminal caſes has not been ſupported on any authority, or eſtabliſhed on any principle. Upon the authorities therefore which have been quoted, and which remain unſhaken and uncontradicted, we do ſubmit to your lordſhips, that theſe two points are well eſtabliſhed. But it has been ſaid, that we are now arguing for what is not open to be conſidered on the general principles of law; becauſe this queſtion has been already decided by the very act upon which the proſecution is now depending: for when an act of parliament makes ſome exceptions, the true interpretation of that act is, that all caſes, which are not within the exceptions, are within the prohibition.

My lords, ſuppoſing that to be a good principle of interpretation, yet it may very well and with propriety be contended, that the caſe that is now offered, I mean the ſentence pronouncing againſt this marriage in a cauſe of jactitation, is within the exceptions of the act of parliament.

My lords, the two exceptions are, that it ſhall not extend to any perſon, who is at the time of ſuch marriage divorced by any ſentence had in the Eccleſiaſtical Court; or to any perſon, where the former marriage hath been, or hereafter ſhall be, by ſentence in any eccleſiaſtical court, decreed to be void and of no effect.

My lords, it will be difficult to explain the latter words, connected with the proviſion in the former clauſe, without taking in the very ſentence which is now under conſideration. The general words in the firſt clauſe are, that it ſhall not extend to thoſe caſes, in which at the time of ſuch marriage the perſon was divorced by any ſentence of the Eccleſiaſtical Court.

Now, my lords, the word *divorce* has always been applied, not only to ſeparations *a menſa & thoro*, but to divorces *a vinculo matrimonii.* The firſt clauſe therefore, under the general word of *divorce*, ſeems to take in both theſe caſes, whether it be a temporary ſeparation for adultery or cruelty, or whether it be a divorce *a vinculo matrimonii.* If that clauſe applies to theſe two caſes, I would aſk, what is the meaning of the ſecond, that ſpeaks of ſentences, declaring a marriage null and void to all effects? A ſentence pronouncing a marriage null and void, and of no effect, is the ſame thing as a divorce *a vinculo matrimonii*; becauſe if the marriage has ever been a true and legal marriage, it is well known, that no judicial power in this kingdom can put an end to it. In order therefore to give every part of this act ſome meaning, it ought to be underſtood, that the legiſlature by thoſe general words muſt mean any ſentence whatever, by which the Eccleſiaſtical Court ſhould have pronounced, that there is no marriage, or that a marriage is void; it being the purport and the general object of this act to ſave not only the juriſdiction of the Eccleſiaſtical Court (that is not what I am contending for), but it is to ſave the innocence of the perſons acting under ſuch ſentences: becauſe where that queſtion has been agitated in a public court (for the legiſlature does not ſuppoſe, as ſome of the counſel on the other ſide have unwarrantably ſuppoſed, it to be a private and clandeſtine tranſaction; but) the conſtitution ſuppoſes every court to be open and public, and proceedings there to be before the face of the world: every body may ſee and know them, if they pleaſe; and when there has been this public ſentence of any conſtitutional court, the meaning, the equity of the act muſt be, that any one of theſe ſentences ſhall juſtify the party acting under it. To make a diſtinction between a cauſe of nullity and a cauſe of jactitation, I apprehend can be founded upon nothing, but not conſidering the nature of the proceedings; becauſe I can hardly put a caſe, which would be a proper ſubject for a ſuit of nullity, but it might likewiſe be proceeded to the ſame effect in a ſuit of jactitation: the only difference is, the proof being put upon the different party. Suppoſe a perſon means to diſpute the validity of his marriage; he may, if he pleaſes, proceed in a cauſe of nullity of marriage; in which caſe he muſt ſtate the circumſtances of his marriage, and the prayer of his libel will be, that under theſe circumſtances his marriage may be pronounced void: the ſentence then would be direct to that point. Suppoſe, on the other hand, he chuſes to bring a ſuit of jactitation, and charges that the woman has claimed him to be her huſband: if ſhe juſtifies that jactitation by pleading her marriage, it is incumbent on her then to ſtate the caſe, and to go into the queſtion, whether it is a marriage or no: and if in that juſtificatory plea ſuch circumſtances be ſtated, as would have been the contents of the libel in a cauſe of nullity, the ſentence, I contend, would have preciſely the ſame effect.

My lords, I have known more inſtances than one to juſtify what I aſſert. The firſt ſuit that ever was brought upon the marriage act to avoid a marriage by reaſon of minority, where the party under age was married by licence without the conſent of parents, was by a ſuit of jactitation: it was the caſe of *Froſt* and *Waldeck* in 1760. I looked into the ſentence that was pronounced in that cauſe, and it was preciſely in the ſame words as this now in queſtion. Will any body contend that it is not an effectual ſentence, declaring the marriage between theſe parties void? Your lordſhips ſee it is a fallacy therefore to ſay, that this method of proceeding in a cauſe of jactitation will not as effectually bring on the queſtion of marriage, as a cauſe of nullity of marriage. There were two other caſes afterwards upon that act, that were brought in the ſame way; neither of them came to a deciſion, but the method of proceeding was the ſame. Afterwards there was a ſuit upon that act of parliament brought as a cauſe of nullity of marriage. I remember it being made a queſtion, whether even that was a proper way of proceeding; but the judge was of opinion, that the party might have proceeded in either way, conceiving, I preſume, that the ſentence in one way would be as effectual as in the other. With what propriety then can it be ſaid, as it was on the other ſide, that all proceedings in cauſes for jactitation of marriage muſt be with an ill intent?

My lords, it doth not apply at all to the manner of proceedings. Suppoſe it to be true, what was aſſerted by the counſel, and I believe it is in a great meaſure ſo, that theſe ſuits were chiefly uſed for the purpoſe of enquiring into contracts of marriage; for before the marriage act put an end to ſuch contracts, it was difficult for parties to know, whether they had entered into ſuch contracts as would bind them or no; with what propriety can it be ſaid, that if a ſuit of jactitation be brought upon ſuch contract, it muſt be with an ill intent? I have mentioned, that theſe ſuits have been brought under the marriage act, and therefore merely upon the queſtion of marriage. In thoſe caſes the ſentences are preciſely conceived in the ſame words with the ſentence in this cauſe: and if a man was to be married again after ſuch a ſentence pronounced, would it be argued one moment, that he would be guilty of polygamy under this ſtatute? If he would not, it muſt be, becauſe ſuch a ſentence is on the ſame footing, as if it had been given in a cauſe of nullity. For, if a ſentence given in a cauſe of nullity was to be offered as concluſive, and before you entered into evidence upon the fact, your lordſhips would think it the proper time to offer it, there would be no occaſion to go into the queſtion; becauſe, let the fact turn out what it might, that ſentence would be ſatisfactory, that the marriage was void, that is, that there was no marriage then ſubſiſting between the parties. What is the aſſertion often then in a ſuit of jactitation; and what was the aſſertion in the cauſe now before your lordſhips? The plaintiff to juſtify his claim upon the lady ſtates, that at a particular time he was married, ſtates the circumſtances, ſtates the perſons preſent: he attempts to prove this fact. The judge having conſidered the proofs, and gone into the queſtion, determined that there was no marriage, or, in other words, that the marriage is of none effect: that is, that the marriage that is pleaded there can have no effect; for he pronounces, that, as far as to him appears, the party is a ſpinſter, and free from all matrimonial contracts. If we are right then in bringing this cauſe within the exceptions of the act, every objection I ſhould conceive, that can be ſtated, is removed under the expreſs regulation of the act of parliament; becauſe the legiſlature taking this matter into their conſideration, well aware, as it muſt be ſuppoſed, of what inconveniencies might be argued to ariſe, have ſtill enacted, that theſe ſentences exiſting, the perſon marrying again ſhall not be within the act of parliament.

Under theſe conſiderations, the reply having been ſo fully and ſo ably gone into by the gentleman who went before me, I ſhall take up your lordſhips time no longer, than in hoping you will be of opinion, that this ſentence coming within the exceptions of the act, it would be improper to go into any proof of the fact: and therefore I hope your lordſhips will admit of this plea of the defendant.

Lord Preſident of the Council. My lords, I move your lordſhips to adjourn to the chamber of parliament.

Lords. Ay, ay.

Lord High Steward. This houſe is adjourned to the chamber of parliament.

The lords and others returned to the chamber of parliament in the ſame order they came down. The ducheſs of *Kingſton* retired from the bar.

After ſome time paſſed in the chamber of parliament,

(*See the Appendix.*)

The lords and others came back from thence in the ſame order; and the peers being ſeated, and the lord high ſteward in his chair, the ducheſs of *Kingſton* was again brought to the bar.

Lord High Steward. Mr. attorney general, you may go on to ſtate your charge.

Mr. *Attorney General.*

My lords, it ſeems to be matter of juſt ſurpriſe, that, before the commencement of the laſt century, no ſecular puniſhment had been provided for a crime of this malignant complexion and pernicious example.

Perhaps, the innocence of ſimpler ages, or the more prevailing influence of religion, or the ſeverity of eccleſiaſtical cenſures, together with thoſe calamities which naturally and neceſſarily follow the enormity, might formerly have been found ſufficient to reſtrain it.

From the moment theſe cauſes ceaſed to produce that effect, imagination can ſcarcely ſtate a crime which calls more loudly, and in a greater variety of reſpects, for the interpoſition of civil authority; which, beſides the groſs and open ſcandal given to religion, implies more cruel diſappointment to the juſt and honourable expectations of the perſons betrayed by it; which tends more to corrupt the purity of domeſtic life, and to looſen thoſe ſacred connections and cloſe relations, deſigned by Providence to bind the moral world together; or which may create more civil diſorder, eſpecially in a country where the title to great honour and high office is hereditary.

[*Here followed a great uproar behind the bar, and the ſerjeant at arms made the uſual proclamation.*]

My lords, the misfortunes of individuals, the corruption of private life, the confuſion of domeſtick relations, the diſorder of civil ſucceſſion, and the offence done to religion, are ſuggeſted, not as ingredients in the particular offence now under trial, but as miſeries likely to ariſe from the example of the crime in general; and are laid before your lordſhips only to call your attention to the courſe and order of the trial, that nothing may fall out, which may give countenance to ſuch a crime, and heighten ſuch dangers to the publick.

The preſent caſe, to ſtate it juſtly and fairly, is ſtript of much of this aggravation. The advanced age of the parties, and their previous habits of life, would reduce many of theſe general articles of miſchief and criminality to idle topicks of empty declamation. No part of the preſent complaint turns upon any ruin brought on the blameleſs character of injured innocence; or upon any diſappointment incurred to juſt and honourable pretenſions; or upon any corruption ſuppoſed to be introduced into domeſtick life. Nor ſhould I expect much ſerious attention of your lordſhips, if I ſhould urge the danger of intailing an uncertain condition upon a helpleſs offspring, or the apprehenſion of a diſputed ſucceſſion to the houſe of *Pierrepoint*, as probable aggravations of this crime.

But your lordſhips will be pleaſed withal to remember, that every plea, which, in a caſe differently circumſtanced, might have laid claim to your pity for an unfortunate paſſion in younger minds, is entirely cut off here. If it be true, that the ſacred rights of matrimony have been violated, I am afraid it muſt alſo appear, that dry lucre was the whole inducement, cold fraud the only means to perpetrate that crime. In truth, the evidence, if it turns out correſpondent to the expectations I have formed, will clearly and expreſly repreſent it as a matter of perfect indifference to the priſoner *which* huſband ſhe adhered to, ſo that the profit to be drawn from *this* marriage, or from *that*, was tolerably equal. The crime, ſtated under theſe circumſtances, and carrying this impreſſion, is an offence to the law; which, if it be leſs aggravated in ſome particulars, becomes only more odious in others.

But I decline making general obſervations upon the evidence. I will ſtate it to your lordſhips (for it lies in a very narrow compaſs) in the ſimpleſt and ſhorteſt manner I can invent. The facts (as the ſtate of the evidence promiſes me they will be laid before your lordſhips) form a caſe, which it will be quite impoſſible to aggravate, and extremely difficult to extenuate.

My lords, conſidering the length of time which has intervened, a very few periods will compriſe the facts which I am able to lay before your lordſhips. *Firſt*, the marriage of the priſoner with Mr. *Hervey*; her cohabitation with him at broken and diſtant intervals; the birth of a child in conſequence of it; the rupture, and ſeparation which ſoon followed. *Secondly*, the attempt which the priſoner, in view to the late lord *Briſtol*'s then ſtate of health, made to eſtabliſh the proofs of her marriage with the preſent earl. *Laſtly*, the plan, which makes the immediate ſubject of the preſent indictment, for bringing about the celebration of a ſecond marriage with the late duke of *Kingſton*.

The priſoner came to *London* early in life, ſome time, as I take it, about the year 1740. About forty-three, ſhe was introduced into the family of the late princeſs of *Wales*, as her maid of honour. In the ſummer of forty-four, ſhe contracted an acquaintance with Mr. *Hervey*; which begins the matter of the preſent indictment. This acquaintance was contracted by the mere accident of an interview at *Wincheſter* races. The familiarity immediately began; and very ſoon drew to its concluſion.

Miſs *Chudleigh* was about eighteen years of age; and reſided at the houſe of a Mr. *Merrill*, her couſin, on a viſit with a Mrs. *Hanmer*, her aunt, who was alſo the ſiſter of Mr. *Merrill*'s mother. One Mr. *Mountenay*, an intimate friend of Mr. *Merrill*'s, was there at the ſame time.

Mr. *Hervey* was a boy about ſeventeen years old, of ſmall fortune, but the younger ſon of a noble family. He was lieutenant of the *Cornwall*, which made part of ſir *John Davers*'s ſquadron, then lying at *Portſ-*

mouth, and deſtined for the *Weſt-Indies.* In ſhort, he appeared to Mrs. *Hanmer* an advantageous match for her niece.

From *Wincheſter* races he was invited to *Lainſton*; and carried the ladies to ſee his ſhip at *Portſmouth.* The *Auguſt* following, he made a ſecond viſit at *Lainſton* for two or three days; during which the marriage was contracted, celebrated, and conſummated.

Some circumſtances, which I have already alluded to, and others, which it is immaterial to ſtate particularly, rendered it impoſſible, or improvident in a degree next to impoſſible, that ſuch a marriage ſhould be celebrated ſolemnly, or publickly given out to the world. The fortune of both was inſufficient to maintain them in that ſituation to which his birth and her ambition had pretenſions. The income of her place would have failed. And the diſpleaſure of the noble family to which he belonged, rendered it impoſſible on his part to avow the connection. The conſequence was, that they agreed without heſitation to keep the marriage ſecret. It was neceſſary for that purpoſe to celebrate it with the utmoſt privacy; and accordingly no other witneſſes were preſent, but ſuch as had been appriſed of the connection, and were thought neceſſary to eſtabliſh the fact, in caſe it ſhould ever be diſputed.

Lainſton is a ſmall pariſh, the value of the living being about fifteen pounds a-year; Mr. *Merrill*'s the only houſe in it; and the pariſh church at the end of his garden. On the 4th of *Auguſt* 1744, Mr. *Amis*, the then rector, was appointed to be at the church, alone, late at night. At eleven o'clock, Mr. *Hervey* and Miſs *Chudleigh* went out, as if to walk in the garden; followed by Mrs. *Hanmer*, her ſervant (whoſe maiden name I forget; ſhe is now called *Ann Cradock*, having married Mr. *Hervey*'s ſervant of that name) Mr. *Merrill*, and Mr. *Mountenay*; which laſt carried a taper to read the ſervice by. They found Mr. *Amis* in the church, according to his appointment; and there the ſervice was celebrated, Mr. *Mountenay* holding the taper in his hat. The ceremony being performed, Mrs. *Hanmer*'s maid was diſpatched to ſee that the coaſt was clear; and they returned into the houſe, without being obſerved by any of the ſervants. I mention theſe ſmall circumſtances, becauſe they happen to be recollected by the witneſs.

The marriage was conſummated the ſame night; and he lay with her two or three nights following; after which he was obliged to return to his ſhip, which had received ſailing orders.

Miſs *Chudleigh* went back, as had been agreed, to her ſtation of maid of honour in the family of the princeſs dowager. Mr. *Hervey* ſailed in *November* following for the *Weſt-Indies*; and remained there till *Auguſt* 1746, when he ſet ſail for *England.* In the month of *October* following he landed at *Dover*, and reſorted to his wife, who then lived, by the name of Miſs *Chudleigh*, in *Conduit-Street.* She received him as her huſband, and entertained him accordingly, as far as conſiſted with their plan of keeping the marriage ſecret. In the latter end of *November* in the ſame year, Mr. *Hervey* ſailed for the *Mediterranean*, and returned in the month of *January* 1747, and ſtaid here till *May* in the ſame year. Mean while ſhe continued to reſide in *Conduit-Street*, and he to viſit her as uſual, till ſome differences aroſe between them, which terminated in a downright quarrel; after which they never ſaw each other more. He continued abroad till *December* 1747, when he returned; but no intercourſe, which can be traced, paſſed between them afterwards.

This general account is all I am able to give your lordſhips of the intercourſe between Mr. *Hervey* and his wife. The cauſe of the diſpleaſure which ſeparated them, is immaterial to be enlarged upon. The fruit of their intercourſe was a ſon, born at *Chelſea*, ſome time in the year 1747. The circumſtances of that birth, the notice which people took of it, and the converſations which ſhe held about that, and the death of the child, furniſh part of the evidence that a matrimonial connection actually ſubſiſted between them.

After having mentioned ſo often the ſecrecy with which the marriage and cohabitation were conducted, it ſeems needleſs to obſerve to your lordſhips, that the birth of a child was ſuppreſſed with equal care. *That* alſo made but an aukward part of the family and eſtabliſhment of a maid of honour.

My lords, that which I call the ſecond period, was in the year 1759. She had then lived at a diſtance from her huſband near twelve years. But the infirm ſtate of the late lord *Briſtol*'s health ſeemed to open the proſpect of a rich ſucceſſion, and an earldom. It was thought worth while, as nothing better had then offered, to be counteſs of *Briſtol*; and for that purpoſe to adjuſt the proofs of her marriage.

Mr. *Amis*, the miniſter who had married them, was at *Wincheſter*, in a declining ſtate of health. She appointed her couſin, Mr. *Merrill*, to meet her there on the 12th of *February* 1759; and by ſix in the morning ſhe arrived at the *Blue Boar* inn, oppoſite Mr. *Amis*'s houſe. She ſent for his wife, and communicated her buſineſs, which was to get a certificate from Mr. *Amis* of her marriage with Mr. *Hervey*. Mrs. *Amis* invited her to their houſe, and acquainted her huſband with the occaſion of her coming. He was ill a-bed; and deſired her to come up. But nothing was done in the buſineſs of the certificate, till the arrival of Mr. *Merrill*, who brought a ſheet of ſtamped paper to write it upon. They were ſtill at a loſs about the form, and ſent for one *Spearing*, an attorney. *Spearing* thought, that the merely making a certificate, and delivering it out in the manner which had been propoſed, was not the beſt way of eſtabliſhing the evidence which might be wanted. He therefore propoſed, that a check-book (as he called it) ſhould be bought; and the marriage be regiſtered in the uſual form, and in the preſence of the priſoner. Somebody ſuggeſting that it had been thought improper ſhe ſhould be preſent at the making of the regiſter, he deſired ſhe might be called; the purpoſe being perfectly fair, merely to ſtate that in the form of a regiſter, which many people knew to be true; and which thoſe perſons of honour, then preſent, give no room to doubt. Accordingly his advice was taken, the book was bought, and the marriage was regiſtered. The book was intitled, *Marriages, Births, and Burials in the pariſh of* Lainſton. The firſt entry ran, *The twenty-ſecond of* Auguſt, *one thouſand ſeven hundred and forty-two, buried, Mrs.* Suſannah Merrill, *relict of* John Merrill, *eſq.* The next was, *The fourth of* Auguſt *one thouſand ſeven hundred and forty-four, married, the honourable* Auguſtus Hervey, *eſq. to Miſs* Elizabeth Chudleigh, *daughter of colonel* Thomas Chudleigh, *late of* Chelſea College, *deceaſed, in the pariſh church of* Lainſton, *by me* Thomas Amis. The priſoner was in great ſpirits. She thanked Mr. *Amis*, and told him, it might be a hundred thouſand pounds in her way. She told Mrs. *Amis* all her ſecrets; of the child ſhe had by Mr. *Hervey*; a fine boy, but it was dead; and how ſhe borrowed a hundred pounds of her aunt *Hanmer* to make baby cloaths. It ſerved the purpoſe of the hour to diſcloſe theſe things. She ſealed up the regiſter, and left it with Mrs. *Amis*, in charge, upon her huſband's death, to deliver it to Mr. *Merrill.* This happened in a few weeks after.

Mr. *Kinchin*, the preſent rector, ſucceeded to the living of *Lainſton*; but the book remained in the poſſeſſion of Mr. *Merrill.*

In the year 1764 Mrs. *Hanmer* died, and was buried at *Lainſton.* A few days after, Mr. *Merrill* deſired her burial might be regiſtered. Mr. *Kinchin* did not know of any regiſter which belonged to the pariſh; but Mr. *Merrill* produced the book which Mr. *Amis* had made; and taking it out of the ſealed cover, in which it had remained till that time, ſhewed *Kinchin* the entry of the marriage, and bade him not mention it. *Kinchin* ſubjoined the third entry, *Buried*, December *the tenth, one thouſand ſeven hundred and ſixty-four, Mrs.* Ann Hanmer, *relict of the late colonel* William Hanmer; and delivered the book again to Mr. *Merrill.*

In the year 1767 Mr. *Merrill* died. Mr. *Bathurſt*, who married his daughter, found this book among his papers; and taking it to be, what it purported, a pariſh regiſter, delivered it to Mr. *Kinchin* accordingly. He has kept it as ſuch ever ſince; and upon that occaſion made the fourth entry, *Buried, the 7th of* February, *one thouſand ſeven hundred and ſixty-ſeven*, John Merrill, *eſq.*

The earl of *Briſtol* recovered his health; and this regiſter was forgotten, till a very different occaſion aroſe for enquiry after it.

The third period, to which I begged the attention of your lordſhips in the outſet, was in the year 1768. Nine years had paſſed, ſince her former hopes of a great title and fortune had fallen to the ground. She had at length formed a plan to attain the ſame object another way. Mr. *Hervey* alſo had turned his thoughts to a more agreeable connection; and actually entered into a correſpondence with the priſoner, for the purpoſe of ſetting aſide a marriage ſo burdenſome and hateful to both. The ſcheme he propoſed was rather indelicate; not that afterwards executed, which could not ſuſtain the eye of juſtice a moment; but a ſimpler method, founded in the truth of the caſe; that of obtaining a ſeparation by ſentence *a menſâ et thoro propter adulterium*; which might ſerve as the foundation of an act of parliament for an abſolute divorce. He ſent her a meſſage to this effect, in terms ſufficiently peremptory and rough, as your lordſhips will hear from the witneſs. Mrs. *Cradock*, the woman I have mentioned before as being Mrs. *Hanmer*'s ſervant, and preſent at the marriage, was then married to a ſervant of Mr. *Hervey*, and lived in the priſoner's family with her huſband. He bade her tell her miſtreſs, *that he wanted a divorce; that he ſhould call upon her* (Cradock) *to prove the marriage; and that the priſoner muſt ſupply ſuch other evidence as might be neceſſary.*

This might have anſwered his purpoſe well enough; but her's required more reſerve and management; and ſuch a proceeding might have diſappointed it. She therefore ſpurned at that part of the propoſal; and refuſed in terms of high reſentment, *to prove herſelf a whore.* On the 18th of *Auguſt* following ſhe entered a caveat at *Doctors Commons*, to hinder any proceſs paſſing under ſeal of the court, at the ſuit of Mr. *Hervey*, againſt her, in any matrimonial cauſe, without notice to her proctor.

What difficulties impeded the direct and obvious plan, or what inducements prevailed in favour of ſo different a meaſure, I cannot ſtate to your lordſhips. But it has been already ſeen in a debate of many days, what kind of plan they ſubſtituted in place of the former.

In the *Michaelmas* ſeſſion of the year 1768, ſhe inſtituted a ſuit of jactitation of marriage in the common form. The anſwer was a croſs libel, claiming the rights of marriage. But the claim was ſo ſhaped, and the evidence ſo applied, that ſucceſs became utterly impracticable.

A groſſer artifice, I believe, was never fabricated. His libel ſtated the marriage, with *many* of its particulars; but not *too many.* It was large in alledging all the indifferent *circumſtances* which attended the courtſhip, contract, marriage ceremony, conſummation, and cohabitation; but when it came to the *facts* themſelves, it ſtated a *ſecret* courtſhip, and a contract, *with the privity of Mrs.* Hanmer *alone*, who was then dead. The marriage ceremony, which, in truth, was celebrated in the church at *Lainſton*, was ſaid to have been performed at *Mr.* Merrill'*s houſe, in the pariſh of* Sparſhot, *by Mr.* Amis, in the preſence of Mrs. *Hanmer* and Mr. *Mountenay*, who were all three dead. Mrs. *Cradock*, whom but three months before he held out as a witneſs of the marriage, was dropped; and, to ſhut her out more perfectly, the conſummation is ſaid to have paſſed *without the privity or knowledge of any part of the family and ſervants of Mr.* Merrill; meaning perhaps that *Cradock* was ſervant to Mrs. *Hanmer.* It was further inſinuated, that the marriage was kept a *ſecret, except from the perſons before-mentioned.*

To theſe articles the form of proceeding obliged her to put in a perſonal anſwer upon oath. She denies the *previous* contract; ſhe evades the propoſal of marriage, by ſtating that it was *made* to Mrs *Hanmer* without *her privity*; not denying that it was afterwards *communicated* to her. The reſt of the article, which contains a circumſtantial allegation of the marriage, together with the time, place, witneſſes, and ſo forth, ſhe buries in the formulary concluſion of every anſwer, by *denying the reſt of the ſaid pretended poſition or article to be true in any part thereof.* Finally, ſhe demurs to the article which alledges conſummation.

Denying the reſt of the article to be true in *any part* of it reſerves this *ſalvo.* The whole averment of marriage was but *one part* of the article; that averment (the language is ſo constructed) makes but one member of a ſentence; and yet it combines falſe circumſtances with true. *They were, in Mr.* Merrill'*s houſe at* Sparſhot, *joined together in holy matrimony.*

This *part* of the article, as her anſwer calls it, is not true. It is true they were *married*; but not true, that they were married *at* Sparſhot, or *at Mr.* Merrill's *houſe.*

How was this groſs and palpable evaſion treated? It is the courſe of the Eccleſiaſtical Court to file exceptions to indiſtinct or inſufficient anſwers. Otherwiſe, to be ſure, they could not compel a defendant to put in any material anſwer. But it was not the purpoſe of this ſuit to exact a ſufficient anſwer; conſequently no exceptions were filed; but the parties went to iſſue.

The plan of the evidence alſo was framed upon the ſame meaſured line. The articles had excluded every part of the family: even the woman whom Mr. *Hervey* had ſent to demand the divorce, was omitted. But her huſband is produced, to ſwear, that in the year 1744 Mr. *Hervey danced* with Miſs *Chudleigh* at *Wincheſter* races, and *viſited* her at *Lainſton*; and in 1746 he *heard a rumour* of their marriage. *Mary Edwards* and *Ann Hillam*, ſervants in Mr. *Merrill*'s family, did not contradict the article they were examined to, which alledges, that none of his ſervants knew any thing of the matter. But they had *heard the report.* So had Meſſrs. *Robinſon*, *Hoſſach*, and *Edwards.* Such was the amount of Mr. *Hervey*'s evidence; in which the witneſſes make a great ſhew of zeal to diſcloſe all they know, with a proper degree of caution to explain that they know nothing.

The *form* of examining witneſſes was alſo obſerved on her part; and ſhe proved, moſt irrefragably, that ſhe paſſed as a ſingle woman; went by her maiden name; was maid of honour to the Princeſs Dowager; bought and ſold; borrowed money of Mr. *Drummond*; and kept caſh with him, and other bankers, by the name of *Elizabeth Chudleigh*; nay, that Mr. *Merrill* and Mrs. *Hanmer*, who had agreed to keep the marriage ſecret, converſed and correſponded with her by that name.

For this purpoſe a great variety of witneſſes was called; whom it would have been very raſh to produce, without ſome foregone agreement, or perfect underſtanding, that they ſhould not be croſs-examined. Many of them could not have kept their ſecret under that diſcuſſion; even in the imperfect and wretched manner, in which croſs-examination is managed upon paper, and in thoſe courts. Therefore not a ſingle interrogatory was filed, nor a ſingle witneſs croſs-examined, though produced to articles exceedingly confidential, ſuch as might naturally have excited the curioſity of an adverſe party to have made further enquiries.

In the event of this cauſe, thus treated, thus pleaded, and thus proved, the parties had the ſingular fortune to catch a judgment againſt the marriage by mere ſurpriſe upon the juſtice of the court.

While I am obliged to complain of this groſs ſurpriſe, and to ſtate the very proceedings in the cauſe as pregnant evidence of their own colluſion, I would not be underſtood to intend any reflection on the integrity or ability of the learned and reſpectable judges.

> *For oft, though wiſdom wake, ſuſpicion ſleeps*
> *At wiſdom's gate, and to ſimplicity*
> *Reſigns her charge; while goodneſs thinks no ill,*
> *Where no ill ſeems.*———

Nor ſhould any imputation of blame be extended to thoſe names, which your Lordſhips find ſubſcribed to the pleadings. The forms of pleading are matters of courſe. And if they were laid before counſel, only to be ſigned, without calling their attention to the matter of them, the colluſion would not appear. A counſel may eaſily be led to overlook what nobody has any intereſt or wiſh that he ſhould conſider.

Thus was the way paved to an adulterous marriage; thus was the duke of *Kingſton* drawn in to believe, that Mr. *Hervey*'s claim to the priſoner was a falſe and injurious pretenſion; and he gave his unſuſpecting hand to a woman, who was then, and had for twenty-five years, been the wife of another.

In the vain and idle converſations which ſhe held, at leaſt with thoſe who knew her ſituation, ſhe could not refrain from boaſting how ſhe had ſurpriſed the duke into that marriage. *Do not you think* (ſays ſhe with a ſmile to Mrs. *Amis*), *do not you think, that it was very kind in his grace to marry an old maid?* Mrs. *Amis* was widow of the clergyman who had married her to Mr. *Hervey*, who had aſſiſted her in procuring a regiſter of that marriage, and to whom ſhe had told of the birth of the child. The duke's kindneſs, as ſhe inſultingly called it, was ſcarcely more ſtrange, than her manner of repreſenting it to one who knew her real ſituation ſo well.

My lords, this is the ſtate of the evidence; which muſt be given, were it only to ſatisfy the *form* of the trial; but is in *fact* produced, to prove that, which all the world knows perfectly well, as a matter of publick notoriety. The ſubject has been much talked of; but never, I believe, with any manner of doubt, in any company at all converſant with the paſſages of that time in this town. The witneſſes, however, will lay theſe facts before your lordſhips; after which, I ſuppoſe, there can be no queſtion what judgment muſt be pronounced upon them: for your lordſhips will hardly view this act of parliament juſt in the light in which the priſoner's counſel have thought fit to repreſent it, as a law made for *beggars*, not for *people of faſhion.* To be ſure, the preamble does not expreſsly prove the legiſlature to have foreſeen or expected, that theſe would be the crimes of higher life, or nobler condition. But the act is framed to puniſh the crime, wherever it might occur; and the impartial temper of your juſtice, my lords, will not turn aſide its courſe in reſpect to a noble criminal.

Nor does the guilt of ſo heinous a fraud ſeem to be extenuated, by referring to the advice of thoſe by whoſe aid it was conducted, or to the confident opinion they entertained of the ſucceſs of their project. I know this project was not (nor did I ever mean to contend it was) all her own. Particularly, in that fraudulent attempt upon publick juſtice, it could not be ſo. But, my lords, that imparting a criminal purpoſe to the neceſſary inſtruments for carrying it into execution, extenuates the guilt of the author, is a conceit perfectly new in morality, and more than I can yield to. It rather implies aggravation, and the additional offence of corrupting theſe inſtruments. Not that I mean by this obſervation to palliate the guilt of ſuch corrupt inſtruments. I think it may be fit, and exceedingly wholeſome, to convey to *Doctors-Commons*, that thoſe among them, if any ſuch there are, who, being acquainted with the whole extent of the priſoner's purpoſe, to furniſh herſelf with the falſe appearance of a ſingle woman in order to draw the duke into ſuch a marriage, aſſiſted her in executing any part of it, are far enough from being clear of the charge contained in this indictment. They are acceſſaries to her felony; and ought to anſwer for it accordingly. This is ſtating her caſe fairly. The crime was committed by her, and her accomplices. All had their ſhare in the perpetration of the crime: each is ſtained with the whole of the guilt.

My lords, I proceed to examine the witneſſes. The nature of the caſe ſhuts out all contradiction or impeachment of teſtimony. It will be neceſſary for your lordſhips to pronounce that opinion and judgment, which ſo plain a caſe will demand.

Mr. *Solicitor General.*

My lords, we will now proceed to call our witneſſes.——Call *Ann Cradock.*

Who came to the bar, and one of the clerks held the book to her, upon which ſhe laid her hand.

Clerk of the Crown. Hearken to your oath.

The evidence that you ſhall give on behalf of our ſovereign lord the king's majeſty, againſt *Elizabeth* ducheſs-dowager of *Kingſton*, the priſoner at the bar, ſhall be the truth, the whole truth, and nothing but the truth,

So help you God.

Then ſhe kiſſed the book.

Mr. *Wallace.* My lords, I am deſired by the noble lady at the bar to apply to your lordſhips for an indulgence, that a queſtion may be put to the witneſs by her counſel.

Lords. Aye, aye.

Mr. *Wallace.* I ſhall beg the witneſs may inform your lordſhips whether ſhe has not had a ſecurity for ſome proviſion, or benefit, or a promiſe, in conſequence of the evidence ſhe is to give on this indictment?

Ann Cradock. No.

Mr. *Solicitor General.* How long have you been acquainted with the lady at the bar?

Ann Cradock. Above thirty-two years.

Mr. *Solicitor General.* Where did you firſt become acquainted with her?

Ann Cradock. I ſaw the lady firſt in *London*, afterwards at *Lainſton.*

Mr. *Solicitor General.* What occaſion carried you to the lady at *Lainſton?*

Ann Cradock. Along with a lady that I ſerved.

Mr. *Solicitor General.* Name the lady.

Ann Cradock. Mrs. *Hanmer.*

Mr. *Solicitor General.* Was Mrs. *Hanmer* any relation to the lady at the bar?

Ann Cradock. Her own aunt.

Mr. *Solicitor General.* Was the lady at the bar at *Lainſton* along with Mrs. *Hanmer?*

Ann Cradock. Not when I firſt went down to *Lainſton.*

Mr. *Solicitor General.* Did ſhe come down there afterwards?

Ann Cradock. Yes.

Mr. *Solicitor General.* Do you remember ſeeing Mr. *Auguſtus Hervey* there at that time?

Ann Cradock. I remember ſeeing Mr. *Auguſtus Hervey* there, but not at the time I firſt ſaw the lady there.

Mr. *Solicitor General.* When did Mr. *Hervey* come there?

Ann Cradock. It was in *June*, at the *Wincheſter* races.

Mr. *Solicitor General.* How long did he ſtay there at that time?

Ann Cradock. I cannot particularly ſay how long he might ſtay: he was coming and going.

Mr. *Solicitor General.* Was you in *Lainſton* church with Mr. *Hervey* and that lady, at any time in that ſummer?

Ann Cradock. I was.

Mr. *Solicitor General.* At what time of the day?

Ann Cradock. It was towards night: it was at night, not in the day.

Mr. *Solicitor General.* Upon what occaſion?

Ann Cradock. To ſee the marriage.

Mr. *Solicitor General.* Name the perſons who were preſent.

Ann Cradock. Mr. *Merrill*, Mrs. *Hanmer*, Mr. *Mountenay*, Mr. *Hervey*, Miſs *Chudleigh*, and myſelf.

Mr. *Solicitor General.* Who was the clergyman?

Ann Cradock. Mr. *Amis*, who belonged to the church.

Mr. *Solicitor General.* Were they married there?

Ann Cradock. Yes; I ſaw them married.

Mr. *Solicitor General.* Was the marriage kept ſecret?

Ann Cradock. Yes.

Mr. *Solicitor General.* By what ceremony was the marriage?

Ann Cradock. By the matrimonial ceremony; by the Common Prayer Book.

Mr. *Solicitor General.* Was you employed to take care, that the other ſervants ſhould be out of the way?

Ann Cradock. Yes.

Mr. *Solicitor General.* Did they return to Mr. *Merrill*'s houſe after the marriage?

Ann Cradock. Yes, they did.

Mr. *Solicitor General.* How far is the church from the houſe?

Ann Cradock. Not a great diſtance, but I cannot ſay how far: it is in the garden.

Mr. *Solicitor General.* Did Mr. *Amis* return with the party into the houſe?

Ann Cradock. Not that I ſaw.

Mr. *Solicitor General.* Did you attend on the lady as her maid?

Ann Cradock. I did at that time, her own not being able.

Mr. *Solicitor General.* After the ceremony, did you ſee the parties in bed together?

Ann Cradock. I did.

A Lord. Repeat what you ſaid.

Ann Cradock. I ſaw them put to bed: I alſo ſaw Mrs. *Hanmer* inſiſt upon their getting up again.

Mr. *Solicitor General.* Did you ſee them the next morning?

Ann Cradock. I ſaw them that night afterwards in bed, the ſame night after Mrs. *Hanmer* went to bed.

Mr. *Solicitor General.* Did you ſee them afterwards in bed for ſome nights after that?

Ann Cradock. I ſaw them particularly in bed the laſt night Mr. *Hervey* was there, for he was to ſet out in the morning at five o'clock; I was to call him at that hour, which I did; and entering the chamber, I found them both faſt aſleep: they were very ſorry to take leave.

Mr. *Solicitor General.* Can you fix what year this was?

Ann Cradock. I believe it to be in the year 1744, but I am certain it was the ſame year in which the *Victory* was at *Portſmouth.*

Mr. *Solicitor General.* Do you recollect what time of the year it was?

Ann Cradock. In the month of *Auguſt*, I think.

Mr. *Solicitor General.* What is your reaſon for thinking it was in the month of *Auguſt?*

Ann Cradock. My reaſon is, that it was in the time of *Maunhill* fair; and alſo that there were green-gages ripe, which the lady and gentleman were both very fond of.

Mr. *Solicitor General.* Do you recollect how long it was after the death of Mr *Merrill*'s mother?

Ann Cradock. No, I cannot juſtly ſay.

Mr. *Solicitor General.* Where did Mr. *Hervey* go, as you underſtood, the morning he went away?

Ann Cradock. To *Portſmouth.*

Mr. *Solicitor General.* Did you underſtand that he was then in the ſea ſervice?

Ann Cradock. I did, and that he was going with admiral *Davers.*

Mr. *Solicitor General.* Have you any particular reaſon for knowing that he did go with admiral *Davers?*

Ann Cradock. The reaſon I have to believe he did go with him is, the perſon whom I married afterwards was Mr. *Hervey*'s ſervant.

Mr. *Solicitor General.* Was he ſervant to him at that time?

Ann Cradock. He was.

Mr. *Solicitor General.* Did you receive any letter from the perſon you afterwards married, who was Mr. *Hervey*'s ſervant, and attended him?

Ann Cradock. I did, from *Port-Mahon.*

Mr. *Solicitor General.* Do you know what relation Mr. *Merrill* was to the lady at the bar?

Ann Cradock. Firſt-couſin.

Mr. *Solicitor General.* Who was Mr. *Mountenay*, whom you mentioned as preſent at the marriage?

Ann Cradock. A friend of Mr. *Merrill*'s, as he pretended.

Mr. Solicitor General. Did he live in the family at that time?

Ann Cradock. He was in the family at that time, and had been from the time of the death of his mother.

Mr. *Solicitor General.* Do you know whether any other part of the family, of both parties, were acquainted with the marriage, except thoſe perſons whom you have mentioned?

Ann Cradock. No, I did not at that time.

Mr. *Solicitor General.* Did the lady change her name on the marriage?

Ann Cradock. Never in public, to my knowledge.

Mr. *Solicitor General.* Had you occaſion after this to ſee the lady in *London?*

Ann Cradock. I ſaw the lady in *London* many times.

Mr. *Solicitor General.* Do you know whether there were any children of the marriage?

Ann Cradock. I believe one.

Mr. *Solicitor General.* What reaſon have you for believing ſo?

Ann Cradock. The lady herſelf told me ſo, and her aunt alſo, whom I ought to have mentioned firſt. The lady told me, that ſhe would take me to ſee the child.

Mr. *Solicitor General.* Did ſhe offer to carry her aunt as well as you to ſee the child?

Ann Cradock. I do not know that.

Mr. *Solicitor General.* How long after the marriage was it, that ſhe told you ſhe would take you to ſee the child?

Ann Cradock. That I cannot ſay, but it was after Mr. *Hervey* returned a ſecond time.

Mr. *Solicitor General.* Returned, from whence?

Ann Cradock. I heard he had been at *Port-Mahon.*

Mr. *Solicitor General.* Do you recollect how long Mr. *Hervey* had been abſent the firſt time?

Ann Cradock. No, I do not.

Mr. *Solicitor General.* How long had he been abſent the ſecond time?

Ann Cradock. After his return the ſecond time, I believe the child to have been begotten.

Mr. *Solicitor General.* How long after Mr. *Hervey*'s ſecond return was it, that ſhe told you ſhe would carry you to ſee the child?

Ann Cradock. It was after his firſt return.

A Lord. I believe there is ſome miſtake. Let the witneſs explain that.

Mr. *Solicitor General.* Was it after Mr. *Hervey*'s *firſt* or *ſecond* return, that the lady told you ſhe would carry you to ſee the child?

Ann Cradock. I believe the firſt time.

Mr. *Solicitor General.* Do you recollect how long that was after the marriage?

Ann Cradock. I do not recollect.

Mr. *Solicitor General.* When did you marry Mr. *Hervey*'s ſervant?

Ann Cradock. The 11th of *February* 1752.

Mr. *Solicitor General.* Did the priſoner at the bar ſay any thing particular to you about the child?

Ann Cradock. She told me the child was a boy, and like Mr. *Hervey.*

Mr. *Solicitor General.* How long did you continue in the ſervice of Mrs. *Hanmer?*

Ann Cradock. Till ſhe died.

Mr. *Solicitor General.* When did Mrs. *Hanmer* die?

Ann Cradock. She has been dead eleven years the ſecond of laſt *December.*

Mr. *Solicitor General.* Had you any occaſion to know what became of the child, whether it lived or died?

Ann Cradock. I know nothing further than what the lady ſaid. When I expected to go to ſee it, the lady came in great grief, and told me it was dead.

Mr. *Solicitor General.* Have you any reaſon to know at what place the child was born?

Ann Cradock. At *Chelſea*, by reaſon her mother could not go there.

Mr. *Solicitor General.* Who informed you that the child was born at *Chelſea?*

Ann Cradock. Mrs. *Hanmer* told me this.

Mr. *Solicitor General.* Have you ever heard it from the priſoner?

Ann Cradock. Yes, I certainly have.

Mr. *Solicitor General.* She ſaid, her mother could not go there. What do you underſtand to be the reaſon, why Mrs. *Chudleigh* could not go to *Chelſea?*

Ann Cradock. By reaſon her huſband and ſon were buried there, as I have been told.

Mr. *Solicitor General.* Had you any converſation with the priſoner, about the year 1768, about any meſſage to be delivered to the priſoner, that Mr. *Hervey* had given to you?

Ann Cradock. I had a meſſage from Mr. *Hervey*, ſignifying to the lady he was determined to be parted from her.

Mr. *Solicitor General.* Did you deliver that meſſage?

Ann Cradock. Not for ſome time after I received it, not being able.

Mr. *Solicitor General.* When did you deliver it?

Ann Cradock. On *Saturday* morning, when the lady came up to me, and told me, that ſhe knew what had been the matter with me. I told her Mr. *Hervey* deſired me to let her know, that he was determined to be, I ſhould have ſaid *divorced*, but I ſaid *parted*; and alſo, that he deſired me to tell the lady, ſhe had it in her own power to aſſiſt him. I delivered the meſſage, and the lady replied, was ſhe to make herſelf a whore to oblige him?

Mr. *Solicitor General.* Did ſhe appear to be with child before this converſation with you?

Ann Cradock. She did appear ſo to be.

Mr. *Solicitor General.* What pariſh is Mr. *Merrill*'s houſe in?

Ann Cradock. I believe in St. *George*'s: his houſe at *Lainſton* is a pariſh of itſelf.

Mr. *Solicitor General.* Are there any other houſes in the pariſh beſides Mr. *Merrill*'s?

Ann Cradock. Not at *Lainſton*, there is not.

Mr. *Solicitor General.* Was there ſervice regularly in *Lainſton* church, or did the family go to any other church?

Ann Cradock. They went to ſervice at *Sparſhot* church.

Mr. *Solicitor General.* My lords, we have no more queſtions to aſk this witneſs at preſent.

Lord High Steward. The counſel for the priſoner are at liberty to aſk the witneſs any queſtions they think proper.

Mr. *Wallace.* Have you not declared to ſome perſons, that you had an expectation of ſome proviſion or benefit on the event of this proſecution?

Ann Cradock. I never could declare I had any thing promiſed me by any body.

Mr. *Wallace.* Expectation of proviſion from the perſons that proſecute?

Ann Cradock. I never had; I know none of the family.

Mr. *Wallace.* Where have you lived for this month, or two, or three?

Ann Cradock. I have lived at Mr. *Beauwater*'s.

Mr. *Wallace.* What is the reaſon of your having your reſidence there?

Ann Cradock. In regard to his lady being a relation to Mr. and Mrs. *Bathurſt.*

Mr. *Wallace.* Had your reſidence there any relation to this proſecution?

Ann Cradock. It is unknown to me, if it has.

Mr. *Wallace.* What have you to do with Mr. *Bathurſt?*

Ann Cradock. Mrs. *Bathurſt* is ſo kind as to have me there, as being a ſervant to her aunt from my childhood.

Mr. *Wallace.* How long have you been at Mr. *Beauwater*'s?

Ann Cradock. I am ſure I cannot juſtly ſay the day when I came there.

Mr. *Wallace.* How long before this proſecution was commenced?

Ann Cradock. I can't tell when I came there; I can't tell how long I have been there.

Mr. *Wallace.* I do not mean that you ſhould anſwer to a day, but according to the beſt of your memory.

Ann Cradock. About four months, I fancy.

Mr. *Wallace.* Was it before or ſince you appeared before the grand jury?

Ann Cradock. Since I appeared before the grand jury.

Mr. *Wallace.* Do you know who is the proſecutor of this indictment?

Ann Cradock. Mr. *Meadows*, I imagine.

Mr. *Wallace.* Do you know Mr. *Meadows?*

Ann Cradock. I have ſeen him twice or three times in my life, and that is all.

Mr. *Wallace.* Where?

Ann Cradock. The firſt time I ever ſaw him, was at Mr. *Beauwater*'s houſe, ſince I came to town.

Mr. *Wallace.* Are you to ſtay at Mr. *Beauwater*'s or to return, when this proſecution is over?

Ann Cradock. The laſt home I had is at *Lainſton*, where I hope I may return again. I went down there in *Auguſt* was a twelvemonth.

Mr. *Wallace.* Have you never declared to any body, that you had an expectation of ſome proviſion from the cauſe now in hand?

Ann Cradock. I could not declare it, as I had no offers made me from the proſecutor.

Mr. *Wallace.* Have you declared it?

Ann Cradock. I have juſt now ſaid, I could not.

Mr. *Wallace.* Would you be underſtood, that you have not?

Ann Cradock. What was I to declare?

Mr. *Wallace.* Whether you have not declared, whether true or falſe I do not care, that you had an expectation of ſome proviſion from this proſecution?

Ann Cradock. I could not declare it, before it was made to me.

Mr. *Wallace.* You muſt ſay, whether you did ſay ſo or not.

Ann Cradock. I never had any offer from the proſecution.

Mr. *Wallace.* Had not you an expectation from the proſecution?

Ann Cradock. No, I could not ſay that, when they never offered it me.

Mr. *Wallace.* Do you underſtand the queſtion generally, or confined to the proſecutor?

Ann Cradock. I think it can be confined to none but himſelf.

Mr. *Wallace.* Have you any expectation from any body elſe?

Ann Cradock. No, none.

Mr. *Wallace.* Nor ever declared ſo?

Ann Cradock. No. I never declared that I had any ſuch expectations.

Mr. *Wallace.* At what time of the night was this marriage?

Ann Cradock. I cannot poſſibly tell the hour; it was at night.

Mr. *Wallace.* Have not you mentioned to any body ſome hour of the night?

Ann Cradock. I do not know that I have mentioned it, any farther than that it was at night.

Mr. *Wallace.* You have ſaid, that you was employed to keep the ſervants out of the way at the time; how came you then to go to the church?

Ann Cradock. I was employed to come out of the church after the marriage, and ſee that the houſe was clear: after the marriage, and not before.

Mr. *Wallace.* Was there any care taken before they went to church?

Ann Cradock. No, I do not know that there was. Mr. and Mrs. *Merrill* dined out that day, and I do not know that any of the houſe knew that there was to be a marriage.

Mr. *Wallace.* Are you ſure that Mr. and Mrs. *Merrill* dined out that day?

Ann Cradock. Yes.

Mr. *Wallace.* When did Mrs. *Merrill* die?

Ann Cradock. I do not know. Mrs. *Hanmer* it was; there was no Mrs. *Merrill* at that time.

Mr. *Wallace.* Then by Mrs. *Merrill* you meant Mrs. *Hanmer*, did you?

Ann Cradock. Certainly I did mean Mrs. *Hanmer*, for there was no Mrs. *Merrill.*

Mr. *Wallace.* Was you deſired to go to the church?

Ann Cradock. I don't know whether I was deſired to go, but there I was; that I recollect.

Mr. *Wallace.* Did you go as a witneſs, or out of curioſity?

Ann Cradock. I was there to ſee the marriage. As to witneſs, I was not called to be a witneſs.

Mr. *Wallace.* Did any of the parties know you was in the church?

Ann Cradock. Thoſe that were in the church knew it.

Mr. *Wallace.* Did you hear the ceremony performed?

Ann Cradock. I did.

Mr. *Wallace.* Did you hear the *whole* ceremony?

Ann Cradock. I believe ſo: certainly.

Mr. *Wallace.* Have you not ſaid, you *did not* hear the ceremony?

Ann Cradock. Not that I know of, and I never was aſked, to my knowledge.

Mr. *Wallace.* Do you ſpeak poſitively that you have not ſo declared?

Ann Cradock. Certainly I do, for I know whether I was aſked or not.

Mr. *Wallace.* How long did Mr. *Hervey* ſtay there after this marriage?

Ann Cradock. I really cannot ſay how many days; he was not long there.

Mr. *Wallace.* You ſaid that Mrs. *Hanmer* made them get up ſoon after they went to bed; how long did Mrs. *Hanmer* ſit up after that?

Ann Cradock. I cannot juſtly ſay how many hours; I can't ſay whether it might have been one, or two, or three hours.

Mr. *Wallace.* Was it Mrs. *Hanmer*'s cuſtom to lock the door where Miſs *Chudleigh* lay?

Ann Cradock. I never knew that ſhe did lock the door at all.

Mr. *Wallace.* Nor any body by her order?

Ann Cradock. Not to my knowledge: I never knew the door ordered to be locked by any body, nor by myſelf neither: I am ſure I never locked it.

Mr. *Wallace.* You are ſure the door was never locked then, when Mr. *Hervey* went out, when he was made to get up and leave the room as you have ſaid?

Ann Cradock. Went out where? I don't underſtand.

Mr. *Wallace.* You have ſaid, he was made to get up again.

Ann Cradock. To the beſt of my knowledge, the lady got up too, as well as Mr. *Hervey.*

Mr. *Wallace.* And both left the room?

Ann Cradock. I believe they both left the room, I know nothing to the contrary; but I know they afterwards went to bed together.

Mr. *Wallace.* Have you not declared, you knew nothing of this marriage?

Ann Cradock. No, never in my life, to my knowledge.

Mr. *Wallace.* That you did not remember any thing about it?

Ann Cradock. It is very odd that I can remember it now, and ſhould not have remembered it before: I ever had it in my memory.

Mr. *Wallace.* Have not you declared, that you did not remember it?

Ann Cradock. No, not that I know of.

Mr. *Wallace.* I deſire you will give a poſitive anſwer, yes or no, whether you have or have not declared it?

Ann Cradock. I never could have declared that which I did not know.

Mr. *Wallace.* That you did not remember any thing about it?

Ann Cradock. No, I never could ſay that.

Mr. *Wallace.* Did you or did you not ſay ſo?

Ann Cradock. No, I did not ſay ſo.

Lord *Buckingham.* I beg to put one queſtion to the witneſs. You know that you ſpeak not only in the preſence of this reſpectable court, but in the preſence of Almighty God?

Ann Cradock. Yes.

Lord *Buckingham.* Have you, or have you not, ever declared that you did expect an advantage from the proſecution? Say aye, or no.

Ann Cradock. I muſt ſay no: I could not ſay aye.

Lord *Buckingham.* You have told us, that Mr. *Merrill* and Mrs. *Hanmer* went out to dinner the day on which the marriage was performed; I ſhould be glad to know at what time Mr. *Merrill* and Mrs. *Hanmer* returned home?

Ann Cradock. I believe it might be between ſeven and eight o'clock, as I had given tea out of the houſekeeper's room to the gentleman and lady by candle-light.

Lord *Buckingham.* What day of the month was it?

Ann Cradock. That I cannot tell.

Duke of *Grafton.* Did you ever ſee the child, that the lady at the bar offered to carry you to ſee?

Ann Cradock. No, I never did.

Duke of *Grafton.* What was the interval of time between the offer to carry you to ſee the child, and the death of that child?

Ann Cradock. That I cannot juſtly ſay neither; but as far as I can remember, the day that I was to go to ſee the child, the lady came and ſaid it was dead.

Duke of *Grafton.* Though you cannot exactly recollect the interval between the one tranſaction and the other, yet ſtill you may ſpeak at large. Was it a week? Was it a month? Was it half a year?

Ann Cradock. It was not a month, *nor yet half a year.*

Duke of *Grafton.* Were there a few days interval between the one and the other?

Ann Cradock. There was, but I cannot ſay how many days.

Duke of *Grafton.* Did you, in the ſpace of theſe few days, ever expreſs to the lady at the bar your earneſtneſs and deſire to ſee the child, which you ſay the lady at the bar told you was ſo like Mr. *Hervey?*

Ann Cradock. I expreſſed my deſire at the time, when the lady ſpoke of the child to her aunt.

Duke of *Grafton.* What was the anſwer that you had for not carrying you immediately to the child?

Ann Cradock. The lady told me, ſhe would come on ſuch a day with the princeſs's coach, and that I ſhould go and ſee the child.

Duke of *Grafton.* Was you examined by the Eccleſiaſtical Court?

Ann Cradock. I was not.

Duke of *Grafton.* Did you know at the time, that there was ſuch a proceſs going on here?

Ann Cradock. I was told by Mr. *Hervey* there was.

Duke of *Grafton.* Did you offer to Mr. *Hervey*, or to any other of the parties, to give that evidence which you now have proved it was material to give?

Ann Cradock. He told me, he muſt call upon me to aſſiſt him in his marriage.

Duke of *Grafton.* Did any thing elſe paſs relative to the proceſs in *Doctors Commons*, after Mr. *Hervey*'s converſation with you?

Ann Cradock. Yes, there certainly was, though I never was called.

Duke of *Grafton.* Did any thing paſs between Mr. *Hervey* and you, or between any of the parties and you, after that declaration of Mr. *Hervey*'s to you?

Ann Cradock. I was to acquaint the lady with his intentions.

Duke of *Grafton* You ſaid you was to remove the ſervants out of the way at Mr. *Merrill*'s houſe at the time of the marriage: how many ſervants might there be about Mr. *Merrill*'s houſe at the time of the marriage?

Ann Cradock. The butler; a maid, who waited on Miſs *Merrill*; two houſe-maids; a laundry-maid: one of the houſe-maids belonged to Mrs. *Hanmer*, who always went down along with her, and there was a kitchen-maid.

Duke of *Grafton.* Were there any lights in the church at the time of the ceremony being performed?

Ann Cradock. There was a wax light in the crown of Mr. *Mountenay*'s hat.

Lord *Townſhend.* Whether ſhe has ever received or been offered any thing to with-hold her evidence relative to the ſuppoſed marriage?

Ann Cradock. I never have.

Lord *Hillſborough.* Did you ever receive any letter, offering yo uany advantage in caſe you would appear againſt the priſoner, before you was ſubpœna'd at *Hicks's-Hall?*

Ann Cradock. I received a letter from a friend, wherein I was told, that a gentleman of their acquaintance would get me a ſine-cure, but on what account I knew not.

Lord *Hillſborough.* A gentleman of whoſe acquaintance?

Ann Cradock. I do not know who the gentleman was; it never was explained to me who the gentleman was; nor I never aſked.

Lord *Hillſborough.* Who was the friend who wrote that letter to you?

Ann Cradock. Mr. *Fozard*, of *Piccadilly.*

Lord *Hillſborough.* What anſwer did you make to that letter?

Ann Cradock. I made no anſwer any further, but that it was very kind in any body that would aſſiſt me in getting me any thing?

Lord *Hillſborough.* Who is Mr. *Fozard?*

Ann Cradock. A perſon that lives near *Hyde-park-Corner*, and keeps livery-ſtables.

Lord *Hillſborough.* You ſay he wrote you word, that ſome of their friends would get you a ſine-cure?

Ann Cradock. I ſaid, a gentleman of their acquaintance.

Lord *Hillſborough.* Of whoſe acquaintance?

Ann Cradock. Mr. *Fozard*'s.

Lord *Hillſborough.* Upon what account did you conceive or underſtand that he was to get you a ſine-cure?

Ann Cradock. That I cannot tell.

Lord *Hillſborough.* What have you done with the letter?

Ann Cradock. I do not know where the letter is; I know I have it not.

Lord *Hillſborough.* Will you take upon you to ſay, that there was not in that letter an expreſſion intimating, that if you would appear againſt the priſoner at the bar, a ſine-cure would be gotten for you?

Ann Cradock. I certainly do ſay, there was no ſuch expreſſion in the letter; only a friend of theirs, or a gentleman of their acquaintance, I do not know which, would get me a ſine-cure.

Lord *Hillſborough.* Did you, or did you not, by virtue of your oath, underſtand that that was to be the conſequence of your appearing againſt the priſoner at the bar?

Ann Cradock. I did not know that that was to be the conſequence of my appearing. I had no room to imagine ſo, becauſe I know not the perſon of the proſecutor, nor none of his family.

Lord *Hillſborough.* Did you adviſe with any body concerning what you ſhould do with regard to that letter?

Ann Cradock. I certainly did apply to a friend, and acquainted him I had received ſuch a letter.

Lord *Hillſborough.* What did you write to your friend?

Ann Cradock. I never writ to any friend; I applied to a friend, and ſhewed the letter.

Lord *Hillſborough.* Whether you did not aſk advice from ſome body, what you ſhould do with regard to that letter?

Ann Cradock. I did not aſk any body what I was to do with it; I received it.

Lord *Hillſborough.* What did you conſult that friend about?

Ann Cradock. To let him know I had received ſuch a letter; but I did not know what it might be upon, or what it might not.

Lord *Hillſborough.* Did he read the letter?

Ann Cradock. Yes.

Lord *Hillſborough.* What converſation paſſed between you and him on the ſubject of the letter?

Ann Cradock. I told him, I did not know what it might be from, but that I apprehended it might be ſomething concerning my being called upon in point of the lady. I think I told him, that I had once been told, that I might have the ſame ſettled upon me as the lady promiſed me when I went into the country.

Lord *Hillſborough.* What reaſon had you for thinking ſo?

Ann Cradock. The reaſon I had for thinking ſo, was, becauſe I had been told once, that I might have the ſame given me that the lady at the bar offered me, when I was to go into the country, if I would ſpeak the truth; but by whom I know not: I never aſked the queſtion.

Lord *Hillſborough.* I deſire to know, what you did with that letter, whether you put it into the hands of the perſon whom you conſulted?

Ann Cradock. I put it into no one's hands; the perſon had the letter I conſulted.

Lord *Hillſborough.* You put it into that perſon's hand to read it?

Ann Cradock. I gave the letter into that perſon's hand to read it, and told him, he might ſhew it to Mr. *Hervey*, if he would.

Lord *Hillſborough.* For what purpoſe did you deſire it might be ſhewn to Mr. *Hervey?*

Ann Cradock. For this purpoſe, believing it might be againſt him and the lady; but by whom I know not, for I never aſked the queſtion, who it was that was to give it.

Lord *Hillſborough.* Did you deſire your friend to ſhew it to the priſoner at the bar?

Ann Cradock. That was impoſſible, for the lady was not in *England.*

Lord *Hillſborough.* Did you then deſire him to ſhew it to any body on her part?

Ann Cradock. I ſhould look upon it, if it was ſhewn to Mr. *Hervey*, it would be on her part, as being man and wife.

Lord *Hillſborough.* Whether you deſired it to be ſhewn to any body elſe?

Ann Cradock. No, not beſides Mr. *Hervey.*

ADJOURNED.

Saturday, April 20.

ANN CRADOCK.

Continuation of her examination.

Lord *Hillſborough.* I WAS exceedingly glad the houſe was adjourned, but I would much rather it had been adjourned ſooner, becauſe I now lie under a good deal of difficulty to reſume the thread of thoſe queſtions, that for my own information, and for that of the houſe, I thought highly proper and neceſſary to be explicitly and exactly anſwered. My lords, I think the laſt queſtion that I put to the witneſs at the bar, was, whether ſhe had put that letter, which ſhe ſaid was ſigned by *Fozard*, into the hand of any other perſon? If I do not miſtake, my lords, ſhe ſaid, ſhe had put it into the hand of a friend of hers to read. Upon aſking her, whether ſhe *had* any other intention than that of putting the letter into his hand? I think ſhe ſaid, ſhe told the perſon he might ſhew the letter to Mr. *Hervey*, as ſhe apprehended it related to him. Now I deſire to aſk the evidence at the bar, whether ſhe knows, that her friend did ſhew that letter to Mr. *Hervey* or not?

Ann Cradock. My friend did ſhew it to Mr. *Hervey.*

Lord *Hillſborough.* Did your friend tell you what Mr. *Hervey* ſaid concerning the letter?

Ann Cradock. My friend told me, that he deſired I ſhould keep the letter.

Lord *Hillſborough.* Do you mean Mr. *Hervey* or the friend deſired you to keep the letter?

Ann Cradock. I mean, the anſwer, that was given upon the letter being ſhewn, was brought by my friend, and Mr. *Hervey* deſired me to keep the letter.

Lord *Hillsborough.* Did your friend, who carried the letter from you to Mr. *Hervey*, ſay any thing more to you, than that Mr. *Hervey* deſired you ſhould keep the letter?

Ann Cradock. He told me that I ſhould acquaint the lady that was abroad with it.

Lord *Hillſborough.* Did you acquaint the lady that was abroad with it?

Ann Cradock. I had it not in my power ſo to do.

Lord *Hillsborough.* Did you acquaint any body elſe with it?

Ann Cradock. I did ſeveral of my acquaintance.

Lord *Hillsborough.* In particular, did you acquaint any body that was concerned in buſineſs for the lady?

Ann Cradock. No.

Lord *Hillsborough.* I deſire to know, whether you did by yourſelf, or by any body elſe for you, make any anſwer whatever to the letter to Mr. *Fozard?*

Ann Cradock. I went to Mr. *Fozard* when I received the letter, as in the letter it was required to know my age, and where I was born.

Lord *Hillsborough.* I deſire you will inform their lordſhips of the whole of what paſſed between Mr. *Fozard* and you at that interview?

Ann Cradock. Nothing in particular, further than relating to where I was born, and my age; my age I did not know. I did not aſk who was to give me the ſine-cure.

Lord *Hillsborough.* Did you not think it extraordinary, that Mr. *Fozard* ſhould enquire of you your age, and where you was born?

Ann Cradock. I certainly did think it extraordinary.

Lord *Hillsborough.* Whether you did not aſk the meaning of it?

Ann Cradock. I did not aſk any meaning for it.

Lord *Derby.* You ſaid yeſterday, that you did expect to receive ſomething adequate to what you had received from the priſoner at the bar: what did you formerly receive from the priſoner at the bar?

Ann Cradock. Many favours in friendſhip, but not any thing in particular.

Lord *Derby.* What was you offered by the lady?

Ann Cradock. Twenty guineas a-year, to go and ſettle in the country, and the choice of three different counties.

Lord *Derby.* At what time was that offer made to you?

Ann Cradock. The time I cannot juſtly remember.

Lord *Derby.* Recollect; how many years was it ago?

Ann Cradock. I believe it may be three years ago, or four, I am not certain.

Lord *Derby.* What was your anſwer to that propoſal?

Ann Cradock. It made me very unhappy to think that I was to be baniſhed, but I conſented to go into *Yorkſhire.*

Lord *Derby.* What were the counties that were propoſed to you?

Ann Cradock. Yorkſhire, Derbyſhire, I think, and *Northumberland.*

Lord *Derby.* In conſequence of that conſent to go into *Yorkſhire*, did you go into *Yorkſhire?*

Ann Cradock. No, I did not; I went to *Thoreſby:* I tried, but I could go no further.

Lord *Derby.* What was the reaſon that you could go no further?

Ann Cradock. From being unhappy, and going from all my friends.

Lord *Derby.* Did you receive any ſum of money in conſequence of going as far as *Thoreſby?*

Ann Cradock. None, no further than was to carry me to the place where I ſaid I was to go.

Lord *Derby.* You mentioned an annuity of twenty guineas a-year; has that annuity been paid, or have you received any part of it ſince that agreement?

Ann Cradock. No.

Lord *Coventry.* You ſaid you was preſent at the marriage in 1744; I deſire to know whether you have ever communicated that information to any perſon till this year, and to whom?

Ann Cradock. I have ſeveral times to many, but to particular perſons I cannot ſpeak.

Lord *Derby.* I ſhould be glad to know whether you do underſtand, or do not underſtand, that any ſum or ſums were ever paid to any perſon for your ſubſiſtence and board, on the part of the priſoner at the bar?

Ann Cradock. No, I do not know that ever any ſum was paid upon my account.

Lord *Buckingham.* I deſire to aſk the witneſs, whether ſhe at any time did receive any preſent whatever from the priſoner at the bar?

Ann Cradock. Several in point of friendſhip.

Lord *Townſhend.* Was you ever offered any ſum of money at any time, to conceal any evidence?

Ann Cradock. No.

Lord *Townſhend.* By either ſide?

Ann Cradock. No.

Lord *Camden.* I deſire to know whether you ſaw the lady at *Thoreſby*, in the way to *Yorkſhire?*

Ann Cradock. I was in the lady's houſe, and ſaw her ſeveral times.

Lord *Camden.* In any of thoſe interviews, did any thing paſs reſpecting the annuity of twenty guineas a-year, and the journey you was then making to *Yorkſhire*?

Ann Cradock. No, not any thing in particular as to that.

Lord *Camden.* What was the reaſon of your return from *Thoreſby*, and not going to your journey's end?

Ann Cradock. My reaſon was, from my ill ſtate of health, and unhappineſs of mind.

Lord *Lyttelton.* Did the lady explain to you what were her motives for ſending you, or, as you called it, *baniſhing* you, into thoſe diſtant counties?

Ann Cradock. No, my lords.

Lord *Derby.* What did you apprehend to be the lady's motives for ſuch a propoſal?

Ann Cradock. That I was ever at a loſs to know, becauſe I never aſked.

Duke of *Ancaſter.* Did you conſult a friend on account of the ſubſtance of Mr. *Fozard*'s letter?

Ann Cradock. I did.

Duke of *Ancaſter.* I deſire you to tell the houſe, who that friend was?

Ann Cradock. My friend was Dr. *Hoſſack*, who is phyſician of *Greenwich* hoſpital.

Duke of *Ancaſter.* What is become of that letter, or have you it?

Ann Cradock. I have it not; but it is in my box, I believe, at *Lainſton*, as I carried it with me when I went there with my other things.

Duke of *Richmond.* Was not the marriage to be kept a ſecret?

Ann Cradock. Yes.

Duke of *Richmond.* If during the time the marriage was to be kept a ſecret, any perſon had aſked you about the marriage, would you have owned it, or denied it?

Ann Cradock. I never from the time divulged the ſecret, until it had been told before.

Duke of *Richmond.* Did no perſon, during the time it was a ſecret, ever aſk you if you knew it?

Ann Cradock. Several have aſked me, but I have always replied, *no.*

Lord Preſident. Do you not know, that your husband was examined in the Spiritual Court, in the cauſe of jactitation?

Ann Cradock. I know he was called upon in the court, but what paſſed I am an utter ſtranger to, as I never aſked.

Lord Preſident. Had not Mr. *Hervey* intimated to you, that you was to be called upon on that occaſion?

Ann Cradock. He did.

Lord Preſident. After that did you hear any thing from Mr. *Hervey*, reſpecting your attendance in that cauſe?

Ann Cradock. Mr. *Hervey* told me, he muſt call upon me to aſſiſt him in the marriage, and to ſwear to Mrs. *Hanmer*'s hand-writing.

Lord Preſident. Was you ever called upon that occaſion?

Ann Cradock. I was not.

Lord *Derby.* Did you live with Mrs. *Hanmer* until the time of her death?

Ann Cradock. I did.

Lord *Derby.* Which happened eleven years ago the ſecond of laſt *December*?

Ann Cradock. Yes.

Lord *Derby.* Upon what have you ſubſiſted ſince that time?

Ann Cradock. Mrs. *Hanmer* left me two hundred pounds; one was taken up, the other was left: I quitted the lady's houſe, and went to *Newington.* I ſhould have told you that the two hundred pounds were in this lady's hands [*pointing to the ducheſs*]; one was taken up, and the other, with my huſband's income, ſupported me whilſt he lived.

Lord *Derby.* How do you know that that two hundred pounds was left you by Mrs. *Hanmer*?

Ann Cradock. It was left me in her will.

Duke of *Ancaſter.* Do you of your own knowledge aſſert that there was a child?

Ann Cradock. I do aſſert I was told ſo. I never ſaw the child.

Duke of *Ancaſter.* Who told you ſo?

Ann Cradock. Mrs. *Hanmer* told me ſo, and the lady told me at our return out of the country.

Duke of *Ancaſter.* Who told you there was a child?

Ann Cradock. This lady at the bar told me ſo herſelf. Both told me ſo.

Duke of *Ancaſter.* Do you from your own knowledge affirm, that that child is dead?

Ann Cradock. The lady at the bar told me it was dead, as ſhe told me before ſhe would take me to ſee it.

Duke of *Ancaſter.* Did the lady at the bar bring the princeſs of *Wales*'s coach, and carry you to ſee the child at *Chelſea*?

Ann Cradock. The lady told me ſhe would come in the princeſs's coach, and carry me to ſee the child.

Lord *Radnor.* How old do you apprehend the child was at the time of its death?

Ann Cradock. That I can give no account of: it was very young; but the age I know not.

Lord *Radnor.* Weeks, months, or years?

Ann Cradock. Months, but not years.

Lord *Radnor.* Did you ever hear that the child was baptized?

Ann Cradock. I did hear that the child was baptized; but Mrs. *Hanmer* and I were in the country at that time.

Lord *Radnor.* Did you ever hear what the child's name was?

Ann Cradock. No, I cannot recollect that I did.

Lord *Radnor.* Did you ever hear where the child was buried?

Ann Cradock. I did hear that it was buried at *Chelſea.*

Lord *Radnor.* Who told you ſo?

Ann Cradock. The lady at the bar told me ſo herſelf one day, when I was airing in the coach with her that way.

Lord *Forteſcue.* How have you ſubſiſted ſince your huſband's death?

Ann Cradock. With what I made of my furniture which was in my houſe, which was all new.

Lord *Forteſcue.* How long is it ſince your huſband died?

Ann Cradock. Five years laſt *March.*

Ordered to withdraw.

Lord High Steward. Who do you call next, Mr. Solicitor-General?

Solicitor-General. We deſire to call

Mr. CÆSAR HAWKINS, *who was ſworn in like manner.*

Mr. *Dunning.* Mr. *Hawkins*, are you acquainted with the lady at the bar? and how long have you been ſo?

Mr. *Hawkins.* A great many years: I believe above thirty.

Mr. *Dunning.* Are you acquainted with the preſent Lord *Briſtol*? and how long have you been ſo?

Mr. *Hawkins.* I have had the honour of knowing the earl of *Briſtol* nearly as many years.

Mr. *Dunning.* Do you know of any intercourſe between my lord *Briſtol* and the lady at the bar?

Mr. *Hawkins.* Of an intercourſe certainly; of acquaintance undoubtedly.

Mr. *Dunning.* Do you know from the parties of any marriage between them?

Mr. *Hawkins.* I do not know how far any thing that has come before me in a confidential truſt in my profeſſion ſhould be diſcloſed, conſiſtent with my profeſſional honour. [*Queſtion and Anſwer repeated.*]

Mr. *Dunning.* I truſt your lordſhips will ſee nothing in my queſtion, that can betray confidential truſt, or diſhonour Mr. *Hawkins* in giving it. My queſtion is ſimply, whether Mr. *Hawkins* knows, from the parties, of any marriage between them?

Lord High Steward. The queſtion that was aſked by the counſel at the bar, is, 'Whether the witneſs knew, from any information of either of 'the two parties, that they were married?' The witneſs objects to it, whether he is to anſwer any queſtions that are inconſiſtent with his profeſſional honour. Your lordſhips are to determine, whether the queſtion put by the counſel at the bar ſhall be aſked?

Lord *Mansfield.* I ſuppoſe Mr. *Hawkins* means to demur to the queſtion upon the ground, that it came to his knowledge ſome way from his being employed as a ſurgeon for one or both of the parties; and I take for granted, if Mr. *Hawkins* underſtands that it is your lordſhips opinion, that he has no privilege on that account to excuſe himſelf from giving the anſwer, that then, under the authority of your lordſhips judgment, he will ſubmit to anſwer it: therefore, to ſave your lordſhips the trouble of an adjournment, if no lord differs in opinion, but thinks that a ſurgeon has no privilege to avoid giving evidence in a court of juſtice, but is bound by the law of the land to do it; [if any of your lordſhips think he has ſuch a privilege, it will be a matter to be debated elſewhere, but] if all your lordſhips acquieſce, Mr. *Hawkins* will underſtand, that it is your judgment and opinion, that a ſurgeon has no privilege, where it is a material queſtion, in a civil or criminal cauſe, to know whether parties were married, or whether a child was born, to ſay, that his introduction to the parties was in the courſe of his profeſſion, and in that way he came to the knowledge of it. I take it for granted, that if Mr. *Hawkins* underſtands that, it is a ſatisfaction to him, and a clear juſtification to all the world. If a ſurgeon was voluntarily to reveal theſe ſecrets, to be ſure he would be guilty of a breach of honour, and of great indiſcretion; but, to give that information in a court of juſtice, which by the law of the land he is bound to do, will never be imputed to him as any indiſcretion whatever.

Mr. *Dunning.* My queſtion is, Whether you knew from either of the parties, that there was a marriage between them?

Mr. *Hawkins.* From the converſation with both parties I apprehended there was a marriage, but nothing in proof appeared before me: I mean nothing as legal proof, but *converſation.*

Mr. *Dunning.* But did they in converſation admit, that they were man and wife? and is that the ground upon which you form that apprehenſion?

Mr. *Hawkins.* Yes, it is; they did admit it in converſation.

Mr. *Dunning.* Do you, or do you not, know that a child was the fruit of that marriage?

Mr. *Hawkins.* Yes, I do.

Mr. *Dunning.* Can you tell their lordſhips, about what time that child was born? and where?

Mr. *Hawkins.* About the time I cannot tell. If I ever put down any thing in writing at the time, I might have deſtroyed it afterwards, according to my cuſtom, which is to deſtroy papers that are of no uſe, and which might be improper to be found after my deceaſe.

Mr. *Dunning.* Inform their lordſhips about what time this might be, as near as your memory will enable you to do.

Mr. *Hawkins.* I ſhould ſuppoſe it was about thirty years ago; but I do proteſt I do not know.

Mr. *Dunning.* Where was this child born?

Mr. *Hawkins.* At *Chelſea*, near to *Chelſea-College*; but I forget the name of the ſtreet.

Mr. *Dunning.* Was this marriage, and the birth of that child, at that time kept a ſecret?

Mr. *Hawkins.* I was told it was to be a ſecret.

Mr. *Dunning.* Do you know what is ſince become of that child?

Mr. *Hawkins.* I believe it died in a little time afterwards.

Mr. *Dunning.* By your anſwer, that you underſtood it was to be kept a ſecret, did you mean the marriage, or the birth of the child, or both?

Mr. *Hawkins.* Both.

Mr. *Dunning.* Which of the parties can you recollect it was, Mr. *Hervey* or Miſs *Chudleigh*, that deſired this might be kept a ſecret? or both?

Mr. *Hawkins.* I ſhould take for granted both equally.

Mr. *Dunning.* Do you know enough of the then Mr. *Hervey*'s motions to be able to inform their lordſhips, whether this child was born after his firſt or ſecond return from ſea, ſubſequent to the marriage?

Mr. *Hawkins.* No, I do not know enough of his motions to anſwer this queſtion.

Mr. *Dunning.* Do you know what age this child had attained before its death?

Mr. *Hawkins.* I proteſt I do not remember now.

Mr. *Dunning.* Can you recollect about what time of the year it was you firſt heard this child was born, and about what time of the year you heard it died?

Mr. *Hawkins.* I do not know; I might hear of the death immediately.

Mr. *Dunning.* Did you ever attend the child in the courſe of your profeſſion?

Mr. *Hawkins.* I did once: I am not ſure whether I did not attend more, but I remember I attended it once.

Mr. *Dunning.* Do you remember whether your recollection of this tranſaction was, or was not, helped about the time of the commencement of the ſuit in the Spiritual Court?

Mr. *Hawkins.* Really I do not know any thing that paſſed to bring it to my mind then.

Mr. *Dunning.* Was you, or was you not, applied to by either of the parties, or both, at the time of the commencing this ſuit in the Spiritual Court?

Mr. *Hawkins.* I was applied to by the earl of *Briſtol.*

Mr. *Dunning.* Will you be ſo good as to tell what was the purport of lord *Briſtol*'s then application to you?

Mr. *Wallace.* On the part of the noble lady, I muſt ſubmit to your lordſhips, that nothing ſaid in the abſence of the lady is evidence againſt the priſoner at the bar.

Mr. *Dunning.* I will put the queſtion in a way that it ſhall be liable to no objection. Did you, or did you not, in conſequence of lord *Briſtol*'s application, apply to the lady at the bar?

Mr. *Hawkins.* I did.

Mr. *Dunning.* Then tell us, what was the purport of lord *Briſtol*'s application to you, and what meſſage you carried from lord *Briſtol* to the lady at the bar?

Mr. *Hawkins.* To the beſt of my remembrance, the earl of *Briſtol* met me in the ſtreet, and ſtopped me, telling me that he ſhould be glad I would call on him at his houſe the firſt morning I had half an hour to ſpare; and that if I could then fix the time, he would take care to be in the way, and that no other company ſhould interrupt the converſation. He intimated that it was not on account of his own health, but on account of an old friend of mine. I named the time, and went to him. I found his lordſhip expecting me. Upon a table, at a little diſtance from his right hand, there lay two or three bundles of papers, folded up as theſe papers are (*taking up ſome papers at the bar*): to theſe papers he often pointed in courſe of what he ſaid afterwards. After making ſome polite apologies to me for the particular trouble he was then giving me, he told me it was on the preſent ducheſs of *Kingſton*'s account: that he wiſhed me to carry her a meſſage upon a ſubject that was very diſagreeable, but that he thought it would be leſs ſhocking to be carried by, and received from, a perſon ſhe knew, than from any ſtranger: that he had been for ſome time paſt very unhappy on account of his matrimonial connections with the ducheſs, Miſs *Chudleigh* that was then: that he wiſhed to have his freedom; which the criminality of her conduct, and the proofs which he had of it (which, in pointing to the papers I before mentioned, he ſaid he had for ſome time paſt, with intent and purpoſe to procure a divorce, been collecting and getting together): that he believed they contained the moſt ample and abundant proofs, circumſtances, and every thing relative to ſuch proof: that he intended to purſue his proſecution with the ſtricteſt firmneſs and reſolution; but that he retained ſuch a regard and reſpect for her, and as a gentleman to his own character, that he wiſhed not to mix malice or ill temper in the courſe of it; but that in every reſpect he would wiſh to appear and act on the line of a man of honour and of a gentleman: that he wiſhed (he ſaid) ſhe would underſtand that his ſoliciting me to carry the meſſage, ſhould be received by her as a mark of that diſpoſition: that as moſt probably in the number of ſo many teſtimonial depoſitions as were there collected, there might be many offenſive circumſtances named, ſuperfluous to the neceſſary legal proofs, that if ſhe pleaſed I might inform her, that her lawyers, either with or without herſelf, might, in conjunction with his lawyers, look over all the depoſitions, and that if any parts were found tending to indecent or ſcandalous reflections, which his gentlemen of the law ſhould think might be omitted without weakening his cauſe, he himſelf ſhould have no objection to it: that as he intended only to act upon the principles of a gentleman and a man of honour, he ſhould hope ſhe would not produce any unneceſſary or vexatious delays to the ſuit, or enhance the expences of it, as he did not intend to proſecute to gain by any demands of damages, I think, or to that purpoſe. I delivered this meſſage to the ducheſs as well as I could. I do not preſume now, that either the preciſe words, or the identity of the words and expreſſions can be recollected by me, but it was to the purport, as near as poſſibly I can remember, of what I have ſaid.

Mr. *Dunning.* Will you recollect, whether upon this converſation any diſtinct propoſition was ſtated to the ducheſs which required an anſwer? or, what anſwer you carried back from the ducheſs for that purpoſe? You will of courſe be referring yourſelf to what paſſed between you and the ducheſs.

Mr. *Hawkins.* I delivered my meſſage to the ducheſs. After a little time taken for conſideration, I do not recollect exactly what her grace deſired me to report to the earl of *Briſtol*; but it was to this effect: that ſhe was obliged to him for the polite parts of his meſſage, but, as to the ſubject of the divorce, ſhe ſhould cut that ſhort by wiſhing him to underſtand, that ſhe did not acknowledge him for her legal huſband, and ſhould put him to the defiance of ſuch proof: that ſhe had then already, or ſhould immediately, inſtitute a ſuit in the Eccleſiaſtical Court, which ſhe called, I think, *a jactitation of marriage*; but, as he had promiſed before, that he would act upon the line of a man of honour and a gentleman in his own intended ſuit, ſhe hoped that he would purſue the ſame line now, and that he would confine himſelf to the proofs of legal marriage only, and not to other proofs of connections or cohabitations: if he did, that he would make it a proceſs of no long delay, and that either he would gain an equal freedom to himſelf by a ſentence of that court, declaring them to be free, or he would the ſooner be able to inſtitute his own intended ſuit.——The earl of *Briſtol* received my meſſage as one affected and ſtruck by it, making no reply or anſwer for two or three minutes; then, not ſpeaking to me, but rather ſeeming to expreſs his own thoughts aloud in ſhort ſentences, that he did not conceive he ſhould have his equal freedom by that method. I believe I ſhould have mentioned, that her grace deſired, in part of her meſſage, that nothing might be brought forwards, which might be the ſubject of uſeleſs converſation and ſcandal. He ſaid, in reply, that he was no more inclined to bring forward any thing for the lovers of ſcandalous converſation only, than ſhe could be; and that, if he could not eſtabliſh the proof of legal matrimony (I do not remember the words, but to the ſenſe of this) that he was too much a gentleman to bring any thing before the publick relative to other connections with the lady. I do not remember that any thing material paſſed, or more than this.

Mr. *Dunning.* Do you recollect that in any ſubſequent converſation with the lady, you was deſired to apply to the gentleman for any other civility in the courſe of this cauſe?

Mr. *Hawkins.* Before the firſt attendance that I have lately alluded to in illneſs, Mrs. *Chudleigh*, her mother, did us the honour of a private family friendſhip. After theſe meſſages, her grace now and then called on my wife in an evening, frequently ſaying, ſhe was paſſing to or from her law gentlemen. When I happened to ſee her grace, I every now and then aſked how her ſuit went on? to which, I think, ſhe always ſeemed to anſwer chearfully, '*Very right*,' and '*Well.*'

Mr. *Dunning.* Did you ever carry any other meſſages?

Mr. *Hawkins.* Two or three times, I cannot recollect which, ſhe aſked me to deliver ſome meſſage to the earl of *Briſtol*; I am not ſure whether one was not a letter, or whether upon the occaſion of her aſking me to deliver ſomething, for my own memory I might not aſk her to write it down, but I really do not remember at preſent, though I have endeavoured to recollect what the ſubject of theſe meſſages were: but I know they were of very trifling import, nothing that could have ſtruck me ſtrongly, or I ſhould have remembered them; and I underſtood they were rather given to me, as if the earl of *Briſtol* was delicate in receiving any meſſage from her grace, and that I was only to expect a verbal anſwer on that account.

Mr. *Dunning.* Do you recollect, whether any of theſe meſſages related to any witneſs or witneſſes to be produced or kept back?

Mr. *Hawkins.* Certainly not; I never had a ſuppoſition, that the ducheſs would have given me ſuch a meſſage. Nothing appeared to me, but what contained matter of little import, and of the moſt honourable kind.

Mr. *Dunning.* Did you ever obſerve, or do you now recollect, any ground to form a belief, whether the parties had forgotten or remembered, that there was then living one of the witneſſes to the fact of the marriage?

Mr. *Hawkins.* I profeſs I do not recollect that: I have heard it in common converſation in the town, but not that ever I remember from either him or her at that time.

Mr. *Dunning.* At what time did you receive that report from him or her?

Mr. *Hawkins.* I think I have ſeen the earl of *Briſtol* but once ſince the commencement of this proſecution, and then his lordſhip ſeemed rather to ſpeak peeviſhly.

Lord *Mansfield.* They will not examine to what lord *Briſtol* has ſaid ſince the commencement of the proſecution?

Mr. *Dunning.* Was any thing, that my lord *Briſtol* ſaid on that ſubject, communicated to the lady?

Mr. *Hawkins.* I certainly might, and did, I believe, tell her grace what was ſaid.

Lord *Mansfield.* Then you may go on.

Mr. *Dunning.* Then tell the houſe what lord *Briſtol* ſaid, and you repeated to the lady.

Mr. *Hawkins.* His lordſhip ſeemed to be peeviſh, that ſuch a perſon was now brought forward, and as he had heard it ſuppoſed, I believe, for want of her having ſuch allowance or ſuch care taken of her by the ducheſs, as he ſuppoſed ſhe uſed to have. If I underſtood him right, the earl of *Briſtol* ſaid, this perſon had been with him to expreſs things to that purpoſe; and ſaid, that if ſhe had been as eaſy to come at, or had had as good a memory when that cauſe was carried on in the Eccleſiaſtical Court, that he believed the iſſue of it would have been different.

Mr. *Dunning.* Will you be ſo good as to recollect, whether you communicated this to the lady, and what paſſed upon that occaſion?

Mr. *Hawkins.* I did communicate it to the ducheſs; and I thought ſhe was rather out of temper with the meſſage, or with me, ſhe calling at my houſe at a time I was very much in haſte to go out upon buſineſs, and could not give her grace that time to hear, what ſhe ſeemed to wiſh to have to talk more upon it. She offered to come again, but I was then not well in my health at all, and perhaps, as ſhe might think, not quite ſo civil, would not name another time with her grace for her to call upon me, but ſaid, that I would take an opportunity, as ſoon as I was able, of waiting upon her grace at her own houſe. I did do this ſome time after, and was told at the door, that her grace was not at home. I left my name, and ſaid I ſhould call again. After ſome days interval I did ſo, and then was told, that her grace was at home, but was laid down to ſleep; from whence I concluded, that I was not to call again.

Mr. *Dunning.* Am I to underſtand from you, that this laſt meſſage from my lord *Briſtol* was never the converſation between you and the ducheſs?

Mr. *Hawkins.* I did relate it to her during the time that ſhe was at my houſe.

Mr. *Dunning.* Have you at any time ſince heard any thing from the ducheſs on that ſubject?

Mr. *Hawkins.* I did hear, but not from any good authority, that her grace was rather angry.

Mr. *Dunning.* Has the lady never converſed with you on the ſubject of this living witneſs to the marriage, from that time to this?

Mr. *Hawkins.* I have never ſeen her grace but once ſince, and that was yeſterday morning for a few minutes at the duke of *Newcaſtle*'s.

Mr. *Dunning.* Generally, at any time whatever, have you heard any thing from the ducheſs on the ſubject of this living witneſs to the marriage, where ſhe was, or any thing concerning her?

Mr. *Hawkins.* I proteſt, nothing concluſive. I might hear there was ſuch a perſon, but it was never related to me, whether ſhe was a better or worſe evidence; nothing relative to that, whether ſhe was a better or worſe evidence, or that ſhe was afraid of her, or any thing to that purpoſe.

Mr. *Dunning.* Am I to underſtand you to have heard her ſay, that there was ſuch a witneſs?

Mr. *Hawkins.* In what looſer converſation I cannot tell, but nothing that ever made me know, that there was ſuch a perſon, who had ſuch material knowledge.

Mr. *Dunning.* I underſtand you, that from lord *Briſtol* you underſtood there was a ſurviving witneſs to the marriage. My queſtion is, whether you ever learnt the ſame thing from the lady, or not?

Mr. *Hawkins.* If it was, it was ſome accidental looſer converſation, not as truſting me with ſuch a knowledge.

Mr. *Dunning.* Was it then mentioned in any looſer or accidental converſation, or any converſation?

Mr. *Hawkins.* I proteſt, it is impoſſible to remember that with any degree of preciſion or of uſe.

Mr. *Dunning.* I did not mean to aſk you to recollect any particulars of the converſation, but ſimply to the point, whether the ducheſs ever ſtated to you, or acknowledged, there was a living witneſs to the marriage?

Mr. *Hawkins.* No, I do not remember that ſhe ever ſtated to me, or ſaid, that there was a living witneſs to the marriage.

Mr. *Dunning.* Is it a fact that ever you learned from the lady?

Lord DERBY *moved the clerk might read this part of the evidence.*

Mr. *Hawkins.* I rather (if I may ſay any thing) underſtood from her grace, that there was ſome looſer marriage, not quite in the common manner. I think I could remember an expreſſion of her grace's once, upon her grace's ſpeaking on the occaſion. If I remember, I aſked her grace how her ſuit went on? This was towards the latter part of it. She looked grave, and deſired to ſpeak to me in another room. She ſaid, that ſhe had had a great deal of concern and agitation of mind ſince ſhe laſt ſaw me, which I remarked to her had been for a longer interval of time on her not calling at the houſe upon my wife in the uſual manner. Her grace ſaid, that ſhe had had ſo much concern upon what ſhe had not expected at the commencement of her ſuit, from finding that a poſitive oath was expected from her grace that ſhe was not married, and which ſhe had for ſome time together apprehended would be put to her in that form, that ſhe thought ſhe ſhould have dropped her ſuit entirely, for that ſhe would not for the whole world have taken that direct kind of poſitive oath; but that what had been offered to her, had been ſo complicated (I think, I underſtood) with other things that were certainly not true, that ſhe could and had taken the oath with a very ſafe conſcience. To ſome queſtions, I do not remember the words to her grace from me, how then ſhe came to inſtitute a ſuit at all? She anſwered me, 'O, for that matter (I think 'it was) the ceremony as done, was ſuch a ſcrambling ſhabby bu'ſineſs (I do not ſay theſe were the preciſe words, but to that purport) 'and ſo much incomplete, that ſhe ſhould have been full as unwilling 'to have taken a poſitive oath that ſhe was married, as that ſhe was not 'married.'

N. B. *This part of the evidence was ordered to be read by the clerk, who accordingly read it.*

Mr. *Dunning.* I ſhould be glad, if you would tell their lordſhips, what it was that was ſo particular in this buſineſs? if the lady ever explained it to you?

Mr. *Hawkins.* I never had an explanation from that moment. I had within myſelf a curioſity from the time that I carried the meſſage to my lord *Briſtol* from her grace, and his reception of it. I had rather imagined that there was ſome marriage of which legal proofs could not be produced, but that was only my own notion: before that time I had no real authority at all; I did not know myſelf honeſtly what to think of it.

Mr. *Dunning.* Did the lady ever explain to you, by what reaſon it happened, that the queſtion, when it came to be put, came in ſo much more palatable a form than ſhe expected it?

Mr. *Hawkins.* No, not in the leaſt: I ſhould not have preſumed to have aſked ſuch a queſtion; nor did ſhe give me any explanation at all.

Mr. *Dunning.* Was any thing ever ſaid by lord *Briſtol*, and communicated to the lady, reſpecting an intention of his to appeal from this ſentence?

Mr. *Hawkins.* I know nothing of that.

Mr. *Dunning.* What ſaid her grace on that ſubject?

Mr. *Hawkins.* Her grace had told me, that the ſentence was paſſed, and that it was *irrevocable and final* to them two, unleſs my lord *Briſtol*, within a certain limited time, did ſomething to keep the cauſe open. I do not know what that was. That there was, ſhe believed, ſome demur at that time, as my lord *Briſtol* was not ſatisfied with the ſentence, and had made ſome demand by his proctor, if I underſtood right, for the coſts of ſuit which were decreed, I believe, againſt him.

Mr. *Dunning.* Do you know whether the coſts of ſuit were ever paid by my lord *Briſtol?*

Mr. *Hawkins.* I do not, but I believe they were. I was going on to ſay what I recollected upon that. They had ſome demurs upon the coſts of ſuit; but that if my lord *Briſtol* inſiſted upon it, ſhe would give her proctor directions not to let ſuch a thing ſtop the cloſing of the ſuit.

Mr. *Dunning.* Do you then know whether my lord *Briſtol*, who by the terms of the ſentence was to pay the coſts, did not, upon this, receive the coſts he had been put to in the ſuit?

Mr. *Hawkins.* I know nothing more than I have mentioned: not a tittle more nor leſs.

Mr. *Dunning.* Do you know of no other means that were uſed to ſatisfy my lord *Briſtol*, and to prevent this cauſe from continuing any longer open?

Mr. *Hawkins.* No.

Mr. *Dunning.* Do you know nothing of any bond that was given from any body to any body, reſpecting this cauſe and this queſtion?

Mr. *Hawkins.* Not the leaſt in the world.

Mr. *Dunning.* Am I to underſtand, that you ſay you know nothing of any bond that has any direct, immediate, or other relation to this ſubject?

Mr. *Hawkins.* Not the leaſt that ever I heard of.

Mr. *Dunning.* You are not then a truſtee in any ſuch bond?

Mr. *Hawkins.* Oh no, certainly not.

Mr. *Dunning.* Can you give us the date of the time when the firſt meſſage was conveyed from lord *Briſtol* to the lady through you?

Mr. *Hawkins.* I was endeavouring, before I came into the court, to recollect it, but I could not: I put nothing down in writing relative to it.

Mr. *Dunning.* Can you recollect the year?

Mr. *Hawkins.* The meſſage muſt have been immediately before the commencement of the ſuit, whenever that was.

Mr. *Dunning.* I preſume, though you uſed the terms, *her grace*, and *his lordſhip*, you perfectly well underſtood, that neither of the parties had a right to theſe appellations *at the time* theſe circumſtances paſſed?

Mr. *Hawkins.* Yes, certainly.

Mr. *Dunning.* Does any circumſtance impreſs you with the recollection of the time of the year when this converſation paſſed, if you cannot tell us the exact year?

Mr. *Hawkins.* I might have enquired how long the ſuit laſted; but I proteſt I do not recollect now any particular circumſtances to bring it to my mind.

Mr. *Wallace.* My lords, I have no queſtion on the part of the priſoner to put to Mr. *Hawkins.*

Duke of *Ancaſter.* Did you attend the child?

Mr. *Hawkins.* I think once.

Duke of *Ancaſter.* Was it a boy or a girl?

Mr. *Hawkins.* A boy.

Duke of *Ancaſter.* Do you ſpeak from your own knowledge that the child is dead?

Mr. *Hawkins.* No; but have no reaſons to doubt it.

Duke of *Ancaſter.* Do you know of your own knowledge, that that child was the child of the priſoner at the bar?

Mr. *Hawkins.* No, I could have no proof of that; for from the time that her grace was brought-to-bed of it, I never ſaw the child till I was ſent for to it in its illneſs; perhaps I had hardly ever heard of it: I had never ſeen it.

Duke of *Ancaſter.* Did you attend the ducheſs at the time ſhe lay-in?

Mr. *Hawkins.* I did not at her lying-in: I was deſired, in caſe at any future time it had been neceſſary, that I ſhould have been a witneſs of the birth of that child.

Duke of *Ancaſter.* Did you underſtand that child to be the legitimate child of the ducheſs of *Kingſton* and Mr. *Hervey?*

Mr. *Hawkins.* I did ſuppoſe ſo at that time.

Duke of *Ancaſter.* Was you told ſo by any body?

Mr. *Hawkins.* I could not be neceſſarily told ſo at that time, becauſe I had been told of the marriage before.

Duke of *Grafton.* Was you, from the converſation that paſſed with the party at that time, convinced that it was a ſuppoſed, or that it was a real marriage; and were any expreſſions uſed relative to the concealing the birth of the child?

Mr. *Hawkins.* I underſtood at that time, that it was a real marriage.

Duke of *Grafton.* Were there expreſſions made uſe of, that would not have been made uſe of in any other circumſtance?

Mr. *Hawkins.* I do not remember any particular expreſſion at all, only that I was deſired to attend, with a view and purpoſe that I might be a witneſs to the birth of that child; being, as I ſuppoſe, thought more proper, as a phyſical man, to be in the room at the time of a delivery and the birth of a child than any other perſon.

Lord *Lyttelton.* Who firſt informed you of the marriage?

Mr. *Hawkins.* I ſhould rather apprehend it came from the ducheſs, before I ſaw my lord *Briſtol.*

Lord *Lyttelton.* Do you recollect how long that was ago?

Mr. *Hawkins.* I do not indeed; it was a great many years ago.

Lord *Lyttelton.* Do you remember to have heard any particular circumſtances related to you by either of the parties, concerning the celebration of that marriage?

Mr. *Hawkins.* No, never more than what I have mentioned juſt now.

Lord *Camden.* Was you in the room at the time of the delivery?

Mr. *Hawkins.* To the beſt of my remembrance, I certainly was.

Lord *Camden.* Did you ever ſee the child itſelf?

Mr. *Hawkins.* At the time of the delivery I dare ſay I did. Afterwards I never did, but when I was ſent for on purpoſe to ſee it.

Lord *Camden.* Had you then any certain knowledge of its being the priſoner's child?

Mr. *Hawkins.* It is impoſſible for me to ſay when I ſaw the child ſome months afterwards, that I could know it to be the ſame child.

Lord *Ravenſworth.* Did you not underſtand that the ducheſs apprehended and was convinced that the ſentence in the Eccleſiaſtical Court was final?

Mr. *Hawkins.* Undoubtedly ſo.

Lord *Ravenſworth.* And that ſhe was at liberty to marry again, unleſs the ſentence was appealed from within a limited time?

Mr. *Hawkins.* Moſt certainly.

Lord *Ravenſworth.* Who delivered the priſoner?

Mr. *Hawkins.* I was endeavouring to recollect before I came, who was preſent beſides myſelf, and who delivered her grace; but I proteſt I have forgotten it, ſo as not to recollect. I could not recollect, it is ſo long ago.

Ordered to withdraw.

The honourable SOPHIA CHARLOTTE FETTIPLACE *ſworn.*

Mr. *Attorney General.* How long have you been acquainted with the priſoner at the bar?

Mrs. *Fettiplace.* A great many years.

Mr. *Attorney General.* Did you know the lady before the year 1744?

Mrs. *Fettiplace.* My lords, I have no other knowledge of any of the circumſtances to be enquired after, than what ariſes from my connection formerly with the lady; and unleſs your lordſhips require it of me as a witneſs for juſtice, I ſhould wiſh to be excuſed.

Lord High Steward. The lady muſt certainly diſcloſe what ſhe knows for the purpoſes of juſtice.

Mr. *Attorney General.* Did you know the priſoner at the bar *before* the year 1744?

Mrs. *Fettiplace.* I cannot recollect.

Mr. *Attorney General.* Did you know the priſoner *before* ſhe was maid of honour to the late princeſs of *Wales?*

Mrs. *Fettiplace.* No, I did not.

Mr. *Attorney General.* What converſation have you ever had with the priſoner relative to her marriage with Mr. *Hervey?*

Mrs. *Fettiplace.* I believe I have heard her ſay that ſhe was married to him.

Mr. *Attorney General.* Can you recollect what circumſtances ſhe has mentioned reſpecting that marriage, where, and at what time, and before what witneſſes?

Mrs. *Fettiplace.* In *Hampſhire*, in a ſummer-houſe, in a garden.

Mr. *Attorney General.* Can you recollect upon what occaſions theſe converſations have paſſed between you and the priſoner?

Mrs. *Fettiplace.* Upon my word, I cannot pretend to ſay that: it is long ago.

Mr. *Attorney General.* Do you recollect any converſation reſpecting the child which the priſoner had by Mr. *Hervey?*

Mrs. *Fettiplace.* I know nothing about it.

Mr. *Attorney General.* Can you recollect how often in converſation it has been ſaid between the priſoner and you, that ſhe was married to Mr. *Hervey?*

Mrs. *Fettiplace.* I believe but once.

Mr. *Attorney General.* My lords, I ſhall not trouble Mrs. *Fettiplace* with any more queſtions.

Lord High Steward. Would the counſel for the priſoner aſk the witneſs any queſtions?

Mr. *Wallace.* My lords, I ſhall not aſk Mrs. *Fettiplace* any queſtions.

Mr. *Solicitor General.* My lords, I would now call lord *Barrington.*

Lord BARRINGTON, *who was in like manner ſworn.*

Mr. *Solicitor General.* How long have you been acquainted with the lady at the bar?

Lord *Barrington.* Above thirty years.

Mr. *Solicitor General.* Did you ever hear from the lady at the bar, that ſhe was married to Mr. *Hervey?*

Lord *Barrington.* My lords, I am come here in obedience to your lordſhips ſummons, ready to give teſtimony as to any matter that I know of my own knowledge, or that has come to me in the uſual way; but if any thing has been confided to my honour, or confidentially told me, I do hold, with humble ſubmiſſion to your lordſhips, that as a man of honour, as a man regardful of the laws of ſociety, I cannot reveal it.

Lord High Steward. When the laſt witneſs but one (Mr. *Hawkins)* was at the bar, he made ſomething like the ſame excuſe for his not anſwering the queſtions put to him. He was then informed by a noble and learned lord, and the whole court agreed with that lord, that ſuch queſtions were to be anſwered in a court of juſtice.

Lord *Barrington.* I have no doubt but that the queſtion is a proper queſtion to be aſked by a court of juſtice, otherwiſe your lordſhips would not have permitted it to be aſked. But, my lords, I think every man muſt act from his own feelings; and I feel, that any private converſation intruſted to me, is not to be reported again.

A Lord. His lordſhip will recollect the oath that he has taken, is, that he ſhall declare the *whole* truth.

Lord *Barrington.* My lords, as I underſtand the oath, I can decline anſwering the queſtion that has been aſked me without acting contrary to that oath, without being guilty of perjury. But, if it is the opinion of your lordſhips that I am bound by that oath to anſwer, and that I ſhall be guilty of a perjury if I do not anſwer, in that caſe, my lords, I ſhall think differently, for I will not be perjured.

Ducheſs of *Kingſton.* I do releaſe my lord *Barrington* from every obligation of honour. I wiſh, and earneſtly deſire, that every witneſs who ſhall be examined, may deliver their opinions in every point juſtly, whether for me or againſt me. I came from *Rome* at the hazard of my life to ſurrender myſelf to this court. I bow with ſubmiſſive obedience to every decree, and do not even complain, that an eccleſiaſtical ſentence has been deemed of no force, although ſuch a ſentence has never been controverted during the ſpace of one thouſand four hundred and ſeventy-five years.

Lord *Barrington.* My lords, I do ſolemnly declare to your lordſhips, on that oath that I have taken, and on my honour, that I have not had the leaſt communication made to me of the ducheſs of *Kingſton*'s generoſity. I have not had the leaſt communication with her grace by letter, meſſage, or in any other way, for more than two months; and I had no idea of being ſummoned as a witneſs here, until the *Eaſter* holy-days, ſo that her grace's generoſity is entirely ſpontaneous, and of her own accord. But, my lords, I have a doubt, which no man can reſolve better than your lordſhips, becauſe your honour is as high as any men; I have a doubt, whether, thinking it improper that I ſhould betray confidential communications before the ducheſs conſented that I ſhould, and gave me my liberty; whether her grace's generoſity ought not to tie me more firmly to my former reſolutions?

Duke of *Richmond.* For one, I think that it would be improper in the noble lord to betray any private converſations. I ſubmit to your lordſhips, that every matter of fact, not of converſation, which can be requeſted the noble lord is bound to diſcloſe.

Lord *Mansfield.* I mean only to propoſe to your lordſhips, to avoid adjourning to conſider this queſtion or any thing further upon it at preſent, that the counſel might be allowed to call other witneſſes in the mean time, and that lord *Barrington* may have an opportunity of conſidering of the matter, if the counſel ſhould think proper to call his lordſhip again.—— *This propoſal was over-ruled.*

The counſel againſt the ducheſs deſired to withdraw the witneſs.

Lord *Camden.* My lords, I underſtand from the bar, that rather than your lordſhips ſhould be perplexed with any queſtion which may ariſe upon the noble lord's difficulty in giving his evidence at the bar, the counſel would rather wave the benefit of his evidence in the cauſe. My lords, if that be their reſolution, and they think, that ſafely and without prejudice to this proſecution they may venture to give up that evidence, your lordſhips, to be ſure, will acknowledge the politeneſs of the ſurrender. But, my lords, now I am upon my legs, you will give me leave to make one ſhort remark on this proceeding, and to hope that your lordſhips, ſitting in judgment on criminal caſes, the higheſt and moſt important, that may affect the lives, liberties, and properties of your lordſhips, that you ſhall not think it befitting the dignity of this high court of juſtice to be debating the *etiquette* of honour, at the ſame time when we are trying lives and liberties. My lords, the laws of the land, I ſpeak it boldly in this grave aſſembly, are to receive another anſwer from thoſe who are called to depoſe at your bar, than to be told that in point of honour and of conſcience they do not think, that they acquit themſelves like perſons of that deſcription, when they declare what they know. There is no power of torture in this kingdom to wreſt evidence from a man's breaſt, who with-holds it; every witneſs may undoubtedly venture on the puniſhment, that will enſue on his refuſing to give teſtimony. As to caſuiſtical points, how far he ſhould conceal or ſuppreſs that which the juſtice of his country calls upon him to reveal, that I muſt leave to the witneſs's own conſcience.

Lord *Lyttelton.* The laws of the land have ſpoken clearly on this occaſion, and if your lordſhips had applied them to the noble lord at the bar, he has told your lordſhips that he is willing to ſubmit to your judgment. But, my lords, it is yet a queſtion, whether or not the noble lord will be perjured? It is a queſtion not decided by your lordſhips, that he will be perjured, if he refuſes to betray a confidence. I am ſure that I feel, and I apprehend your lordſhips as men of honour feel, the full weight of the noble lord's objection. He will ſpeak to matters of fact, but he does not deſire to ſpeak merely to converſation. And, my lords, I am not ſurpriſed that he ſhould make that objection: for if you conſider how looſe and inaccurate all evidence of converſation muſt be, it takes off in a court of juſtice much from its availment. The noble lord has told you, that confidential converſation may have paſſed between him and the noble lady at the bar: he has ſtated to you his doubts, and I apprehend he is not obliged to go on with his evidence, until your lordſhips have unanimouſly pronounced, that it is your opinion that he is obliged ſo to do.

Lord High Steward. If the counſel for the proſecution ſay, that they have no queſtions to aſk the noble lord, he may withdraw.

Lord *Barrington.* My lords, might I be allowed to ſay a word or two, before I withdraw from this bar! It is impoſſible that any perſon can revere this high court, indeed any court of juſtice in this country, more than I do. It is not, my lords, from contumacy, of which I am incapable; it is not with any view or purpoſe that any of your lordſhips would diſapprove, as individuals, I am certain, that I have taken the part which I have done. I do not ſay, that there are no caſes, in which a perſon ought not to reveal private converſation. There are caſes, in my opinion, in which he ſhould: there are caſes, in my opinion, in which he ſhould not: and, my lords, no perſon can draw the line but himſelf. But, my lords, I have recollected (I am obliged to the counſel for the proſecution, who are willing to admit me to withdraw. I return them my thanks. I dare ſay in that they have conſulted my feelings as much as they could, conſiſtent with the duties of their ſtation) but I have recollected, my lords, ſince the generous manner in which the ducheſs of *Kingſton* has been pleaſed to abſolve me from all ties, I have recollected, that ſhe ſaid, ſhe wiſhed and deſired that I might ſay any thing. If her grace thinks that any thing I can ſay, conſiſtent with truth, can tend to her juſtification, I am then ready to be examined to private communications.

Mr. *Solicitor General.* I do not deſire to examine the noble lord. I ſtated to your lordſhips, that I do not think the cauſe, in which my duty engages me, will at all ſuffer by having deference to any difficulty that the noble lord may entertain. I will not examine the noble lord on the conceſſion of the lady at the bar. The noble lord ſtands at your lordſhips bar a witneſs. Having taken the oath, though I do not examine him, the priſoner may.

Mr. *Wallace.* At the ſame time that I expreſs my aſtoniſhment at the offer, lord *Barrington* is not called to the bar as a witneſs for the priſoner. The noble lady at the bar has her witneſſes, in her turn, to call, with which ſhe ſhall trouble your lordſhips.

Duke of *Richmond.* I do not look on a witneſs at the bar to be the witneſs of the counſel or of the priſoner, but the witneſs of the houſe. I ſhall, therefore, aſk a queſtion or two of the noble lord. I will not diſtreſs the noble lord's feelings by inquiring into confidential matters. I will merely aſk queſtions of fact. The firſt queſtion I would aſk the noble lord is, whether he knows any fact by which he is convinced that Mr. *Hervey* was married to Miſs *Chudleigh?*

Lord *Barrington.* I do not know of any fact, which will prove the marriage between the ducheſs of *Kingſton* and Mr. *Hervey*, of my own knowledge.

Duke of *Richmond.* The noble lord muſt leave it to the houſe to judge whether it will or not. But does his lordſhip know any fact relative to that matter?

Lord *Barrington.* I do not know any thing of my own knowledge that can tend to prove that marriage. I know nothing but what I have heard in the world, and from converſation.

Lord *Radnor.* I am afraid your lordſhips, by your acquieſcence, have admitted a rule of proceeding here, which would not be admitted in any inferior court in the kingdom. I deſire, therefore, to aſk the noble lord, whether he knows any matter of fact relative to that marriage.

Lord *Barrington.* My lords, if I do, I cannot reveal it; nor can I anſwer the queſtion without betraying private converſation.

Moved to adjourn. Adjourned to the chamber of parliament.

After an adjournment of ſome time, the lords returned to Weſtminſter Hall.

Lord High Steward. My lord viſcount *Barrington*, I am commanded by the lords to acquaint your lordſhip, that it is the judgment of this houſe, that you are bound by law to anſwer all ſuch queſtions as ſhall be put to you.—Has the counſel for the proſecution any queſtion to put to the witneſs at the bar?

Mr. *Solicitor-General.* We ſhall not aſk the noble lord any queſtions.

Lord High Steward. Has the counſel for the priſoner any queſtion to put to the witneſs at the bar?

Mr. *Wallace.* Not any.

Lord *Radnor.* Does the witneſs know from converſation with the lady at the bar, that ſhe was married to the earl of *Briſtol?*

Lord *Barrington.* My lords, I have already told your lordſhips the motives which induce me to think that I cannot, conſiſtent with conſcience, with honour, or with probity, anſwer ſuch queſtions, as will tend to diſcloſe confidential communications made to me. At the ſame time I informed your lordſhips, that if the oath went ſo far as that I ſhould break that oath, if I did not anſwer all queſtions which could be put to me; if that was the determination of your lordſhips, I ſaid I would not break my oath. My lords, I continue in the ſame opinion and principle. My own judgment, as far as it guides me, which is very imperfectly, does tell me, that I am not obliged to anſwer all queſtions that can be put to me. But, my lords, though nobody can draw the line of conſcience, of honour, and of probity in this caſe but myſelf, yet in point of law, and in interpretation of law, and the oath I have taken, I am deſirous of aſſiſtance from thoſe who can beſt give it me, and I had much rather truſt almoſt any man's judgment than my own. I do not dare to aſk again your lordſhips opinion on that point. But, my lords, might I be permitted to apply to the learned counſel who are near me; if it is the opinion of the learned counſel, that I am obliged by my oath to anſwer the noble lord's queſtion, I will readily anſwer it.

Lord *Effingham.* I apprehend, that no queſtion can be put in this court on a matter of law to the counſel at the bar.

Several lords ſaid, 'You may aſk the counſel.'

Lord *Barrington.* My lords, I have put the queſtion to the Attorney-General, and I give him my thanks. He ſays, he thinks I am obliged by my oath to anſwer all queſtions. That being the caſe, I have nothing more to ſay, than humbly to beg your lordſhips pardon for having given you ſo much trouble, and to beg and entreat that you will believe, that nothing but the tendereſt and the ſtrongeſt feelings, and the moſt determined reſolution to do what was right in my ſituation, could have induced me to give you ſo much trouble.

Lord *Radnor.* Whether his lordſhip knows from converſation with the lady at the bar, that ſhe was married to the earl of *Briſtol?*

Lord *Barrington.* My memory I have found by long experience to be a very erroneous one, and eſpecially with relation to things paſt long ago. To the beſt of my memory and belief, the ducheſs has never honoured me with any converſation on the ſubject for many, many years paſt; I believe I might ſay for above twenty years paſt. And, my lords, that being the caſe, I muſt anſwer that queſtion very doubtfully: but after the ſolution which the learned counſel has given to my doubts, I mean not to conceal any thing from your lordſhips. Thinking it right to be examined, I think it right to give frank anſwers, and any doubt in any thing I ſay will ariſe from my not remembering well the circumſtances. The ducheſs of *Kingſton* many (I ſhould not ſay too much if I was to ſay thirty) years ago did entruſt me with a circumſtance in her life, relative to an engagement of a matrimonial kind with the earl of *Briſtol*, then Mr. *Hervey.*

Lord *Radnor.* Whether his lordſhip underſtood, that that matrimonial engagement, which had already paſſed, was a marriage?

Lord *Barrington.* I underſtood, there had been a matrimonial engagement entered into; but whether it amounted to a legal marriage or not, I am not lawyer or civilian enough to judge.

Lord *Radnor.* Did his lordſhip ever underſtand, that there was iſſue of that marriage?

Lord *Barrington.* Upon my word I cannot ſay; I do not know that the ducheſs ever made any communication of that ſort to me. I had heard of it in the world, but I do not know that the ducheſs ever communicated to me the circumſtance of her having had any iſſue.

Lord *Radnor.* Does his lordſhip know any thing of a bond entered into on the part of the priſoner at the bar, of late years, relative to the ſuppreſſion of evidence, or the payment of coſts of ſuit in the Eccleſiaſtical Court?

Lord *Barrington.* I never had the leaſt communication from the ducheſs of *Kingſton*, or from any perſon relative to any thing of the kind; I do not recollect that I ever heard of any ſuch thing even in the world; and the ducheſs of *Kingſton* has never communicated to me, in the courſe of her life, to the beſt of my memory or belief, any thing which was, at the time ſhe was pleaſed to communicate it to me, in the leaſt a deviation from the ſtricteſt rules of virtue and religion.

Ordered to withdraw.

My Lords, is it too much to beg, that what I have ſaid at the bar may be read over to me? Part of it is of a nice nature; I may have expreſſed myſelf improperly; the writer may have taken it down erroneouſly: I ſhould be glad to have it read over to me, that I may correct it in your lordſhips preſence.

Here the univerſal voice was 'Read, Read!' *but lord* Barrington *ſpared the houſe the trouble, by addreſſing himſelf to their lordſhips as follows:*

My lords, I find by the clerk, that the part which is of the niceſt kind with relation to me, wherein I expreſſed the difficulties and feelings I had on the ſubject of queſtions that I thought I ought not to anſwer, and why and on what ground I have ſince thought it my duty, underſtanding that my oath obliges me to it, to give my anſwers; I find, my lords, that part has not been taken down by the clerk, and therefore I ſhall give your lordſhips no further trouble.

Mr. *Dunning.* My lords, we deſire next to produce

Mrs. JUDITH PHILLIPS, *who was ſworn in like manner.*

Mr. *Dunning.* You was the widow of Mr. *Amis*, was you not?

Mrs. *Phillips.* Yes.

Mr. *Dunning.* Mr. *Amis* was parſon of the pariſh of *Lainſton* in *Hampſhire?*

Mrs. *Phillips.* Yes.

Mr. *Dunning.* Did you know a family of the name of *Merrill?*

Mrs. *Phillips.* I did.

Mr. *Dunning.* Was, or was not, Mr. *Merrill*'s houſe in that pariſh?

Mrs. *Phillips.* It was.

Mr. *Dunning.* How long ſince did your huſband die?

Mrs. *Phillips.* Seventeen years ago.

Mr. *Dunning.* Do you know the lady at the bar?

Mrs. *Phillips.* Very well.

Mr. *Dunning.* How long have you known the lady at the bar?

Mrs. *Phillips.* About thirty years.

Mr. *Dunning.* Was you privy to her marriage in your huſband's life-time?

Mrs. *Phillips.* I was not at the wedding; but I heard my huſband ſay, he married them.

A Lord. That is not evidence.

Mr. *Dunning.* Had you not any other means of knowing that fact from the lady at the bar herſelf?

Mrs. *Phillips.* Yes.

Mr. *Dunning.* Do you remember the lady at the bar coming to *Wincheſter?*

Mrs. *Phillips.* Very well.

Mr. *Dunning.* When?

Mrs. *Phillips.* She came about the middle of *February*, 1759.

Mr. *Dunning.* Was that in your huſband's life-time, or ſince his death?

Mrs. *Phillips.* In my huſband's life-time.

Mr. *Dunning.* Was it long before, and how long before Mr. *Amis*'s death?

Mrs. *Phillips.* Six weeks.

Mr. *Dunning.* What was the occaſion of the lady's viſit to *Wincheſter?*

Mrs. *Phillips.* For a regiſter of her marriage.

Mr. *Dunning.* If you recollect any particulars of what paſſed upon that occaſion, ſtate them.

Mrs. *Phillips.* She came to the *Blue Boar* in *Kingſgate-ſtreet*, *Wincheſter*, and ſent for me by ſix o'clock in the morning. When I went to her, ſhe aſked me if I thought Mr. *Amis* would give her a regiſter of her marriage? I told her, I thought he would. Then I aſked her to my houſe; and when ſhe came, ſhe aſked me to go up with her to Mr. *Amis*, and aſk if he would ſee her and give her a regiſter of her marriage? I went up to Mr. *Amis*, and told Mr. *Amis* what the lady had deſired. Mr. *Amis* deſired to ſee the lady. Then I came down and told her, that Mr. *Amis* at that time was confined to his bed. The lady went to Mr. *Amis*, and told Mr. *Amis* her requeſt. Then Mr. *Merrill* and the lady conſulted together whom to ſend for, and they deſired me to ſend for Mr. *Spearing*, the attorney. I did ſend for him; and during the time the meſſenger was gone, the lady concealed herſelf in a cloſet: ſhe ſaid, ſhe did not care that Mr. *Spearing* ſhould know that ſhe was there. When Mr. *Spearing* came, Mr. *Merrill* produced a ſheet of ſtamped paper, that he brought to make the regiſter upon. Mr. *Spearing* ſaid, it would not do, it muſt be a book, and that the lady muſt be at the making of it. Then I went to the cloſet, and told the lady. Then the lady came to Mr. *Spearing*, and Mr. *Spearing* told the lady a ſheet of ſtamped paper would not do, it muſt be a book. Then the lady deſired Mr. *Spearing* to go and buy one. Mr. *Spearing* went and bought one, and, when brought, the regiſter was made. Then Mr. *Amis* delivered it to the lady. The lady thanked him, and ſaid it might be an hundred thouſand pounds in her way: at the ſame time ſhe added, that ſhe had had a child by Mr. *Hervey*, and that it was a boy, but that it was dead; and that ſhe had borrowed an hundred pounds of her aunt *Hanmer* to buy baby things. Before Mr. *Merrill* and the lady left my houſe, the lady ſealed up the regiſter, and gave it to me, and deſired I would take care of it until Mr. *Amis*'s death, and then deliver it to Mr. *Merrill*.

Mr. *Dunning*. Did it accordingly remain in your hands until your huſband's death, and then deliver it to Mr. *Merrill*?

Mrs. *Phillips*. I did.

Mr. *Dunning*. Do you recollect, whether Mr. *Merrill* accompanied the lady from the time you firſt ſaw her in *Wincheſter* to your huſband's houſe, or did Mr. *Merrill* join them afterwards when they were there?

Mrs. *Phillips*. He joined them afterwards.

Mr. *Dunning*. Do you remember, whether any other entry was then made in this regiſter-book, beſides the entry of this marriage?

Mrs. *Phillips*. I don't remember any.

Mr. *Dunning*. Do you recollect to have ſeen any thing of the lady at the bar ſince your huſband's death?

Mrs. *Phillips*. Many times.

Mr. *Dunning*. Do you recollect any converſation that has paſſed between you at any of thoſe times?

Mrs. *Phillips*. After I had delivered the regiſter to Mr. *Merrill*, I waited upon the lady at her houſe at *Knightſbridge*, and found her in the garden. I told her, I had delivered the regiſter to Mr. *Merrill*. She thanked me for it; and deſired I would take no notice of it: at the ſame time ſhe ſaid Mr. *Swino* was in the garden, and hoped I would take no notice to him of the affair.

Mr. *Dunning*. Do you recollect any further converſation about this book, after Mr. *Merrill*'s death, with the lady?

Mrs. *Phillips*. I was once a-fiſhing with the lady, and ſhe told me ſome things that had paſſed in the family. She told me, that Mrs. *Bathurſt* had uſed her very ill, for ſhe had got all the papers Mr. *Merrill* had of her's at the time of his death. Upon which I aſked her, what was become of the regiſter? She told me the miniſter of the pariſh had it.

Mr. *Dunning*. Was, or was not, the Mrs. *Bathurſt* you have ſpoken of, the daughter of that Mr. *Merrill*?

Mrs. *Phillips*. She was.

Mr. *Dunning*. Do you recollect any other converſation with the lady at the bar, after her marriage with the duke of *Kingſton*?

Mrs. *Phillips*. Yes; I waited upon her in *Arlington-ſtreet*, after her marriage with the duke of *Kingſton*. She ſaid to me, Was it not very good-natured of the duke to marry an old maid? I looked her in the face and ſmiled, but ſaid nothing then. She aſked me, if Mr. *Hervey* had ſent to me at the time of her trial? I ſaid he had not ſent to me.

(The book ſhewn to the witneſs.)

Mr. *Dunning*. Can you be ſure, whether that is the book you have been ſpeaking of?

Mrs. *Phillips*. I am very ſure.

Mr. *Dunning*. I believe there are the veſtiges of the ſeals about it ſtill?

Mrs. *Phillips*. There are.

Mr. *Dunning*. Where it was ſealed up?

Mrs. *Phillips*. Yes.

Mr. *Dunning*. Look at the entries in the book; are they not your huſband's writing? and were they not made in your preſence?

Mrs. *Phillips*. They are my huſband's hand-writing, and they were made in my preſence.

Mr. *Dunning*. They were made likewiſe in the preſence of the lady at the bar, were they not?

Mrs. *Phillips*. They were.

Clerk reads.

'*Marriages, births, and burials in the pariſh of* Lainſton. *2d of* Au-
'guſt, *Mrs.* Suſannah Merrill, *relict of* John Merrill, *eſq*; *buried.*
'*4th of* Auguſt 1744, *Married the honourable* Auguſtus Hervey, *eſq*;
'*in the pariſh church of* Lainſton, *to Miſs* Elizabeth Chudleigh, *daugh-*
'*ter of colonel* Thomas Chudleigh, *late of* Chelſea College, *deceaſed.*
'*By me* Thomas Amis.'

Mr. *Dunning*. My lords, I have done with this witneſs.

Lord High Steward. Would the counſel for the priſoner aſk this witneſs any queſtions?

Mr. *Manſfield*. I ſhould be glad firſt to ſee the book.——I would wiſh to know by what means you now ſubſiſt? what ſupport you have?

Mrs. *Phillips*. Upon my own private fortune.

Mr. *Manſfield*. Where do you live?

Mrs. *Phillips*. At *Briſtol*.

Mr. *Manſfield*. Is your huſband living or dead?

Mrs. *Phillips*. Alive.

Mr. *Manſfield*. What employment was he in, before he lived at *Briſtol* upon his fortune?

Mrs. *Phillips*. He was ſteward to the duke of *Kingſton*, and a graſier.

Mr. *Manſfield*. Was he not turned out of the ſervice of the duke of *Kingſton*?

Mrs. *Phillips*. I believe he was not turned out.

Mr. *Manſfield*. Do not you know, whether he was or not?

Mrs. *Phillips*. He wrote a letter to the duke, and deſired to leave him.

Mr. *Manſfield*. Do you know then, that he was not turned out?

Mrs. *Phillips*. Yes.

Mr. *Manſfield*. Had he been threatened to be turned out, before he ſent that letter?

Mrs. *Phillips*. Not that ever I heard of.

Mr. *Manſfield*. Had your huſband had any differences or diſputes with the duke of *Kingſton*?

Mrs. *Phillips*. No, not that I know.

Mr. *Manſfield*. Was his reaſon then for quitting the ſervice of the duke of *Kingſton* merely his own inclination, without any particular reaſon or cauſe?

Mrs. *Phillips*. He thought the duke looked cool upon him: for what reaſon he could not tell.

Mr. *Manſfield*. Had the duke ever expreſſed any cauſe of diſlike to him?

Mrs. *Phillips*. Not that I know of.

Mr. *Manſfield*. How long have you left *Briſtol*?

Mrs. *Phillips*. About four months.

Mr. *Manſfield*. Where have you lived?

Mrs. *Phillips*. Sometimes in one place, ſometimes in another.

Mr. *Manſfield*. In what places?

Mrs. *Phillips*. Sometimes at the *Turf* coffee-houſe, ſometimes in *St. Mary Axe*.

Mr. *Manſfield*. How much of the time at the *Turf* coffee-houſe?

Mrs. *Phillips*. I really cannot ſay exactly.

Mr. *Manſfield*. You are not aſked as to a week. Have you lived there the greater part?

Mrs. *Phillips*. The greater part.

Mr. *Manſfield*. Who has ſupported you at the *Turf* coffee-houſe?

Mrs. *Phillips*. Ourſelves.

Mr. *Manſfield*. Have you paid the expences of your ſupport there?

Mrs. *Phillips*. That I do not know any thing of.

Mr. *Manſfield*. Do you not know, that the whole of your expence at the *Turf* coffee-houſe is to be defrayed by the proſecutor, Mr. *Evelyn Meadows*?

Mrs. *Phillips*. I do not know it is.

Mr. *Manſfield*. Have you not underſtood ſo?

Mrs. *Phillips*. I have not.

Mr. *Manſfield*. Nor do you believe it?

Mrs. *Phillips*. I cannot tell what to believe, or what is to be done.

Mr. *Manſfield*. Cannot you tell, whether you believe that your expences at the *Turf* coffee-houſe are to be defrayed by Mr. *Meadows*?

Mrs. *Phillips*. No, I do not. I do not know any thing of that.

Mr. *Manſfield*. Do you not know, by whom you expect the expence of your ſupport at the *Turf* coffee-houſe is to be paid?

Mrs. *Phillips*. I do not know by whom it is to be paid.

Mr. *Manſfield*. Have you ſeen Mr. *Evelyn Meadows* at the *Turf* coffee-houſe?

Mrs. *Phillips*. I have.

Mr. *Manſfield*. How often may you have ſeen that gentleman there?

Mrs. *Phillips*. I cannot tell.

Mr. *Manſfield*. Many times, or only once or twice?

Mrs. *Phillips*. I may have ſeen him twice or three times.

Mr. *Manſfield*. Have you not ſeen him oftener than that, there?

Mrs. *Phillips*. I have ſeen him frequently in the yard.

Mr. *Manſfield*. Have you not had frequent converſations with him?

Mrs. *Phillips*. Not frequent.

Mr. *Manſfield*. Have you not converſed with him ſometimes at the *Turf* coffee-houſe, ſometimes at other places?

Mrs. *Phillips*. No where, but at the *Turf* coffee-houſe?

Mr. *Manſfield*. Who has been preſent at ſuch converſations?

Mrs. *Phillips*. My huſband.

Mr. *Manſfield*. Who elſe?

Mrs. *Phillips*. No one elſe.

Mr. *Manſfield*. Has not Mr. *Fozard* been preſent at ſome of theſe converſations?

Mrs. *Phillips*. Never.

Mr. *Manſfield*. Have you not been at Mr. *Fozard*'s houſe with Mr. *Meadows*?

Mrs. *Phillips*. Never; by accident on *Chriſtmas-day* I called at his door, and he was there.

Mr. *Manſfield*. Was you in company with Mr. *Meadows* at Mr. *Fozard*'s?

Mrs. *Phillips*. I was.

Mr. *Manſfield*. Does Mr. *Fozard* aſſiſt Mr. *Meadows* in the courſe of this proſecution?

Mrs. *Phillips*. I know nothing of that.

Mr. *Manſfield*. Do not you know, that Mr. *Fozard* has aſſiſted Mr. *Meadows* in looking out for witneſſes?

Mrs. *Phillips*. I don't know any thing about it.

Mr. *Manſfield*. Have you not yourſelf been preſent at converſations with Mr. *Fozard* about this proſecution?

Mrs. *Phillips*. Nothing, but what was merely accidental.

Mr. *Manſfield*. How often has that *accident* happened, that you have been preſent at converſations with Mr. *Fozard* about this proſecution?

Mrs. *Phillips*. I never was at Mr. *Fozard*'s but twice.

Mr. *Manſfield*. Has Mr. *Fozard* been at the *Turf* coffee-houſe with you?

Mrs. *Phillips*. He came to ſee Mr. *Phillips*, when he had the gout.

Mr. *Manſfield*. How often might Mr. *Fozard* viſit you at the *Turf* coffee-houſe?

Mrs. *Phillips*. He came to ſee Mr. *Phillips*, but not me.

Mr. *Manſfield*. How often might he viſit Mr. *Phillips* there?

Mrs. *Phillips*. About three times.

Mr. *Manſfield*. Have you ever met Mr. *Fozard* at any other places beſides the *Turf* coffee-houſe and his own houſe?

Mrs. *Phillips*. Never.

Mr. *Manſfield*. Do you know of any promiſe made to you or your huſband of any benefit or advantage depending upon the event of this proſecution?

Mrs. *Phillips*. None in the world.

Mr. *Manſfield*. Did you never hear of any ſuch promiſe being made to you or your huſband?

Mrs. *Phillips*. Never.

Mr. *Manſfield*. Have you never ſaid, that any ſuch promiſe or offer was made?

Mrs. *Phillips*. Never, nor it never was.

Mr. *Manſfield*. Have you never ſaid any thing to that purpoſe?

Mrs. *Phillips*. No, never to any body.

Mr. *Manſfield*. Have you never made any mention of any kind of benefit or advantage you was to receive from the evidence you ſhould give on this proſecution?

Mrs. *Phillips*. Not in the leaſt; I don't want it, nor wiſh it.

Mr. *Manſfield*. Did I underſtand you right, when you ſaid, that at the time of the entry of the marriage in this regiſter no other entry was made?

Mrs. *Phillips*. I don't remember that; I remember very well ſtanding at the bed's feet when the regiſter was made.

Mr. *Manſfield*. Do not you know whether any other entry was made at that time?

Mrs. *Phillips*. I don't, for I was backwards and forwards in the room.

Mr. *Manſfield*. How come you then to know, that the regiſter of this marriage was made in the book at that time?

Mrs. *Phillips*. I ſaw it.

Mr. *Manſfield*. Did you read it at that time?

Mrs. *Phillips*. I heard Mr. *Amis* read it.

Mr. *Manſfield*. Did you hear him read any thing elſe beſides the entry of the marriage?

Mrs. *Phillips*. Nothing but that, for I was going backwards and forwards in the room.

Mr. *Manſfield*. Do you know nothing at all, whether any thing elſe was entered beſides that at the time of the marriage?

Mrs. *Phillips*. I did not ſee any thing but that; though it might, as I was going backwards and forwards.

Mr. *Manſfield*. Did you ſee the entry of the marriage in the book?

Mrs. *Phillips*. I did.

Mr. *Manſfield*. If you ſaw that, muſt not you have ſeen whether there were any other entries made on the ſame leaf?

Mrs. *Phillips*. I heard it read; I never ſaw it afterwards but when the lady ſealed it up.

Mr. *Manſfield*. Did not you take notice that there were other entries?

Mrs. *Phillips*. I did not.

Mr. *Manſfield*. You took notice of nothing upon the paper but the entry of this marriage?

Mrs. *Phillips*. Of nothing elſe.

Mr. *Manſfield*. Did you keep the paper long enough before you, or did the lady at the bar keep the book long enough before her, for her to ſee whether what ſhe heard read was written on the paper?

Mrs. *Phillips*. She held it in this manner (*deſcribing the manner*) open, and I ſaw it as I ſtood by her: I did not read it, but heard it read.

Mr. *Manſfield*. Did all the perſons, who were preſent, hear what was ſaid about the hundred pounds lent by Mrs. *Hanmer*?

Mrs. *Phillips*. No, they did not; the lady ſaid ſhe had borrowed an hundred pounds of her aunt Mrs. *Hanmer* to buy baby things.

Mr. *Manſfield*. Who did the lady tell that to?

Mrs. *Phillips*. To Mr. *Amis* and to me.

Mr. *Manſfield*. Did ſhe ſpeak it loudly or ſoftly, or how?

Mrs. *Phillips*. She ſpoke it as ſhe was ſitting by the bed-ſide talking to Mr. *Amis*.

Mr. *Manſfield*. When did you tell any body of ſuch regiſter?

Mrs. *Phillips*. I really cannot ſay exactly when, but I have ſaid, I had it in my poſſeſſion.

Mr. *Manſfield*. When did you firſt mention it?

Mrs. *Phillips*. I cannot tell.

Mr. *Manſfield*. Was Mr. *Merrill* preſent at the time when this entry was made in the regiſter?

Mrs. *Phillips*. He was.

Mr. *Manſfield*. Was he in the room the whole time that this converſation paſſed, that you have mentioned, of lending an hundred pounds by Mrs. *Hanmer*?

Mrs. *Phillips*. No, he was not.

Mr. *Manſfield*. Did Mr. *Merrill* come with the lady, or the lady before him, or without him?

Mrs. *Phillips*. The lady before him, for Mr. *Merrill* was gone to *Lainſton* to his ſeat.

Mr. *Manſfield*. When Mr. *Merrill* came, did not the lady repeat the converſation that had been about the child and the hundred pounds?

Mrs. *Phillips*. There was nothing of that ſaid before Mr. *Merrill*.

Mr. *Manſfield*. Was any thing ſaid about making any other entry in the regiſter, beſides that of the marriage?

Mrs. *Phillips*. Nothing that I heard.

Mr. *Manſfield*. When did Mr. *Merrill* come into the room; before the entry was made in the book, or after?

Mrs. *Phillips*. Before.

Mr. *Manſfield*. Was Mr. *Merrill* in the room at the time that it was made?

Mrs. *Phillips*. He was.

Mr. *Manſfield*. Who was it brought the ſtamp paper?

Mrs. *Phillips*. Mr. *Merrill*.

Mr. *Manſfield*. Was Mr. *Merrill* in the room when the lady concealed herſelf, as you have ſaid?

Mrs. *Phillips*. He was.

Mr. *Manſfield*. Who elſe was in the room?

Mrs. *Phillips*. No one except myſelf.

Mr. *Manſfield*. Now look at the book.

Mrs. *Phillips*. I know the hand perfectly well.

Mr. *Manſfield*. Is the whole of that, which is written on that leaf, the writing of your huſband?

Mrs. *Phillips*. It is.

Mr. *Manſfield*. You have ſaid that you went to *Arlington-ſtreet*; can you name any perſon that you ſaw there?

Mrs. *Phillips*. No one was in the room, when I went, except the lady.

Mr. *Manſfield*. Can you name any perſon that ſaw you there?

Mrs. *Phillips*. Only a ſervant for ſome time, and then a milliner came.

Mr. *Manſfield*. Can you name thoſe perſons?

Mrs. *Phillips*. I can't; I don't know them.

Mr. *Manſfield*. Can you name neither of them?

Mrs. *Phillips*. The ſervant was *Fozard*.

Mr. *Manſfield*. Can you name no other ſervants that you ſaw there?

Mrs. *Phillips*. No; I had an inflammation in my eye, and the lady was exceedingly kind to me: ſhe ordered an egg to be boiled for me, and *Fozard* brought it, in order that it might be opened and laid on my eye.

Mr. *Manſfield*. Can you name any other ſervants whom you ſaw there?

Mrs. *Phillips*. I don't remember.

Lord *Camden*. My lords, I obſerve in the entry of the regiſter the words '*was married*' are ſtruck through with a black line; I want to know of the witneſs whether ſhe can account for that ſtroke?

Mrs. *Phillips*. I cannot.

Mr. *Dunning*. It is a repetition. There is marriage written in the margin. '*Auguſt* the 24th, married.' The entry then proceeds, 'The honourable *Auguſtus Hervey*, Eſq. *was married*;' which being a repetition, I ſuppoſe they ſtruck that through with a black line.

Lord *Camden*. I believe it is ſo.

Mr. *Dunning*. If your lordſhips pleaſe, the next witneſs to be called is

The Reverend Mr. STEPHEN KENCHEN, *who was ſworn in like manner.*

Mr. *Dunning*. You ſucceeded Mr. *Amis* in this church at *Lainſton*, I believe?

Mr. *Kenchen*. I did.

Mr. *Dunning*. When did you firſt ſee that book that he has in his hand, and how did it come there?

Mr. *Kenchen*. The firſt time that I ſaw the book was after the death of Mrs. *Hanmer*, aunt to Mr. *Merrill*, who was buried in the vault of that little church.

Mr. *Dunning*. By whom was that book produced to you, and for what purpoſe?

Mr. *Kenchen*. In order to regiſter Mrs. *Hanmer*'s burial.

Mr. *Dunning*. By whom?

Mr. *Kenchen*. By Mr. *Merrill*.

Mr. *Dunning*. Did you accordingly make an entry of the burial of Mrs. *Hanmer*?

Mr. *Kenchen*. I made an entry of the burial of Mrs. *Hanmer*.

Mr. *Dunning*. What then became of the book?

Mr. *Kenchen*. Mr. *Merrill* carried it back again to his own houſe.

Mr. *Dunning*. When did you next ſee the book?

Mr. *Kenchen*. At the death of Mr. *Merrill*.

Mr. *Dunning*. By whom was the book then produced to you?

Mr. *Kenchen*. I cannot ſay; either by Mr. or Mrs. *Bathurſt*, or in the preſence of them both.

Mr. *Dunning*. Did you then make an entry of the burial of Mr. *Merrill*?

Mr. *Kenchen*. I did.

Mr. *Dunning*. What then became of the book?

Mr. *Kenchen*. I have had it in my poſſeſſion ever ſince.

Mr. *Dunning*. My lords, I ſhall aſk no more queſtions of this witneſs.

Lord High Steward. Mr. *Wallace*, would you aſk this witneſs any queſtions?

Mr. *Wallace*. I have no queſtions to put to this witneſs.

Mr. *Dunning*. If your lordſhips pleaſe, we will now call

The Reverend Mr. JOHN DENNIS, *who was ſworn in like manner.*

Mr. *Dunning*. Look at that book. Was you acquainted with the hand-writing of the late Mr *Amis*? You knew Mr. *Amis*, I preſume?

Mr. *Dennis*. I knew him perfectly well.

Mr. *Dunning*. Do you know his hand-writing when you ſee it?

Mr. *Dennis*. I have ſeen his hand-writing often, as ſucceeding him in the living.

Mr. *Dunning*. Did you ever ſee him write?

Mr. *Dennis*. I have ſeen him write, but not often.

Mr. *Dunning*. Look at that hand-writing; tell me whether you believe the two entries in the firſt page of that book are his hand-writing?

Mr. *Dennis*. Yes, particularly his name, *Thomas Amis*, ſeems very much ſo.

Mr. *Dunning*. Do you believe it to be his hand-writing?

Mr. *Dennis*. I believe the whole to be his hand-writing.

Ordered to withdraw.

Mr. *Dunning*. I do not know whether, on the part of the priſoner, they mean to put us on the proving, which it is neceſſary for us to do if they require it, the marriage with the duke of *Kingſton*.

Mr. *Wallace*. We are ready to admit that fact. There is no doubt of her being married by the licence of the archbiſhop of *Canterbury*.

Mr. *Dunning*. You will give us the date.

Mr. *Wallace*. Mention what the day is.

Mr. *Dunning.* The 8th of *March* 1769, I underſtand.

Mr. *Dunning.* My lords, we are now going to prove a caveat entered by the lady, upon the apprehenſion of a ſuit intended to be inſtituted by Mr. *Hervey* in the Spiritual Court.

Mr. JAMES, *who was ſworn in like manner.*

Mr. *Dunning.* Do you know any thing of the caveat entered at *Doctors Commons* on the part of the lady at the bar?

Mr. *James.* Yes, the caveat is entered in this book *(producing it).*

Mr. *Dunning.* Is that the proper book, in which ſuch entries ought to be made?

Mr. *James.* It is.

The caveat was read by the clerk, and is as follows: 'The 18th of '*Auguſt* 1768. Let no citation, intimation, or other proceſs, or 'any letters of requeſt for the ſame, to any other judge or juriſ'diction whatſoever, iſſue under the ſeal of this court at the ſuit 'or inſtance of the honourable *Auguſtus John Hervey*, or his 'brother, againſt the honourable *Elizabeth Chudleigh*, ſpinſter, of 'any cauſe or ſuit matrimonial, without due notice being given to 'Mr. *Nathaniel Biſhop*, proctor for the ſaid honourable *Elizabeth* '*Chudleigh*, who, on his being warned thereto before the judge 'of this court, or his lawful ſurrogate, will be ready by himſelf 'or counſel to ſhew juſt cauſe of this ſame caveat, and why no 'ſuch proceſs or letters of requeſt ſhould iſſue thereupon.'

Mr. *Wallace.* The witneſs merely produces the book; he knows nothing of the fact of the entry being made.

Mr. *James.* I know Mr. *Biſhop*'s clerk's hand; this is his hand-writing.

Mr. *Dunning.* Perhaps the witneſs may know, that Mr. *Biſhop* was the proctor employed by the lady in the courſe of that ſuit?

Mr. *James.* I have heard ſo.

Mr. *Attorney General.* That appears on the record they have put in.

Mr. *Dunning.* I underſtand, that it is the pleaſure of ſome of your lordſhips, that we ſhould go into the proof of the marriage of the duke of *Kingſton*?

Mr. *Wallace* It is admitted on the part of the priſoner.

Mr. *Dunning.* But as ſome of the lords wiſh for the proof, we will examine it.

The Reverend Mr. JAMES TREBECK, *who was ſworn in like manner.*

Mr. *Dunning.* Be ſo good as find the regiſter of the marriage of the duke of *Kingſton.*

Points it out; clerk reads. 'Nº 92. Marriages in *March* 1769. 'Nº 92. The moſt noble *Evelyn Pierrepont*, duke of *Kingſton*, a 'batchelor, and the honourable *Elizabeth Chudleigh* of *Knightſbridge*, in St. *Margaret*'s *Weſtminſter*, a ſpinſter, were married 'by ſpecial licence of the archbiſhop of *Canterbury* this 8th of '*March* 1769, by me *Samuel Harpur*, of the *Britiſh Muſeum.* This 'marriage was ſolemnized between us,

'KINGSTON,
'ELIZABETH CHUDLEIGH,'
In the preſence of
'MASHAM,
'WILLIAM YEO,
'A. K. F. GILBERT,
'JAMES LAROCHE jun.
'ALICE YEO,
J. ROSS MACKYE,
E. R. A. LAROCHE,
ARTHUR COLLIER,
C. MASHAM.'

Mr. *Dunning.* I am deſired to apprize your lordſhips of a fact, which may or may not be proved, if thought neceſſary. Your lordſhips have heard in the evidence of the laſt woman an account of a certain Mr. *Spearing*, who was preſent. That Mr. *Spearing* could not be found. He, though mayor of *Wincheſter*, is now found to be amuſing himſelf ſome where or other beyond ſea, God knows where. We have witneſſes to give your lordſhips that account, if your lordſhips think it neceſſary.—— Will your lordſhips now pleaſe to hear the reverend Mr. *Harpur*?

The Reverend Mr. HARPUR, *who was ſworn in like manner.*

Mr. *Dunning.* Did you perform the marriage ceremony between theſe parties?

Mr. *Harpur.* Yes.

Mr. *Dunning.* At the time mentioned in the regiſter?

Mr. *Harpur.* Yes.

Lord High Steward. Have you any more witneſſes to produce?

Mr. *Dunning.* We don't judge it neceſſary to offer to your lordſhips any more evidence in this ſtage of the buſineſs. If it ſhould become ſo, we reſerve to ourſelves the right of examining them hereafter.

Mr. *Wallace.* I beg Mrs. *Phillips* may be called to the bar, that a letter may be produced to her, and that ſhe may ſay whether it is her hand-writing.

Mrs. PHILLIPS *called.*

Mr. *Wallace.* Is that your hand-writing?

Mrs. *Phillips.* The name is my hand-writing.

Mr. *Wallace.* Is that your letter?

Mrs. *Phillips.* It is my letter.

A letter from JUDITH PHILLIPS *to her grace the ducheſs of* Kingſton *read.*

'MY LADY DUCHESS,

'I write your grace this letter.—My heart has ever been firmly attached 'to your grace's intereſt and pleaſure, and my utmoſt wiſh to deſerve 'your favour and countenance. Suffer me not then in my declining 'years to think I have forfeited that favour and protection, without in'tentionally giving the moſt diſtant cauſe.

'May I intreat your grace to accept this as a *ſincere and humble ſubmiſſion* for any failure of reſpect and duty to your grace; and permit 'me moſt humbly to intreat your grace's *kind interceſſion* with my lord 'duke to *continue* Mr. *Phillips* his ſteward, whoſe happineſs conſiſts only 'in acting and diſcharging his duty to his grace's pleaſure. This addi'tional mark of your grace's goodneſs we hope to be happy in; and in 'return, the remainder of our lives ſhall be paſſed in gratitude and duty. 'The perſon who carries this will wait to receive your grace's pleaſure 'and commands to her, who remains, with the greateſt reſpect,

'My lady ducheſs,
'Your grace's moſt dutiful ſervant,
'J. PHILLIPS.'

'*November* 7, 1771.

Mr. *Attorney General.* The evidence, your lordſhips will recollect, given by the witneſs was in anſwer to a queſtion, whether her huſband had or had not been *turned out of his place?* pointing the queſtion ſo as to give your lordſhips, and to give the witneſs to underſtand, that they meant the circumſtance of being *turned out of his place* ſhould go perſonally to the diſcredit of her huſband, and alſo imply ſome memory of that in the mind of the wife. The witneſs, in anſwer to that, told your lordſhips, with reſpect to ſuch part of it as might be deemed to relate to her huſband's credit in the buſineſs, that he had reſigned his place under the duke. The letters which I have in my hand, and will juſt ſtate to your lordſhips, if it be thought neceſſary before the calling of the witneſs, is that very correſpondence, by which it appears that he did ſo reſign his employment under his grace into his grace's hands. He wrote to his grace at *Newmarket* from *Holm Pierrepont.* The letter is dated the '*17th of October* 1771.' And he writes thus:

'I Have ever done my duty with the ſtricteſt regard to your grace's in'tereſt, and with the moſt perfect reſpect. I have declined accepting a 'good ſettlement, to act conformable to your grace's pleaſure, which 'her grace was pleaſed to promiſe ſhould be made up to me, which muſt 'have eſcaped her grace's memory, as I have ſince had my rent conſi'derably raiſed, and am much concerned to obſerve lately your grace's 'diſpleaſure; and being conſcious of a faithful diſcharge of my duty, I 'muſt be unjuſtly repreſented to your grace. I hope your grace will be 'pleaſed to permit my delivering up the charge of your grace's affairs, 'which, as an honeſt man, I can only properly keep, while ſatisfied my'ſelf, and honoured with your grace's approbation, &c.'

In anſwer to which he received this letter:

'Mr. *Phillips*,

'Your letter came to me at *Newmarket.* After what has paſſed, there 'is no occaſion for many words. *Sherin* will be at *Holm Pierrepont* ſome 'time next week, with my orders about ſettling your buſineſs, which I 'flatter myſelf you will readily comply with.

'I am yours, &c. &c.'

I believe I may refer to your lordſhips memory, that Mrs. *Phillips* mentioned his grace's having looked cooly on her huſband, which occaſioned his reſignation.

A Peer. What is that, Mr. Attorney General, that you have been reading?

Mr. *Attorney General.* The firſt is a copy of a letter to the duke; the other, the duke's original anſwer. If it is thought material enough to trouble your lordſhips with it, we can eaſily prove that this is his grace's hand-writing, and this the copy of his grace's letter, which was all that was neceſſary.

Adjourned to *Monday.*

Monday, April 22. *The fifth and laſt day.*

THE lords and others came from the chamber of parliament in the cuſtomary order. Proclamation for ſilence being made as uſual, the ducheſs of *Kingſton* was conducted to the bar, when her grace addreſſed the lords in the following terms:

My lords,

This my reſpectful addreſs will, I flatter myſelf, be favourably accepted by your lordſhips: my words will flow freely from my heart, adorned ſimply with innocence and truth. My lords, I have ſuffered unheard-of perſecutions; my honour and fame have been ſeverely attacked; I have been loaded with reproaches; and ſuch indignities and hardſhips have rendered me the leſs able to make my defence before this auguſt aſſembly againſt a proſecution of ſo extraordinary a nature, and ſo undeſerved.

My lords, with tenderneſs conſider how difficult is the taſk of myſelf to ſpeak, nor ſay too little nor too much. Degraded as I am by adverſaries; my family deſpiſed; the honourable titles on which I ſet an ineſtimable value, as received from my moſt noble and late dear huſband, attempted to be torn from me; your lordſhips will judge how greatly I ſtand in need of your protection and indulgence.

My lords, were I here to plead for life, for fortune, no words from me ſhould beat the air: the loſs I ſuſtain in my moſt kind companion and affectionate huſband, makes the former more than indifferent to me; and, when it ſhall pleaſe Almighty God to call me, I ſhall willingly lay that burthen down. I plead before your lordſhips for my fame and honour.

My lords, logic is properly defined, and well repreſented in this high court. It is a talent of the human mind, and not of the body, and holds a key which ſignifies, that logic is not a ſcience itſelf, but the key to ſcience. That key is your lordſhips judicial capacity and wiſdom. On the left hand is repreſented a hammer, and before it a piece of falſe, and another of pure gold. The hammer is your penetrating judgment, which, by the mercy of God, will ſtrike hard at falſe witneſſes who have given evidence againſt me, and prove my intention in this pending cauſe as pure as the fineſt gold, and as juſtly diſtinguiſhed from the ſophiſtry of falſhood.

My lords, your unhappy priſoner is born of an ancient, not ignoble family; the women diſtinguiſhed for their virtue, the men for their valour; deſcended in an honourable and uninterrupted line for three centuries and a half. Sir *John Chudleigh*, the laſt of my family, loſt his life at the ſiege of *Oſtend*, at eighteen years of age, glorioufly preferring to die with his colours in his boſom, rather than accept of quarter from a gallant *French* officer, who, in compaſſion to his youth, three times offered him his life for that enſign, which was ſhot through his heart. A happy death! that ſaves the bluſh he would now feel for the unheard-of injuries and diſhonour thrown on his unfortunate kinſwoman, who is now at the bar of this right honourable houſe.

His grace the late duke of *Kingſton*'s fortune, of which I now ſtand poſſeſſed, is valuable to me, as it is a teſtimony to all the world how high I was in his eſteem. As it is my pride to have been the object of affection of that virtuous man, ſo ſhall it be my honour to beſtow that fortune to the honour of him who gave it to me; well knowing, that the wiſe diſpoſer of all things would not have put it in his heart to prefer me to all others, but that I ſhould be as faithful a ſteward, as I was a faithful wife; and that I ſhould ſuffer others, more worthy than myſelf, to ſhare theſe his great benefits of fortune.

My lords, I now appeal to the feelings of your own hearts, whether it is not cruel, that I ſhould be brought as a criminal to a public trial for an act committed under the ſanction of the laws;—an act that was honoured with his majeſty's moſt gracious approbation; and previouſly known and approved of by my royal miſtreſs, the late princeſs-dowager of *Wales*; and likewiſe authorized by the eccleſiaſtical juriſdiction. Your lordſhips will not diſcredit ſo reſpectable a court, and diſgrace thoſe judges who there ſo legally and honourably preſide. The judges of the Eccleſiaſtical Court do not receive their patents from the crown, but from the archbiſhops or biſhops. Their juriſdiction is competent in eccleſiaſtical caſes, and their proceedings are conformable to the laws and cuſtoms of the land, according to the teſtimony of the learned judge *Blackſtone*[*] (whoſe works are as entertaining as they are inſtructive), who ſays, 'It muſt be acknowledged, to the honour of the ſpiritual courts, that though they continue to this day to decide many queſtions which are properly of temporal cognizance, yet juſtice is in general ſo ably and impartially adminiſtered in thoſe tribunals (eſpecially of the ſuperior kind), and the boundaries of their power are now ſo well known and eſtabliſhed, that no material inconvenience at preſent ariſes from their juriſdiction. And ſhould an alteration be attempted, great confuſion would probably ariſe, in overturning long eſtabliſhed forms, new modelling a courſe of proceedings that has now prevailed for ſeven centuries.'—And I muſt here preſume to add, as founded on truth, that that court (of whioh his majeſty is the head) cannot be ſtopped by any authority whatſoever, while they act in their own juriſdiction.——Lord Chief Juſtice *Hale* ſays, 'Where there has been a ſentence of divorce (which is a criminal caſe), if that ſentence is ſuſpended by an appeal to the court of *Arches* (as a ſuperior court), and while that appeal is depending one of the parties marries again, the ſentence will be a juſtification within the exception of the act of parliament, notwithſtanding that the ſentence has been appealed from, and conſequently may be reverſed by a ſuperior court.' And, my lords, how much more reaſon is there for its coming within the exception of the act in my caſe, ſince no appeal had been made?

My lords, I earneſtly look up to your lordſhips for protection, as being now a ſufferer for having given credit to the Eccleſiaſtical Court. I reſpectfully call upon you, my lords, to protect the ſpiritual juriſdiction, and all the benefit of religious laws, and me, an unhappy priſoner, who inſtituted a ſuit of jactitation upon the advice of a learned civilian, who carried on the proſecution, from which I obtained the ſentence that authorized your priſoner's marriage with the moſt noble *Evelyn* duke of *Kingſton*; that ſentence ſolemnly pronounced by *John Betteſworth*, doctor of laws, vicar-general of the right reverend father in God *Richard* by divine permiſſion lord biſhop of *London*, and official principal of the Conſiſtorial Court of *London*: the judge thereof, calling on God, and ſetting him alone before his eyes, and hearing counſel in that cauſe, did pronounce, that your priſoner, then the honourable *Elizabeth Chudleigh*, now *Elizabeth* dowager ducheſs of *Kingſton*, was free from all matrimonial contracts or eſpouſals, as far as to him at that time appeared, more eſpecially with the ſaid right honourable *Auguſtus John Hervey*.

My lords, had this proſecution been ſet on foot merely for the love of juſtice, or good example to the community, why did they not inſtitute their proſecution during the five years your priſoner was received and acknowledged the undoubted and unmoleſted wife of the late duke of *Kingſton*?

My lords, the preamble of the very act on which I am indicted, plainly and intirely precludes your priſoner: it runs thus: 'Foraſmuch as divers evil-diſpoſed perſons, being married, run out of one county into another, or into places where they are not known, and there become to be married, having another wife or huſband living, to the great diſhonour of God, and utter undoing of divers honeſt mens children, and others, *&c.*' And as the preamble has not been conſidered to be ſufficient in my favour to impede the trial, I beg leave to obſerve how much your priſoner ſuffers by being produced before this noble houſe, on the penalty of an act of parliament, without benefiting by the preamble, which is ſuppoſed to contain the whole ſubſtance, extent, and meaning of the act.

My lords, upon your wiſe reſult on my unhappy caſe, you will bear in your willing remembrance, that the orphan and widow is your peculiar care; and that you will be tender of the honour of your late brother peer, and ſee in me his widow and repreſentative, recollecting how eaſy it may be for a next of kin to proſecute the widows or the daughters, not only of every peer, but of every ſubject of *Great-Britain*, if it can be effected by the oath of one ſuperannuated and intereſted old woman, who declared ſeven years ago that ſhe was incapable of giving evidence thereon, as will appear in proof before your lordſhips. And I may further obſerve to your lordſhips, that my caſe is clearly within the proviſo of the ſtatute on which I am indicted. In the third clauſe, it is 'provided that this act ſhall not extend to any perſon, where the former marriage hath been, or hereafter ſhall be, declared by ſentence of the Eccleſiaſtical Court to be void, and of no effect.'

If there is ſuppoſed to have been a former marriage, the ſame muſt have been a true marriage, or a falſe one. If a true one, it cannot be declared void; and if a falſe one, or the ſemblance of one only, then only, and no otherwiſe, is it that it can be declared void.——Therefore muſt this proviſo have reſpect to pretended marriages only, and to none other: and ſuch only it is, that can be the objects of cauſes of jactitation, the ſentence in which is a more effectual divorce and ſeparation of the parties, than many divorces which have been determined to fall within this proviſo ——The crime charged in the indictment was not a felony, or even a temporal offence, until the act of *James* the firſt: till then, it was only cognizable in the Eccleſiaſtical Court; and though an indictment could lie for a ſlight blow, yet the common law did not allow of a criminal proſecution for polygamy until that period: ſo that if the caſe comes within the exception of the only ſtatute upon that ſubject, it is no offence at all; and Dr. *Sherlock*, biſhop of *London*, has ſaid, in ſuch caſes the law of the land is the law of God.

My lords, I have obſerved, that I had greatly ſuffered in fame and fortune by the reports of Mr. *Hervey*; and I beg leave to mention in what manner. Your priſoner was at that time poſſeſſed of a ſmall eſtate in the county of *Devon*, where ſir *George Chudleigh*, her father's eldeſt brother, had large poſſeſſions. The purchaſe of that eſtate was much ſolicited in that county; and having frequent opportunities to diſpoſe of it, it was ever made an inſuperable objection by the intended purchaſer, that I could not make a clear title to the eſtate on account of Mr. *Hervey*'s claim to your priſoner as his wife.

And your priſoner being alſo poſſeſſed of building lands for a great number of years, for the ſame reaſons ſhe never had the ground covered (valued at 1,200*l. per annum*). And as your priſoner's health declined, and made it neceſſary for her to ſeek relief in foreign climes (which increaſed her expences beyond what her circumſtances could ſupport), and her little fortune daily decreaſed by money taken up on mortgage and bond, as will appear by the evidence of Mr. *Drummond*; her royal miſtreſs likewiſe in the decline of life, whoſe death would probably have deprived her of 400*l.* a-year; the perſecutions threatened on Mr. *Hervey*'s ſide preſented but a gloomy proſpect for her declining life; your priſoner was induced, as ſhe before obſerved to your lordſhips, to follow the advice of Dr. *Collier*, and inſtituted the ſuit of jactitation, your priſoner ſubſcribing entirely to his opinion, and following his advice and inſtructions, which ſhe preſumes alone is a full defence againſt the charge of felony; for your lordſhips in your great candour cannot think, that a lady can know more of the civil law, than her learned civilians could point out to her.

And as a criminal and felonious intent is neceſſary to conſtitute the offence with which I ſtand charged, certainly I cannot be guilty in following the advice I received, and in doing what in my conſcience I thought an authorized and innocent act.

My lords, though I am aware, that any perſon can proſecute for the crown for an offence againſt an act of parliament, yet I will venture to ſay, that few inſtances, if any, have been carried into execution without the conſent of the party injured: and with great deference to your lordſhips judgment I venture to declare, that in the preſent caſe no perſon whatever has been injured, unleſs your lordſhips candour will permit me to ſay that I am injured, being now the object of the undeſerved reſentment of my enemies. It is plain to all the world, that his grace the duke of *Kingſton* did not think himſelf injured, when in the ſhort ſpace of five years his grace made three wills, each ſucceeding one more favourable to your priſoner than the other, giving the moſt generous and inconteſtable proof of his affection and ſolicitude for my comfort and dignity. And it is more than probable, my lords, from the well-known mutual friendſhip ſubſiſting between us, that had I been intereſted, I might have obtained the bulk of his fortune for my own family. But I reſpected his honour, I loved his virtues, and had rather have forfeited my life than have uſed any undue influence to injure the family. And though it has been induſtriouſly and cruelly circulated, with a view to prejudice me, that the firſt-born of the late duke's ſiſter was deprived of the ſucceſſion to his grace's fortune by my influence, the wills, my lords, made in three diſtant periods, each excluding him, demonſtrate the calumny of theſe reports.

I muſt further obſerve to your lordſhips, in oppoſition to the charge againſt me of intereſtedneſs, that had I poſſeſſed or exerciſed that undue influence with which I am charged by the proſecutor, I might have obtained more than a life-intereſt in the duke's fortune. And though from the affection I bear to the memory of my late much-honoured huſband, I have forborne to mention the reaſon of his diſinheriting his eldeſt nephew, yet *Charles*, the ſecond ſon, with his heirs, appear immediately after me in ſucceſſion; *William* and his heirs follow next; after him *Edward* and his heirs; and the unfortunate *Thomas*, lady *Frances*'s youngeſt ſon, is not excluded, though labouring under the infirmities of childhood at the age of manhood, and not able to ſupport himſelf. For the late noble duke of *Kingſton* repeatedly mentioned to your priſoner, 'I have not excluded him, for he has never offended; and who can ſay God cannot reſtore him? Who can ſay that God will not reſtore him to health?' My lords, that good man did honour to the peerage, honour to his country, honour to human nature.

His grace the moſt noble duke of *Newcaſtle* appeared with the will, which had been intruſted to his grace for four years by his late dear friend. In honour to the lady *Frances Meadows*, the proſecutor was requeſted to attend at the opening of the will. He retired with diſpleaſure, diſappointed that his eldeſt ſon was diſinherited, and unthankful, though the duke's fortune ſtill centered in his four youngeſt ſons and their poſterity.

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[*] Vol. III. chap. vii. p. 98.

My lords, worn down by ſorrow, and in a wretched ſtate of health, I quitted *England* without a wiſh for that life which I was obliged by the laws of God and nature to endeavour to preſerve; for your priſoner can with great truth ſay, that ſorrow had bent her mind to a perfect reſignation to the will of Providence. And, my lords, while your unhappy priſoner was endeavouring to re-eſtabliſh her greatly-impaired health abroad, my proſecutor filed a bill in *Chancery* upon the moſt unjuſt and diſhonourable motives. Your priſoner does not complain of his endeavouring to eſtabliſh a right to himſelf; but ſhe does complain of his forming a plea on diſhonourable and unjuſt opinions of his late noble relation and generous benefactor, to the prejudice and diſcredit of his much-afflicted widow: and not ſatisfied with this proſecution, as a bulwark for his ſuit in *Chancery*, he cruelly inſtituted a criminal proſecution, in hopes, by a conviction in a criminal cauſe, to eſtabliſh a civil claim; a proceeding diſcountenanced by the opinion of the late lord *Northington.*

My lords, I have heretoſore forborne, from the great love and affection to my late noble lord, to mention what were the real motives that induced his grace to diſinherit his eldeſt nephew; and when my plea and anſwer in *Chancery* were to be argued, I particularly requeſted of the counſel to abſtain from any reflections upon my adverſaries, which the nature of their proſecutions too much deſerved; and grieved I am now, that I muſt no longer conceal them. For as ſelf-preſervation is the firſt law of nature, and as I am more and more perſecuted in my fortune and my fame, and my enemies hand about pocket-evidence to injure me in every company, and with double tongues they ſting me to the heart, I am reduced to the ſad neceſſity of ſaying, that the late duke of *Kingſton* was made acquainted with the fatal cruelty with which Mr. *Evelyn Meadows* treated an unfortunate lady, who was as amiable as ſhe was virtuous and beautiful; to cover which offence, he moſt ungratefully and falſely declared, that he broke his engagements with her for fear of diſobliging the duke, which he has often been heard to ſay. This, with his cruelty to his ſiſter and mother, and an attempt to quit actual ſervice in the late war, highly offended the duke; and it would be difficult for him, or his father, to boaſt of the leaſt friendly intercourſe with his grace for upwards of eighteen years.

My lords, in a dangerous ſtate of health, when my life was deſpaired of, I received a letter from my ſolicitor, acquainting me, that if I did not return to *England* to put in an anſwer to the bill in *Chancery* within twenty-one days, I ſhould have receivers put into my eſtates; and alſo, that if in contempt of the indictment I did not return, I ſhould be outlawed. It clearly appeared to me, my lords, as I make no doubt it does to your lordſhips, that if in the inclemency of the weather I riſqued to paſs the *Alps*, my life would probably be endangered, and the family would immediately enter into poſſeſſion of the real eſtates, and if female fears ſhould prevail, that I ſhould be outlawed. Thus was I to be deprived of life and fortune under colour of law. And that I might not return to theſe perſecuting ſummonſes, by ſome undue and cruel proceedings my credit was ſtopped by my banker for £.4,000, when there remained an open account of £.75,000, and at that inſtant upwards of £.6,000 was in his hands, my revenues being conſtantly paid into his ſhop to my credit. Thus was I commanded to return home at the manifeſt riſque of my life, and at the ſame time every art uſed to deprive me of the means of returning for my juſtification. Conſcious of the perfect innocence of my intention, and convinced that the laws of this country could not be ſo inconſiſtent as to authorize an act, and then defame and degrade me for having obeyed it, I left *Italy* at the hazard of my life. It was not for property I returned, but to prove myſelf an honourable woman. Grant me, my lords, but your good opinion, and that I ſtand juſtified in the innocence of my intention, and you can deprive me of nothing that I value, even if you ſhould take from me all my worldly poſſeſſions; for I have reſted on that ſeat where the poor blind *Beliſarius* is ſaid to have aſked charity of every paſſenger, after having conquered the *Goths* and *Vandals*, *Africans* and *Perſians*; and would do the ſame without murmuring, if you would pronounce me, what I hope your lordſhips will cheatfully ſubſcribe to—that I am an honourable woman.

My lords, your late brother, the truly honourable duke of *Kingſton*, whoſe life was adorned by every virtue and every grace, does not his moſt reſpectable character plead my cauſe and prove my innocence?

My lords, the evidence of the fact of a ſuppoſed clandeſtine marriage with Mr. *Hervey* depends entirely upon the teſtimony of *Ann Cradock.*

I am perſuaded your lordſhips, from the manner in which ſhe gave her evidence, already entertain great ſuſpicions of the veracity of her teſtimony. She pretends to ſpeak to a marriage ceremony being performed, at which ſhe was not aſked to be preſent, nor can ſhe aſſign any reaſon for her being there.—She relates a conduct in Mrs. *Hanmer*, who ſhe pretends was preſent at the ceremony, inconſiſtent with a real marriage. She acknowledges that ſhe was in or about *London* during the jactitation ſuit, and that Mr. *Hervey* applied to her on that occaſion; and ſwears that ſhe then and ever had a perfect remembrance of the marriage, and was ready to have proved it, had ſhe been called upon, and never declared to any perſon that ſhe had not a perfect memory of the marriage, and that ſhe never was deſired either to give or with-hold her evidence; and from Mr. *Hervey*'s not calling on this woman, it is inſinuated he abſtained from the proof by colluſion with me. She alſo ſwears, that I offered to make her an allowance of twenty guineas a-year, provided ſhe would reſide in either of the three counties ſhe has mentioned, but acknowledges ſhe has received no allowance from me. Can your lordſhips believe, that if I could have been weak enough to have inſtituted the ſuit, with a conviction in my own mind of a real lawful marriage between Mr. *Hervey* and myſelf, that I would not, at any expence, have taken care to have put that woman out of the way? But, my lords, I truſt that your lordſhips will be perfectly ſatisfied, that great part of the evidence of this woman is made for the purpoſe of the proſecution. Though ſhe has denied ſhe has any expectation from the event, or ever declared ſo, yet it will be proved to your lordſhips, that her future proviſion (as ſhe has declared) depends upon it: and notwithſtanding ſhe has now brought herſelf up to ſwear that ſhe heard the ceremony of marriage performed, yet it will be proved that ſhe has declared ſhe did not hear it. And it will be further proved to your lordſhips, that Mr. *Hervey* was extremely ſolicitous to have eſtabliſhed a legal marriage with me for the purpoſe mentioned by Mr. *Hawkins*, and that this woman was actually applied to, and declared to Mr. *Hervey*'s ſolicitor, that her memory was impaired, and that ſhe had not any recollection of it, which was the reaſon why ſhe was not called as a witneſs.

My lords, if ſhe is thus contradicted in theſe particulars, and appears under the influence of expectations from this event of the proſecution, your lordſhips will not credit her evidence, that the complete ceremony of marriage was performed, or any other particulars which reſt upon her evidence.

My lords, with reſpect to what your lordſhips have heard from the witneſſes, of my deſire at times to be conſidered as the wife of Mr. *Hervey*, your lordſhips in your candour will naturally account for that circumſtance, after the unfortunate connection that had ſubſiſted between us.

My lords, I call God Almighty, the ſearcher of hearts, to witneſs, that at the time of my marriage with the duke of *Kingſton*, I had, myſelf, the moſt perfect conviction that it was lawful. That noble duke, to whom every paſſage of my life had been diſcloſed, and whoſe affection for me, as well as regard for his own honour, would never have ſuffered him to have married me, had he not as well as myſelf received the moſt ſolemn aſſurances from doctor *Collier*, that the ſentence, which had been pronounced in the Eccleſiaſtical Court, was abſolutely final and concluſive, and that I was perfectly at liberty to marry any another perſon. If therefore I have offended againſt the letter of the act, I have ſo offended without criminal intention. Where ſuch intention does not exiſt, your lordſhips juſtice and humanity will tell you there can be no crime; and your lordſhips, looking on my diſtreſſed ſituation with an indulgent eye, will pity me as an unfortunate woman, deceived and miſled by erroneous notions of law, of the propriety of which it was impoſſible for me to judge.

My lords, before I take my leave, permit me to expreſs my warm and grateful ſenſe of the candour and indulgence of your lordſhips, which have given me the firmeſt confidence that I ſhall not be deemed criminal by your lordſhips for an act, in which I had not the leaſt ſuſpicion that there was any thing illegal or immoral.

My lords, I have loſt, or miſlaid, a paper, where I had put together my ideas to preſent to your lordſhips. The purport was to tell your lordſhips, that my advocate doctor *Collier*, who inſtituted this ſuit of jactitation, is now in a dangerous ſtate of health. He has had two phyſicians to attend him, by my order, yeſterday, to inſiſt and order his attendance to acquaint your lordſhips, that I acted entirely under his directions; that it was by his advice I married his grace the duke of *Kingſton*, aſſuring me that it was lawful; that he had the honour of going to his grace the archbiſhop of *Canterbury* to obtain a licence, and to explain every part that regarded the cauſe; that his grace was ſo juſt, ſo pious, and ſo good, as to take time to conſider whether he would grant us a ſpecial licence for the marriage. After mature conſideration and conſultation with great and honourable perſons in the law, he returned the licence to doctor *Collier*, with full permiſſion for our marriage. Doctor *Collier* was preſent at the marriage; doctor *Collier* ſigned the regiſter of St. *George*'s church. Mr. *La Roche* has frequently attended the duke of *Kingſton* to doctor *Collier*, where he heard him conſult the doctor if the marriage would be lawful: he ſaid it would, and never could be controverted.

Under theſe circumſtances, I wiſhed to bring my advocate forth to protect me. He, my lords, is willing to make an affidavit, to be examined by the enemy's counſel, to ſubmit to any thing that your lordſhips can command, willing to juſtify his conduct; but he has had the misfortune, my lords, ever ſince the latter end of *Auguſt*, or the firſt week in *September*, I do not well remember which, never to have been in bed. I apprehended, from ſeeing him yeſterday, with your lordſhips indulgence, that he had the ſaint *Anthony*'s fire: but my phyſicians, who have been with him, can give a better account, if you will permit them, of the ſtate of his health, that your lordſhips may not imagine that he keeps back, or that I am afraid to produce him. If it is not to avail me in law, I aſk no favour: but I petition your lordſhips, and would upon my knees, that you will hear the evidence that he will give to the juſtification of my honour, though it does not avail me in law.

My lords, I do requeſt that doctor *Collier* may be examined in the ſtricteſt manner, and by every enemy that I have in the world. My phyſicians ſaw him laſt night; and they can, previous to his examination, inform your lordſhips in what ſtate they apprehend him to be.

Lord *Ravenſworth.* After what I have juſt heard from the priſoner at the bar, it is impoſſible not to feel equally with the reſt of your lordſhips: and, my lords, what came laſt from the priſoner at the bar I own ſtrikes me with the neceſſity of permiſſion being given, if it could be done, to have doctor *Collier* examined.

Lord *Camden.* I am really, my lords, at ſome loſs to know, upon what ground it is your lordſhips ſtand at this moment with reſpect to the evidence of doctor *Collier*. I do not underſtand yet, that doctor *Collier* is called by the priſoner or by her counſel. I do not yet underſtand, that in conſideration of the infirm ſtate of his health, the priſoner or her counſel do require from your lordſhips any ſpecific particular mode of examination, by which your lordſhips might be appriſed of the ſubſtance of his evidence. I underſtand neither of theſe things to be moved to your lordſhips: if they were, matter of debate on either one or the other might probably ariſe; and then this is not the place for your lordſhips to enter into a conſideration of it. With regard to the caſe itſelf, which the noble priſoner has made for one of her moſt material witneſſes, it is undoubtedly ſuch as would touch your lordſhips with a proper degree of compaſſion, as far as the juſtice of the court can go, and your feelings are able to indulge; beyond that it is impoſſible, let your lordſhips deſire be what it may: for you to tranſgreſs the law of the land, or to go beyond the rules preſcribed by thoſe laws, is impoſſible. A witneſs ſo infirm that he is totally incapable of attendance! Your lordſhips, if you are to loſe his evidence, will lament the want of it: juſtice cannot be ſo perfect and complete without the examination of a neceſſary and material witneſs, as if you had it. But if a greater evil than that ſhould happen (and it has frequently happened in the courſe of cauſes), which is death itſelf, which ſhuts up the mouth in everlaſting ſilence, if this ſhould arreſt the witneſs before he could be produced, his evidence is loſt for ever. If this witneſs ſhould by his infirmity be totally unable to attend whilſt this cauſe laſts, I am ſorry to ſay your lordſhips muſt go on without him; it is impoſſible to wait until that witneſs can be produced. While the cauſe laſts (and your lordſhips will precipitate nothing in the courſe of juſtice) if he can be brought, you will make every accommodation to receive him, you will take every means in your power to make the attendance ſafe and convenient for him, you will receive him in any part of the cauſe, even at the laſt moment before it is concluded. So far your lordſhips may go; beyond that, I doubt, you cannot. But, my lords, I have now been ſpeaking without a queſtion, without a motion, without any thing demanded of your lordſhips by the priſoner or by her counſel.

Lord *Ravenſworth.* I would beg leave to put it to thoſe noble lords who ſit upon the bench, whether there ever was an inſtance in a criminal cauſe of a witneſs being examined otherwiſe than in open court?

Lord *Camden.* The noble lord is pleaſed to put a queſtion particularly pointed to ſuch of your lordſhips as have been educated in the profeſſion of the law, to know 'whether any inſtance can be produced where a witneſs, 'not attending at your bar to be examined *viva voce*, has been permitted 'by commiſſion, by delegation, or any other manner whatever, to give his 'evidence out of court, ſo that that evidence, ſo given out of court, 'might be reported into the court, and ſtand as evidence on the trial?' I preſume that is the point, in which the noble lord deſires to know if any precedent can be produced. When that queſtion is aſked, and the anſwer is to be a negative, your lordſhips eaſily conceive how much the modeſty of the anſwerer is to be affected, if he gives a full, a poſitive, and a round negative to that queſtion. I therefore beg to be underſtood as confining the anſwer to my own knowledge. Within the courſe of my own practice and experience, I never did know of ſuch an inſtance; I never have, to the beſt of my memory, read of ſuch an inſtance; I never heard of ſuch an inſtance: I ſpeak in the preſence of thoſe who are better verſed in this kind of knowledge than myſelf; I ſpeak before the law of the land, which is now upon your lordſhips wool-ſacks. My lords, if any ſuch caſe occurs to them, it will be eaſy for your lordſhips to apply to them; I know of no ſuch; and if I might add briefly one word on the ſubject, I hope I ſhall never ſee ſuch an inſtance ſo long as I live in this world. What, my lords! to give up, and to part with, that noble privilege in the mode of open trial, of examinations of witneſſes *viva voce* at your bar, with a croſs examination to confront them in the eye of the world, and to transfer that to a private chamber on a few written interrogatories! I go too far in arguing the point: I never knew an inſtance. I am in the judgment of the houſe, and of the learned judges that hear me; if there ever was an inſtance, let it be produced, and in God's name let juſtice be done.

The lords then proceeded to hear the witneſſes.

Lord High Steward. Mr. *Wallace*, you may proceed to call your witneſſes.

Mr. *Wallace.* The firſt witneſs I would call is

Mr. BERKLEY, *who was ſworn in like manner.*

Mr. *Berkley.* My lords, what knowledge I had of this buſineſs aroſe from my being attorney to lord *Briſtol*; and I muſt leave it to your lordſhips, whether I ought to be examined as being attorney for lord *Briſtol*, conſiſtent with honour to myſelf and the duty I owe to him.

Mr. *Wallace.* I know the delicacy of the ſituation of an attorney: I merely call Mr. *Berkley* to what paſſed between him and Mrs. *Cradock*, being ſent to get her to attend and prove the marriage.

Lord *Manſfield.* With regard to the demurrer put in by Mr. *Berkley* to the queſtion that is aſked him, when they make him a witneſs, they ſubject him to croſs examinations; but the point is, whether he, as being concerned as ſolicitor for my lord *Briſtol*, can demur to the queſtion put to him to know, what this woman ſaid when he went to deſire her to come to give evidence? And as to that, there ſeems to be no colour to the demurrer; for the protection of attorneys is as to what is revealed to them by their client, in order to take their advice or inſtruction with regard to their defence. This is no ſecret of the client, but is to a collateral fact, what a party ſaid to him upon ſuch an application; and it has been often determined, that as to fact an attorney or counſel has no privilege to with-hold his evidence, if there is a doubt: even if he ſwears to an anſwer in *Chancery*, he cannot protect himſelf from ſwearing, whether that is his client's hand or not, or to his having ſworn it, or the execution of a deed: it does not come within the objection to an attorney revealing the ſecrets of his client. I ſuppoſe it is only mentioned to your lordſhips for a juſtification. If none of your lordſhips are of a different opinion, it will ſave time, and the witneſs will underſtand it to be the opinion of all your lordſhips.

Mr. *Wallace.* I beg to know, whether you ever made any application to Mrs. *Cradock* relative to her being a witneſs to the marriage?

Mr. *Berkley.* I did.

Mr. *Wallace.* At what time?

Mr. *Berkley.* It was after my lord *Briſtol* was ſerved with a citation to *Doctors Commons.*

Mr. *Wallace.* For what purpoſe did you apply to her?

Mr. *Berkley.* To know, what ſhe knew relative to the marriage between lord *Briſtol* and Miſs *Chudleigh.*

Mr. *Wallace.* What anſwer did Mrs. *Cradock* give to that?

Mr. *Berkley.* My lord *Briſtol* was preſent. She ſaid ſhe was very old, very infirm, and the tranſaction happened many years ago, and ſhe could not at that diſtance of time remember any thing of the matter: upon which my lord *Briſtol* ſeemed vaſtly ſurprized, and ſaid, How can you ſay ſo? or to that effect.

Mr. *Wallace.* Did ſhe perſiſt in not remembering any thing of the tranſaction?

Mr. *Berkley.* She did, and ſaid ſhe remembered nothing of the matter; and that was the only time I ever ſaw her.

Mr. *Wallace.* My lords, I ſhall aſk Mr. *Berkley* no more queſtions.

Mr. *Attorney General.* Was you ſent to her as a perſon that was preſent at the marriage?

Mr. *Berkley.* I was employed in order to collect evidence from different people, whom my lord *Briſtol* directed me to go to, and other people, with reſpect to the marriage, as his lordſhip wanted to have a divorce; and in that way I ſaw Mrs. *Cradock.*

Mr. *Attorney General.* Did lord *Briſtol* explain his want of a divorce at the time he ſent you to the witneſs?

Mr. *Berkley.* The direction I had from my lord was in *May* 1768.

Mr. *Attorney General.* Was it at that time that my lord *Briſtol* told you he wanted a divorce?

Mr. *Berkley.* It was.

Mr. *Attorney General.* What you have ſaid was after the citation?

Mr. *Berkley.* When I ſaw the witneſs, as well as I remember, it was after the citation.

Mr. *Attorney General.* Did lord *Briſtol* deſcribe the witneſs to you as preſent at the marriage?

Mr. *Berkley.* He did. My lord ſaid, that ſhe could prove the marriage.

Mr. *Attorney General.* When lord *Briſtol* expreſſed himſelf ſurprized at that diſappointment, did he then expreſs to you, that ſhe was one of thoſe preſent at the marriage?

Mr. *Berkley.* I do not know that my lord did.

Mr. *Attorney General.* Was ſhe never repreſented to you as a perſon preſent at the marriage?

Mr. *Berkley.* I underſtood, as ſhe was repreſented to me, that ſhe was preſent at the marriage.

Mr. *Attorney General.* Was her huſband, Mr. *Cradock*, ever repreſented as being preſent at that marriage?

Mr. *Berkley.* Mr. *Cradock* has often told me, that he was not.

Mr. *Attorney General.* The queſtion that I mean to put upon that is, why was the huſband called who was not preſent at the marriage, and the wife not called who was repreſented to be preſent at the marriage?

Mr. *Berkley.* I know nothing of that; it went out of my hands afterwards to *Doctors Commons.*

Mr. *Attorney General.* Did you decline that part of the buſineſs in reſpect to *Doctors Commons?*

Mr. *Berkley.* I apprehend, I could not act there.

Mr. *Wallace.* Are you an attorney or a proctor?

Mr. *Berkley.* An attorney, not a proctor.

Ordered to withdraw.

Mr. *Manſfield.* My lords, we are now going to call Mrs. *Ann Pritchard* to contradict part of the evidence of *Ann Cradock.* We beg the clerk may read the part alluded to.

> *The clerk of the parliament was ordered to read that part of the evidence; but not having taken it down, Mr.* Gurney *was ordered to produce his notes. When they were produced, the part alluded to could not be found; and*

Mr. *Manſfield* addreſſed himſelf to the lords thus: This witneſs, *Ann Pritchard*, is called to contradict Mrs. *Cradock.* In the firſt place, to prove that ſhe has told this Mrs. *Pritchard*, that ſhe had ſome expectations of advantage from this proſecution; and likewiſe, that ſhe did tell this witneſs, that ſhe did not hear any part of the ceremony read at the time when ſhe ſaid the lady at the bar and lord *Briſtol* were married, though ſhe has repeatedly told your lordſhips that ſhe had no view of advantage from this cauſe, and that ſhe had heard the whole of the ceremony read.

ANN PRITCHARD, *who was ſworn in like manner.*

Mr. *Manſfield.* Do you know Mrs. *Cradock?*

Ann Pritchard. Yes.

Mr. *Manſfield.* Have you ever had any converſation with Mrs. *Cradock* concerning the reading the marriage ceremony between the lady at the bar and lord *Briſtol?*

Ann Pritchard. No, I never had.

Mr. *Manſfield.* Did you ever hear Mrs. *Cradock* ſay any thing concerning that ceremony, or her having heard it, or not heard it?

Ann Pritchard. Never, before ſhe was examined.

Mr. *Manſfield.* What do you mean, before ſhe was examined?

Ann Pritchard. Before a maſter in *Chancery.*

Mr. *Manſfield.* When was that?

Ann Pritchard. I cannot particularly ſay the time; it was about a month after I was examined, to the beſt of my knowledge.

Mr. *Manſfield.* When was you examined?

Ann Pritchard. I cannot particularly ſay the time when ſhe was examined.

Mr. *Manſfield.* Can you recollect how many months ago?

Ann Pritchard. I cannot indeed; it might be a year and an half ago.

Mr. *Manſfield.* What did Mrs. *Cradock* ſay to you in that converſation, which ſhe had with you, about her having heard or not having heard the marriage ceremony?

Ann Pritchard. She related her examination before the maſter in *Chancery* concerning her grace's marriage.

Mr. *Mansfield.* In that converſation, did Mrs. *Cradock* ſay whether ſhe had or had not heard the marriage ceremony read?

Ann Pritchard. I never heard her relate any thing concerning the marriage ceremony. I underſtand the queſtion now: I did not before. She told me, ſhe did not hear the marriage ceremony.

Lord High Steward. Let the laſt queſtion be aſked over again.

Mr. *Mansfield.* Whether Mrs. *Cradock* did or did not ſay to you, Mrs. *Pritchard*, that ſhe did or did not hear the marriage ceremony read?

Ann Pritchard. She told me, ſhe did not hear the marriage ceremony read.

Mr. *Mansfield.* Had you any converſation with Mrs. *Cradock* about any advantage which ſhe expected from this proſecution?

Ann Pritchard. I had.

Mr. *Mansfield.* What did Mrs. *Cradock* ſay to you in that converſation?

Ann Pritchard. She told me ſhe was to be provided for, but in what manner ſhe could not ſay, till after the affair was over, leſt it ſhould be deemed bribery.

Mr. *Mansfield.* Did you hear any thing more ſaid by Mrs. *Cradock* relating to that ſubject?

Ann Pritchard. Not at that time, but at another time I have.

Mr. *Mansfield.* What did you hear from her at the other time?

Ann Pritchard. I gave her an invitation to come to ſee me. She told me, it would not ſuit her until this affair was over; and then if ſhe ſhould get a good fortune, ſhe might come and live with me.

Mr. *Mansfield.* Did you hear from Mrs. *Cradock* any thing ſaid of any particular proviſion to be made for her, or any place to be got?

Ann Pritchard. Her brother applied to my huſband at the *Cuſtom-Houſe*, deſiring him in caſe he heard of a vacancy to let him know.

Mr. *Attorney General.* This is not evidence in the queſtion now propoſed. I know nothing of what will be brought; but this is not evidence.

Mr. *Mansfield.* Nothing that paſſes, unleſs it comes home to Mrs. *Cradock*, will be evidence, to be ſure. The witneſs muſt relate it in her own manner.

Mr. *Attorney General.* I object to the witneſs relating either in her own or in any other manner whatever, a converſation to which Mrs. *Cradock* is not a party.

Mr. *Mansfield.* It is under an apprehenſion that it will come to Mrs. *Cradock*, or it would not be aſked.

Mr. *Mansfield.* Did you tell to Mrs. *Cradock* what you heard from her huſband?

Ann Pritchard. I told her myſelf, that her brother had been at the *Cuſtom-Houſe* to deſire my huſband, when there was a vacancy in the houſe, to let him know of it, as Mr. *Meadows* had promiſed to get him a place.

Mr. *Mansfield.* What did Mrs. *Cradock* ſay to you upon your telling her this?

Ann Pritchard. She had never heard any thing about it.

Mr. *Mansfield.* Did Mrs. *Cradock* ſay any thing more to you about this place?

Ann Pritchard. Her anſwer was, it was more than ſhe knew, but that it would be equally the ſame.

Mr. *Mansfield.* What was meant by being equally the ſame?

Ann Pritchard. She thought her brother was to provide for her out of it, or at leaſt allow her ſomething.

Mr. *Attorney General.* How long have you been acquainted with Mrs. *Cradock?*

Ann Pritchard. Five years.

Mr. *Attorney General.* How long with the priſoner?

Ann Pritchard. From the 2d of *February* laſt.

Mr. *Attorney General.* I wiſh to know whether any body was preſent at any of the converſations which you had with Mrs. *Cradock*, but yourſelf?

Ann Pritchard. No.

Mr. *Attorney General.* I wiſh you would tell where they were?

Ann Pritchard. Once at my own houſe at *Mile-End.*

Mr. *Attorney-General.* At what time was that converſation held at your houſe at *Mile-End?*

Ann Pritchard. It was on a *Sunday*, but I cannot particularly tell the month.

Mr. *Attorney-General.* How long ago was that *Sunday?*

Ann Pritchard. It was a very little time after ſhe had been ſubpœnaed.

Mr. *Attorney-General.* Do you know if it was a week, or more time, or leſs, after ſhe had been ſubpœnaed?

Ann Pritchard. It might be more than a week, I cannot tell particularly.

Mr. *Attorney-General.* What reaſon have you to know, that it was within ſome ſhort time after ſhe had been ſubpœnaed?

Ann Pritchard. As we were very intimate acquaintances, ſhe came to dine with me. She told me, ſhe longed to tell me what had happened ſince the laſt time ſhe ſaw me.

Mr. *Attorney-General.* But how long was that laſt time ſhe ſaw you before that laſt time that ſhe came to you again?

Ann Pritchard. I cannot particularly ſay.

Mr. *Attorney-General.* As near as you can go; was it a fortnight?

Ann Pritchard. It might be a quarter of a year.

Mr. *Attorney-General.* Have you any means of recollecting within a week or a fortnight of the time of her having been examined upon the ſubpœna?

Ann Pritchard. I cannot poſſibly recollect, as not expecting ever to be called upon.

Mr. *Attorney-General.* Does your intimacy continue with Mrs. *Cradock?*

Ann Pritchard. It always did, until ſhe has been confined at Mr. *Beauwater*'s.

Mr. *Attorney-General.* Did you ever mention this converſation to Mrs. *Cradock*, ſince the time it happened?

Ann Pritchard. No, never.

Mr. *Attorney-General.* Will you give an account to their lordſhips of the whole converſation which Mrs. *Cradock* held upon the ſubject of that marriage; whether ſhe told you the whole ſtory of the marriage?

Ann Pritchard. She told me a great deal of it. I do not know the particulars.

Mr. *Attorney-General.* It is important, that you ſhould recollect as many particulars as you can, that Mrs. *Cradock* told you of that marriage. What particulars did Mrs. *Cradock* tell you of that marriage?

Ann Pritchard. She told me that ſhe had been examined by a maſter in *Chancery*, who aſked her if ſhe knew of the marriage between *Auguſtus John Hervey* and Miſs *Chudleigh?* They aſked her if ſhe was in the church? She anſwered, ſhe was. They aſked her who was in the church? She told them, herſelf, Mr. *Merrill* and Mrs. *Hanmer.* They aſked her, if ſhe heard the ceremony? She told him, ſhe did not. That was all the particulars I heard her relate.

Mr. *Attorney-General.* Had not you the curioſity yourſelf to enquire after ſome more particulars?

Ann Pritchard. I had not.

Mr. *Attorney-General.* Did ſhe ever tell you at what time of night it was?

Ann Pritchard. Never.

Mr. *Attorney-General.* Was any body preſent at the converſation about the reward that the witneſs expected?

Ann Pritchard. No.

Mr. *Attorney-General.* At what time was that converſation had?

Ann Pritchard. It was after dinner, it might be at two o'clock on the *Sunday*; it was ſummer-time I know, but I cannot particularly ſay the month.

Mr. *Attorney-General.* Was it the ſame *Sunday* that the former converſation paſſed?

Ann Pritchard. No.

Mr. *Attorney-General.* Whether, when the witneſs propoſed, on her having a great fortune coming to her, that ſhe ſhould live with Mrs. *Cradock*, or Mrs. *Cradock* live with her?

Ann Pritchard. Mrs. *Cradock* live with me.

Mr. *Attorney-General.* What are you?

Ann Pritchard. In a very creditable ſituation, and a pretty fortune. I live at *Mile-End.*

Mr. *Attorney-General.* Do you carry on any buſineſs at *Mile-End?*

Ann Pritchard. No.

Mr. *Attorney-General.* Are you married?

Ann Pritchard. Yes.

Mr. *Attorney-General.* Has your huſband any buſineſs?

Ann Pritchard. Yes; a place in the *Cuſtom-Houſe.*

Lord *Groſvenor.* What do you mean by Mrs. *Cradock*'s being confined at Mr. *Beauwater*'s?

Ann Pritchard. I went to enquire for her: I was not permitted to ſee her.

Lord *Denbigh.* I beg to know upon what account you ſaw the priſoner in *February* laſt?

Ann Pritchard. By an invitation to her houſe-keeper.

Lord *Denbigh.* Did you ſee the priſoner herſelf at that time?

Ann Pritchard. I did.

Lord *Denbigh.* What paſſed between you and the priſoner?

Ann Pritchard. I cannot particularly relate it; nothing material.

Lord *Denbigh.* Did nothing paſs relative to this trial?

Ann Pritchard. Nothing.

Lord *Denbigh.* Did nothing paſs relative to the converſations between you and Mrs. *Cradock?*

Ann Pritchard. I do not recollect there was.

Lord *Weymouth.* I think the witneſs has ſaid, that Mrs. *Cradock* told her that ſhe did not hear the ceremony read, and Mrs. *Cradock* has likewiſe told your lordſhips, that ſhe was preſent when the ceremony was read: I ſhould be glad to aſk whether Mrs. *Cradock* gave any reaſon for not having heard the ceremony? whether, that ſhe was at a diſtance in the church, or the clergyman did not ſpeak loud enough?

Ann Pritchard. She was at too great a diſtance in the church.

Duke of *Richmond.* Did Mrs. *Cradock* tell you, that ſhe had in her examination before the maſter in *Chancery* ſaid, that ſhe did not hear the ceremony read?

Ann Pritchard. She told me, ſhe did.

A Lord. The counſel may produce that examination.

Lord *Camden.* I have been aſking the ſame queſtion, conceiving it would give light to your lordſhips, if it could be produced. I find that it is an examination *de bene eſſe.* Publication is not made, and the examinations are ſealed up.

Ordered to withdraw.

Mr. *Wallace.* My lords, I ſhall call witneſſes now to prove the conſultation of Dr. *Collier*; and I ſhall follow that, my lords, with a proof of what advice he gave to the noble lady at the bar and the duke of *Kingſton* in the preſence of a witneſs I have to produce. My lords, we have ſent, but find there is no poſſibility of bringing Dr. *Collier*, or he ſhould have been here.—We will now call

Dr. WARREN, *who was ſworn in like manner.*

Mr. *Wallace.* I wiſh Dr. *Warren* would inform your lordſhips, whether he has lately ſeen Dr. *Collier.*

Dr. *Warren.* I viſited Dr. *Collier* yeſterday, about eight o'clock in the afternoon, and found him very ill under a variety of complaints, particularly a St. *Anthony*'s fire in his head and face, by which one ſide of it was ſo much ſwelled, that the eye was almoſt cloſed up. It appeared to me that he could not venture out without great hazard.

Mr. *Attorney-General.* I beg Dr. *Warren* may be aſked, whether he thinks Dr. *Collier*'s condition ſuch, that he could not ſtir out without danger?

Dr. *Warren.* I ſaid ſo, my lords.

Mr. *Attorney-General.* What ſort of danger do you mean, when you ſpeak of the danger under which he would come out?

Dr. *Warren.* I think that he is in danger. I cannot ſay that it would certainly kill him, but it would be very imprudent in me to adviſe him to come out.

Ordered to withdraw.

Mr. *Mansfield.* The witneſs now intended to be produced to your lordſhips is Mr. *Laroche.* The purpoſe for which he is to be produced, is to tell your lordſhips, that he ſaw Dr. *Collier* frequently with the lady at the bar and the late duke of *Kingſton*, during the ſuit in the Eccleſiaſtical Court; that he has himſelf heard Dr. *Collier* aſſure both the parties, the late duke of *Kingſton* and the lady at the bar, after that ſentence in the Spiritual Court, that they were perfectly free to marry, and might marry any one they pleaſed.

Mr. LAROCHE, *who was ſworn in like manner.*

Mr. *Laroche.* My lords, I did not know, until within theſe few minutes, that it would be neceſſary to call me. I will endeavour to recollect to the beſt of my knowledge. I have got ſome memorandums in my pocket, and I hope I may be at liberty to refer to them.

Lord High Steward. Are they in your own writing?

Mr. *Laroche.* A copy of it, and it has been in my poſſeſſion ever ſince it was copied.

A Lord. Copied by his deſire?

Mr. *Laroche.* Yes, from my own notes, and in my preſence, and has been in my own cuſtody ever ſince.

Mr. *Mansfield.* Did you know the late duke of *Kingſton?* and do you know Dr. *Collier?*

Mr. *Laroche.* Yes, I both knew his grace the duke of *Kingſton* and Dr. *Collier.*

Mr. *Mansfield.* Was you preſent at the marriage of the lady at the bar and the duke of *Kingſton?*

Mr. *Laroche.* I was.

Mr. *Mansfield.* Was Dr. *Collier* preſent alſo at the marriage?

Mr. *Laroche.* He was.

Mr. *Mansfield.* Do you know, that Dr. *Collier* was conſulted by the lady at the bar and the duke of *Kingſton*, while the ſuit was depending in the Spiritual Court?

Mr. *Laroche.* I do know, that I have frequently walked with his grace the duke of *Kingſton* to *Doctors Commons* in a morning to Dr. *Collier.* I have gone alſo with the ducheſs in her coach, and the duke likewiſe, to Dr. *Collier.*

Mr. *Mansfield.* Has this happened frequently?

Mr. *Laroche.* Many times.

Mr. *Mansfield.* Was you ever preſent with Dr. *Collier* and the duke of *Kingſton* and the lady at the bar, after that ſentence had been given in that court?

Mr. *Laroche.* I was ſeveral times at Dr. *Collier*'s chambers after the ſuit had been determined.

Mr. *Mansfield.* Was you preſent when Dr. *Collier* gave to the lady at the bar, or the late duke of *Kingſton*, or both of them, any opinion concerning the effect of that ſentence?

Mr. *Laroche.* I was many times at Dr. *Collier*'s chambers, and in converſation I have heard Dr. *Collier* tell the duke, that he might with ſafety marry the ducheſs of *Kingſton*, Miſs *Chudleigh* as ſhe then was.

Mr. *Mansfield.* Have you heard that opinion, or to that effect, given more than once?

Mr. *Laroche.* I cannot be exact: I have heard it ſaid from Dr. *Collier* to the duke.

Mr. *Mansfield.* Have you heard that ſaid alſo in the preſence of the lady at the bar by Dr. *Collier?*

Mr. *Laroche.* I think I have, to the beſt of my recollection. I went with the duke of *Kingſton*, I breakfaſted with him, as well as I can recollect, the morning that he was married: we then agreed to dine together at the *Thatched-Houſe Tavern.* I went into the city with his grace firſt of all to Dr. *Collier*'s to get the licence. Dr. *Collier*, when we came there, was not at home, but was gone to his grace's houſe with the licence in his pocket.

Mr. *Mansfield.* My lords, theſe are all the queſtions I have to aſk Mr. *Laroche.*

Mr. *Dunning.* My lords, I ſhould be glad to aſk Mr. *Laroche*, what the occaſion was of taking theſe opinions of Dr. *Collier?* whether it aroſe about any doubt entertained by the duke or the lady, or both, whether they were at liberty to marry?

Mr. *Laroche.* The duke certainly had a doubt upon his breaſt, until the ſuit of jactitation was over. In conſequence of that ſentence, at the decree of which I was preſent, and which declared her a ſingle woman, he applied to Dr. *Collier* to know whether there was any thing further to go on that might impede his marriage? He was told, No, that ſhe was a ſingle woman, and he might marry her.

Mr. *Dunning.* Were theſe converſations pending the ſuit, or after the ſuit was determined?

Mr. *Laroche.* The laſt converſation was after the ſuit was over. During the time of the ſuit, I have frequently, I ſuppoſe when I was in town I walked five days out of ſix into the city with the duke, and then we called there to know how the ſuit went on.

Mr. *Dunning.* Do you recollect how long the ſuit had been determined before the marriage with the duke of *Kingſton?*

Mr. *Laroche.* I ſhould think, to the beſt of my recollection—I believe within three weeks. There were fourteen days to put in an appeal; the appeal was revoked, and I believe they married the week after.

Mr. *Dunning.* Did the duke's doubt continue until the day of the marriage?

Mr. *Laroche.* He had no doubt after he had applied for the licence, and the licence had been granted.

Mr. *Dunning.* What was the occaſion of the converſation that paſſed upon the morning of the marriage between the duke and Dr. *Collier?*

Mr. *Laroche.* There was no converſation upon it, as I remember, between them upon the morning of the marriage?

Mr. *Dunning.* When did Dr. *Collier* inform the duke, that he might marry?

Mr. *Laroche.* It was, I believe, after the revocation of the appeal---but it was after the ſentence was obtained.

Mr. *Dunning.* Will you be ſo good as to fix the time as nearly as you can, when both theſe converſations paſſed between Dr. *Collier* and the duke, and Dr. *Collier* and the ducheſs?

Mr. *Laroche.* As for aſcertaining a time, I cannot; but it was from the meeting of the parliament in the month of *October* 1768. If I remember right, it was the beginning of the ſeſſions of parliament before laſt; and during that time I uſed often to walk with the duke to Dr. *Collier*'s.

Mr. *Dunning.* How many days was it before the marriage, if I am miſtaken in ſuppoſing you ſaid the day of the marriage?

Mr. *Laroche.* It might be three or four days, or within a week.

Mr. *Dunning.* Do you know that Dr. *Collier* had been in fact informed, that there had been a marriage between the lady and Mr. *Hervey?*

Mr. *Laroche.* I know nothing at all of that.

Mr. *Dunning.* Was you yourſelf informed at this time that there had been in fact a marriage between the lady and Mr. *Hervey?*

Mr. *Laroche.* I never knew that there had been a marriag

Mr. *Dunning.* Had you been ſo informed, was my queſtion?

Mr. *Laroche.* From hear-ſay, and nothing elſe. I heard there was a ſuſpicion of a marriage, and that ſhe had put him upon the proof of that marriage, and that he had failed in his proof.

Mr. *Dunning.* Had you, or had you not, been informed of the marriage by the lady herſelf?

Mr. *Laroche.* Never.

Mr. *Dunning.* Can you enable their lordſhips to judge, what was the occaſion that drew the duke and ducheſs to make this application to Dr. *Collier* ſo recently before the marriage, and ſo long after the ſentence?

Mr. *Laroche.* I ſuppoſe, the meaning of the duke's going there was to aſk Dr. *Collier*, who had the whole management of the affair, whether he could with ſafety marry the ducheſs.

Mr. *Dunning.* Do you know whether any body had or had not ſuggeſted a doubt upon the ſubject?

Mr. *Laroche.* There had been a doubt before the ſentence, but after the ſentence there was no doubt; but ſtill he thought proper to aſk him, becauſe there was an appeal: that appeal was revoked, and after that appeal he married.

Mr. *Mansfield.* If your lordſhips will permit me, I will aſk one queſtion of Mr. *Laroche.* Whether in the opinion that Dr. *Collier* gave to the duke of *Kingſton* in his hearing, Dr. *Collier* founded his opinion upon the effect of that ſentence which had paſſed?

Mr. *Laroche.* He certainly did, in my conception of the matter.

Mr. *Dunning.* I ſhould be glad to know, whether the witneſs meant to have it underſtood upon what Dr. *Collier* founded his opinion, that ſuch a marriage, if it had been lawful, could be ſet aſide by thoſe proceedings?

Mr. *Laroche.* The words I heard were theſe: You may ſafely marry Miſs *Chudleigh*, my lord, for you neither offend againſt the laws of God or man.

Lord *Fauconbridge.* After this had they any doubt that they might lawfully marry?

Mr. *Laroche.* After the ſentence pronounced in the Eccleſiaſtical Court, I am firmly of opinion, that neither of them had a doubt as to the legality of the marriage.

Mr. *Wallace.* My lords, I have many witneſſes to prove facts, which I believe will be admitted by the gentlemen on the other ſide, becauſe they have already been proved in another place: they are ſuch, as the lady at the bar living continually in the ſtate of a ſingle woman, and tranſacting in that character matters of conſequence relative to property: they are already contained in depoſitions in another place, and I ſhall offer to your lordſhips now that ſentence which has been pronounced in *Doctors Commons*: the officer ſwears he brought it from *Doctors Commons.* Your lordſhips are in poſſeſſion of it.

Mr. *Attorney General.* I have already ſtated to your lordſhips the meaſure which was obſerved in giving evidence in that caſe in *Doctors Commons*, both upon one ſide and the other; and I ſtated the meaſure obſerved upon the part of the priſoner in *Doctors Commons* to be that of her having given evidence, that ſhe acted as a ſingle woman in a great many tranſactions.

Mr. *Wallace.* Then, my lords, I call no more witneſſes.

Lord High Steward. Mr. Solicitor General, you will pleaſe to reply.

Mr. *Solicitor General.* My lords, the cuſtom which has prevailed in trials at your lordſhips bar, authorizes the counſel on the part of the proſecution to obſerve upon the evidence that has been laid before your lordſhips, and to apply that evidence to the charge. In the preſent caſe, wiſhing to diſcharge my duty as counſel in a public proſecution without the leaſt degree of unneceſſary ſeverity, or occaſioning a momentary reflection of pain to the adverſe party who ſtands at your lordſhips bar; reflecting on the whole courſe of the evidence that has been given; being in my own mind ſo clearly convinced as I am, that the evidence offered in ſupport of the proſecution has not in the leaſt degree been anſwered by any evidence that has been offered in defence; but, on the contrary, that the nature of the defence attempted ſupports, confirms, and gives credit to the charge; I find nothing on which I could with propriety obſerve in this period of the buſineſs at your lordſhips bar, but the ſpeech which has been made by the priſoner in defence. And I truſt, your lordſhips will think that it is in no degree abandoning the duty I owe unto the credit and weight of a public proſecution, if I decline entering into obſervations, in reply to a mere argumentative defence, offered to your lordſhips by a priſoner in perſon. I therefore hope that your lordſhips will think, that I have not failed in my duty, in declining to trouble your lordſhips any farther upon this matter.

Mr. Solicitor General having finiſhed his replication on the part of the proſecution, the ducheſs of *Kingſton* was ordered from the bar.

The houſe was then adjourned to the chamber of parliament.

The lords, and others, returned to the chamber of parliament in the cuſtomary order, and after ſome time, the houſe was adjourned again into *Weſtminſter-Hall.*

The peers being ſeated, the lord high ſteward in his chair, and the houſe reſumed, the ſerjeant at arms made proclamation for ſilence, as uſual.

Lord High Steward. Your lordſhips have heard the evidence, and every thing that has been alledged on both ſides; and you have alſo heard the opinion of the learned and reverend judges upon the queſtions ſtated to them; and the ſolemnity of your proceedings requires that your lordſhips opinions on the queſtion of *Guilty*, or *Not Guilty*, ſhould be delivered ſeverally in the abſence of the priſoner, beginning with the junior baron; and that the priſoner ſhould afterwards be acquainted with the reſult of thoſe opinions by me. Is it your lordſhips pleaſure to proceed now to give your opinions upon the queſtion of *Guilty* or *Not Guilty?*

Lords. Ay, ay.

Then the lord high ſteward ſtood up uncovered, and beginning with the youngeſt peer ſaid,

John Lord *Sundridge* (Duke of *Argyle* in *Scotland)*, what ſays your lordſhip? Is the priſoner *Guilty* of the felony whereof ſhe ſtands indicted, or *Not Guilty?*

Whereupon *John* Lord *Sundridge*, ſtanding up in his place uncovered, and laying his right hand upon his breaſt, anſwered,

GUILTY, upon my honour.

In like manner the ſeveral lords aftermentioned, being all that were preſent, anſwered as followeth:

Henry Lord *Digby.* Guilty, upon my honour.
Charles Lord *Camden.* Guilty, upon my honour.
George Venables Lord *Vernon.* Guilty, upon my honour.
Edward Lord *Beaulieu.* Guilty, upon my honour.
John James Lord *Lovel* and *Holland.* Guilty, upon my honour.
Thomas Lord *Pelham.* Guilty, upon my honour.
Frederick Lord *Boſton.* Guilty, upon my honour.
Nathaniel Lord *Scarſdale.* Guilty, upon my honour.
Richard Lord *Groſvenor.* Guilty, upon my honour.
William Lord *Wycombe.* Guilty, upon my honour.
Thomas Lord *Lyttelton.* Guilty, upon my honour.
William Lord *Manſfield.* Guilty, upon my honour.
Horatio Lord *Walpole.* Guilty, upon my honour.
Thomas Lord *Hyde.* Guilty, upon my honour.
Vere Lord *Vere.* Guilty, upon my honour.
William Lord *Ponſonby.* Guilty, upon my honour.
Andrew Lord *Archer.* Guilty, upon my honour.
Henry Lord *Ravenſworth.* Guilty, upon my honour.
Matthew Lord *Forteſcue.* Guilty, upon my honour.
Thomas Bruce Lord *Bruce.* Guilty, upon my honour.
Edward Lord *Sandys.* Guilty, upon my honour.
George Lord *Edgecumbe.* Guilty, upon my honour.
Henry Frederick Lord *Chedworth.* Guilty, upon my honour.
Francis Lord *Godolphin.* Guilty, upon my honour.
Thomas Lord *King.* Guilty, upon my honour.
Robert Lord *Romney.* Guilty, upon my honour.
Thomas Lord *Middleton.* Guilty, upon my honour.
Edmund Lord *Boyle.* Guilty, upon my honour.
Charles Schaw Lord *Cathcart.* Guilty, upon my honour.
William Lord *Craven.* Guilty, upon my honour.
John Lord *Clifton.* Guilty, upon my honour.
Henry Lord *Paget.* Guilty, upon my honour.
George Lord *Willoughby* of *Parham.* Guilty, upon my honour.
John Peyto Lord *Willoughby de Broke.* Guilty, upon my honour.
George Lord de *Ferrars* of *Chartley.* Guilty, upon my honour.
George Lord *Abergavenny.* Guilty, upon my honour.
Francis Lord *Le Deſpencer.* Guilty, upon my honour.
Charles Viſcount *Maynard.* Guilty, upon my honour.
Thomas Viſcount *Wentworth.* Guilty, upon my honour.
George Viſcount *Torrington.* Guilty, upon my honour.
Frederick Viſcount *Bolingbroke* and *St. John.* Guilty, upon my honour.
David Viſcount *Stormont.* Guilty, upon my honour.
Thomas Viſcount *Weymouth.* Guilty, upon my honour.
George Viſcount *Townſhend.* Guilty, upon my honour.
Richard Viſcount *Say* and *Sele.* Guilty, upon my honour.
Anthony Joſeph Viſcount *Montague.* Guilty, upon my honour.
Edward Viſcount *Hereford.* Guilty, upon my honour.
Wills Earl of *Hillſborough.* Guilty, upon my honour.
John Earl *Spencer.* Guilty, upon my honour.
Jacob Earl of *Radnor.* Guilty, upon my honour.
Robert Earl of *Northington.* Guilty, upon my honour.
Henry Earl *Fauconberg.* Guilty, upon my honour.
Henry Earl of *Darlington.* Guilty, upon my honour.
Philip Earl of *Hardwicke.* Guilty, upon my honour.
Richard Grenville Earl *Temple.* Guilty, upon my honour.
William Earl *Fitzwilliam.* Guilty, upon my honour.
John Earl of *Buckinghamſhire.* Guilty, upon my honour.
George Earl *Brooke.* Guilty, upon my honour.
William Earl of *Harrington.* Guilty, upon my honour.
Thomas Earl of *Effingham.* Guilty, upon my honour.
John Earl of *Aſhburnham.* Guilty, upon my honour.
John Earl *Waldegrave.* Guilty, upon my honour.
John Earl *Ker.* Guilty, upon my honour.
Thomas Earl of *Macclesfield.* Guilty, upon my honour.
Philip Earl *Stanhope.* Guilty, upon my honour.
Henry Earl of *Suſſex.* Guilty, upon my honour.
Heneage Earl of *Aylesford.* Guilty, upon my honour.
Charles Earl of *Tankerville.* Guilty, upon my honour.
William Earl of *Strafford.* Guilty, upon my honour.
Edward Earl of *Oxford* and Earl *Mortimer.* Guilty, upon my honour.
Niel Earl of *Roſebery.* Guilty, upon my honour.
Hugh Hume Earl of *Marchmont.* Guilty, upon my honour.
John Earl of *Breadalbane.* Guilty, upon my honour.
George Earl of *Dalhouſie.* Guilty, upon my honour.
John Earl of *Loudoun.* Guilty, upon my honour.
John Earl of *Galloway.* Guilty, upon my honour.
James Earl of *Abercorn.* Guilty, upon my honour.
George James Earl of *Cholmondeley.* Guilty, upon my honour.
George Buſſy Earl of *Jerſey.* Guilty, upon my honour.
George William Earl of *Coventry.* Guilty, upon my honour.
William Henry Earl of *Rochford.* Guilty, upon my honour.
Richard Lumley Earl of *Scarborough.* Guilty, upon my honour.
Other Earl of *Plymouth.* Guilty, upon my honour.
Henry Earl of *Gainſborough.* Guilty, upon my honour.
Frederick Auguſtus Earl of *Berkeley.* Guilty, upon my honour.
Henry Earl of *Doncaſter.* Guilty, upon my honour.
Frederick Earl of *Carliſle.* Guilty, upon my honour.
William Anne Holles Earl of *Eſſex.* Guilty, upon my honour.
John Earl of *Sandwich.* Guilty, upon my honour.
Sackville Earl of *Thanet.* Guilty, upon my honour.
George Earl of *Winchelſea* and *Nottingham.* Guilty, upon my honour.
George Harry Earl of *Stamford.* Guilty, upon my honour.
Baſil Earl of *Denbigh.* Guilty, upon my honour.
Henry Earl of *Suffolk* and *Berkſhire.* Guilty, upon my honour.
Francis Earl of *Huntingdon.* Guilty, upon my honour.
Edward Earl of *Derby.* Guilty, upon my honour.
Francis Seymour Earl of *Hertford*, Lord Chamberlain of the Houſhold. Guilty, upon my honour.
William Earl *Talbot*, Lord Steward of the Houſhold. Guilty, upon my honour.
Charles Watſon Marquis of *Rockingham.* Guilty, upon my honour.
Hugh Duke of *Northumberland.* Guilty, upon my honour.
Henry Fienes Pelham Duke of *Newcaſtle.* Guilty erroneouſly, but not intentionally, upon my honour.
Francis Duke of *Bridgewater.* Guilty, upon my honour.
John Frederick Duke of *Dorſet.* Guilty, upon my honour.
James Duke of *Chandos.* Guilty, upon my honour.
George Duke of *Mancheſter.* Guilty, upon my honour.
William Henry Cavendiſh Duke of *Portland.* Guilty, upon my honour.
Alexander Duke of *Gordon.* Guilty, upon my honour.
George Duke of *Marlborough.* Guilty, upon my honour.
William Duke of *Devonſhire.* Guilty, upon my honour.
Harry Duke of *Bolton.* Guilty, upon my honour.
George Duke of *St. Albans.* Guilty, upon my honour.
Henry Duke of *Beaufort.* Guilty, upon my honour.
Auguſtus Henry Duke of *Grafton.* Guilty, upon my honour.
Charles Duke of *Richmond.* Guilty, upon my honour.
William Earl of *Dartmouth*, Lord Privy Seal. Guilty, upon my honour.
Granville Leveſon Earl *Gower*, Lord Preſident of the Council. Guilty, upon my honour.
His Royal Highneſs *Henry Frederick* Duke of *Cumberland* and *Strathern.* Guilty, upon my honour.

Then the lord high ſteward, ſtanding uncovered at the chair, laying his hand upon his breaſt, ſaid,

Lord High Steward. My lords, I am of opinion that the priſoner is *Guilty*, upon my honour.

Lord High Steward. My lords, all your lordſhips have found the priſoner guilty of the felony whereof ſhe ſtands indicted, one lord only excepted; who ſaid, that ſhe was guilty—'*erroneouſly*, but *not intentionally*:' is it your lordſhips pleaſure that ſhe ſhould be called in and acquainted therewith?

Lords. Ay, ay.

Proclamation was then made for the deputy-uſher of the black rod to bring her grace the ducheſs of *Kingſton* to the bar; which was done. Afterwards proclamation was made for ſilence, as uſual.

Lord High Steward. Madam, the lords have conſidered the charge and evidence brought againſt you, and have likewiſe conſidered of every thing which you have alledged in your defence; and, upon the whole matter, their lordſhips have found you guilty of the felony whereof you ſtand indicted. What have you to alledge againſt judgment being pronounced upon you?

The ducheſs of Kingſton *delivered a paper, wherein her grace prayed the benefit of the peerage according to the ſtatutes.*

Then his grace the lord high ſteward aſked the counſel for the proſecution, whether they had any objection to the ducheſs's claim of the benefit of the peerage?

Mr. *Attorney General.* My lords, not expecting to be called upon, I did not attend to the form of words uſed by the priſoner.——However, I underſtand, that ſhe claims the benefit of the *ſtatutes*; not confining herſelf, I ſuppoſe, in the form of her claim, to *one* ſtatute; but, alledgi herſelf to be a peereſs, claims the benefit of *both*; meaning to inſiſt, that the act, which exempts women from judgment of death, is to be conſtrued with reference to that, which allows clergy to lords of parliament.

My lords, upon this claim I ſuppoſe two queſtions will naturally ariſe; one, whether it be competent in her ſituation to claim *that* judgment, or an analogous judgment to *that*, which would have been pronounced upon a lord in parliament convicted of the like offence; the other, what would be the extent, or poſſible extent of *that* judgment upon a lord of parliament, ſo convicted.

My lords, I ſpeak to both theſe queſtions; becauſe I conceive, that, without aggravating the offence, I may fairly aſſume, that all the qualifications, which were put upon it, have been fully and effectually proved; the marriage; the iſſue of that marriage; the fraud upon public juſtice; the additional aggravation, that it was no leſs a ſurprize upon the duke of *Kingſton*, than a ſcandal to the reſt of the world.

This being the true ſtate of the caſe, it muſt occur to every noble lord's mind, that the laws of this country would be conſiderably diſgraced, if it were poſſible to ſtate to ſuch a court ſuch a crime, attended with all its circumſtances and qualifications, as an object of perfect impunity.

In this point of view, I ſhall take it for certain, that, if I can eſtabliſh in the judgment of your lordſhips my own firm perſuaſion, that this claim to avoid judgment of death cannot be made under the ſtatute of *Edward* VI. or with any reference to it, but muſt reſort to the act of *William* and *Mary*, I ſhall then have laid before your lordſhips that opportunity, which juſtice, undoubtedly, will be deſirous to lay hold on, of pronouncing a judgment ſomewhat more adequate to the offence; though perhaps, in the opinion of many, far enough from adequate. Or, if, contrary to my preſent thoughts, ſhe may claim any benefit from the firſt ſtatute, yet the act of *Elizabeth* will enable your lordſhips to make ſome ſlight ſatisfaction to the law for ſo enormous a violation of it.

My lords, this I take to be a clear propoſition, that, from the beginning of time to this hour, *clergy* was never demandable by *women*. By the ancient law of the land this privilege was ſo favourably uſed, that reading was ſufficient proof of clergy: and all were taken to be clerks, who lay under no *indiſpenſable impediment* to receive orders. This rule is laid down in all the books. Several ſtatutes, nay the Provincial Conſtitution of 1531, adopt the diſtinction thus made between perſons in holy orders, and *other* clerks, or *lay* clerks. But women were under this *indiſpenſable impediment*. They might be profeſſed, and become religious; but even a nun could not claim this privilege. This is proved by the ſame books: and lord *Hale* puts the caſe of manſlaughter, where the huſband ſhall have his clergy, and the wife no privilege. The ſtatutes, which exempt women from judgment of death, expreſly recite, that they were not intitled to clergy; and diſtinctly provide a new and different ſpecies of exemption.

Having reminded your lordſhips of this clear rule in the law, I ſhall take up the ſtatutes, which are material to this argument, in their order of time. This will lead me to conſider; firſt, what is the true nature and extent of that exemption from capital puniſhment, which his clergy gives to a lord of parliament, by the firſt of *Edward* the ſixth, and the eighteenth of *Elizabeth*; ſecondly, whether the twenty-firſt of *James*, or the third and fourth of *William* and *Mary*, contain any reference to thoſe other laws.

In order to explain the true effect of the ſtatute of *Edward* the ſixth, I ſhall conſider the ſituation, in which the peerage ſtood with reſpect to clergy, at the time of making it. I ſay, the ſituation of the peerage as to clergy; becauſe it will not be doubted, I ſuppoſe, that they were intitled to this valuable privilege in common with others. So peculiar and cruel a diſtinction could not have remained in perfect ſilence for ſuch a number of years. Nor, if they had been intitled to claim it upon peculiar terms, would thoſe have been unnoticed. Beſides, if there be no evidence of ſuch a privilege at *any time*, how can it be claimed *now?*

Although the allowance of clergy was ſetting aſide the conviction as to the perſon of the offender, his goods remained forfeit, and the king ſeized his lands under the record. By the 4th of *Hen.* VII. *c.* 13, it was to be allowed but once; and the convict was to be branded in open court, before the judge. And in the very year of the ſtatute now under conſideration, a long liſt of offences was deprived of it; and, even where it remained, ſlavery, with an iron yoke, was inflicted on the convict, as a vagabond.

It was thought too much to leave the lords of parliament expoſed to thoſe cruel and ſhameful ſtigmata; eſpecially in caſes, where they might make purgation, and ſo be reſtored to the exerciſe of their high functions. Nay, in ſuch inſtances even forfeiture was thought too much. It was alſo conceived by their lordſhips, that, in their caſe, capital puniſhment had extended too far. It was alſo thought proper to deliver a lord of parliament from the neceſſity of proving his title to clergy in the ordinary way. Therefore by the 1 *E.* VI. *c.* 12, *ſ.* 14, it was enacted, ‘ That in ‘ all and every caſe and caſes, where any of the king's majeſty's ſubjects ‘ ſhall and may, upon his prayer, have the privilege of clergy, as a clerk ‘ convict, that may make purgation; in all thoſe caſes and every of them, ‘ and alſo in all and every caſe and caſes of felony, wherein the privilege ‘ and benefit of clergy is reſtrained, excepted, or taken away by this ſtatute or act (wilful murder and poiſoning of malice prepenſed only excepted) the lord and lords of the parliament, and peer and peers of the ‘ realm, having place and voice in parliament, ſhall, by virtue of this ‘ preſent act, of common grace, upon his or their requeſt or prayer, alledging that he is a lord or peer of this realm, and claiming the benefit ‘ of this act, though he cannot read, without any burning in the hand, ‘ loſs of inheritance, or corruption of his blood, be adjudged, deemed, ‘ taken, and uſed, for the firſt time only, to all intents, conſtructions, and ‘ purpoſes, as a clerk convict, and ſhall be in caſe of a clerk convict, ‘ which may make purgation, without any further or other benefit or privilege of clergy to any ſuch lord or peer from thenceforth at any time ‘ after for any cauſe to be allowed, adjudged, or admitted; any law, ‘ ſtatute, uſage, cuſtom, or any other thing to the contrary in any-wiſe ‘ notwithſtanding.’ More ſhortly thus--At preſent, men prove their clergy by reading; and muſt forfeit, and be branded, before it may be obtained. For the future, in all caſes, where any of the king's ſubjects may now obtain privilege, as a clerk convict, who may make purgation, a lord of parliament, without reading, burning, or forfeiture, ſhall be adjudged and uſed as a clerk convict, who may make purgation. All that was harſh in the law, was taken off the peerage: all that was left, was privilege. The trial by the biſhop and his clerks (which differed from trial by peers, no more in the caſe of a lord than of a commoner) was not ſubſtituted in the place of legal trial, but ſuperadded to it, for his advantage. This was the only way, which had then been thought of, in any caſe, to avoid judgment of death. The reaſon of the thing, and the expreſs letter of the ſtatute unite to prove, that, till the eighteenth of *Elizabeth*, a lord of parliament, convicted of a clergyable crime, and being capable of purgation, muſt have been deemed and treated as a clerk convict, who might make purgation, and delivered over to the ordinary for that purpoſe.

The learned and laborious *Staunford*, our ableſt writer, at leaſt on this branch of the law, treats it as a thing without queſtion. Fol. 130. *A lord ſhall have privilege of clergy, where a common perſon ſhall not have it. He ought to make purgation; and if ſo, he muſt be delivered to the ordinary, to be kept, till he has made his purgation. If he confeſſes, abjures, or is outlawed, he cannot have the benefit of this ſtatute; becauſe he cannot make purgation. Staunford* flouriſhed when this ſtatute was made; wrote a few years after; and died before the eighteenth of *Elizabeth*. His therefore is a contemporary expoſition of it, unentangled with the caſual phraſe of any ſubſequent act.

Hale, in his ſecond volume, fol. 376, where he ſeems to differ from *Staunford*, as to the extent of the ſtatute, agrees with him as to the nature of the privilege; which he calls *The Clergy of Noblemen*. At one time, judges would not deliver clerks to the ordinary, who had become incapable of purgation, by confeſſion or otherwiſe. The church alledged, that nothing done before an unlawful judge was ſufficient to ſuſtain their proceſs, or ſentence. Whereupon the *articuli cleri* provided, that all clerks ſhall be delivered to their ordinaries. But they were delivered, in the inſtances mentioned by *Staunford*, *abſque purgatione faciendâ.* Now the caſe put in the ſtatute is, where *any man* may have the privilege of clergy, as a clerk convict *that may make purgation*. And a lord of parliament, being in the ſame predicament, was put in the caſe of a *clerk convict that may make purgation*, without reading or undergoing the pains which attended a commoner under thoſe circumſtances. *Staunford* therefore thought, that theſe exemptions did not reach to the caſe, where, before the ſtatute, there could be *no purgation for any man*. And the opinion was ſo probable, at leaſt, that a very eminent lawyer, of unexceptionable character, in the time of the great rebellion, actually burnt a peer, who confeſſed. *Hale* doubts; *eſpecially at this day, when delivery to the ordinary and purgation are both taken away by the eighteenth of* Elizabeth. It is not obvious what difference that makes. *I think*, ſays he, *it was never meant, that a peer of the realm ſhould be put to read, or be burnt, where a common perſon ſhould be put to his clergy.* Both agree, that the peer ſhould have had his clergy, and have been delivered to the ordinary, and have made purgation, exempt from the concomitant penalties; *in ſome caſes*, ſays *Staunford*; *in all*, ſays *Hale*. But even *Hale* makes no doubt of peers being liable to impriſonment.

In the trial of lord *Warwick*, the chief juſtice lays it down, *That the ſtatute of* Edward VI. *exempted peers from the penalty of burning, and repealed the ſtatute of* Henry VII. *as to ſo much*. Then a peer was liable to burning before; and by the act of *Henry* VII. which, in terms, puts it upon *perſons admitted to their clergy*. But how could it be ſeriouſly argued, that a thing ſo anxiouſly repealed never exiſted? I have conſulted on this occaſion as many books, as I could think of referring to; and I do not recollect one, which ſuppoſes a time when a peer had not the benefit of his clergy.

Nothing, it muſt be confeſſed, could be more unprincipled, and incongruous, than to ſuffer the truth or juſtice of a conviction at common law to be queſtioned in the Eccleſiaſtical Court. But the church had not then loſt its hold upon men's minds; nor would, probably, for ſome ages, but for its own glaring miſconduct.

The trial called purgation, as it was had in the Biſhop's Court, was a ridiculous mockery of juſtice; or became ſerious, only by the perjury which it produced. It was therefore aboliſhed. But ſimply to aboliſh it would alſo have cut off that impriſonment, which followed a conviction in the Biſhop's Court, and which (it ſhould have been preſumed) would always follow actual guilt. To remedy which, it was thought fit to give the court authority to puniſh by impriſonment for any time leſs than a year. This was proper in all caſes; but particularly ſo in the caſes of peers, and perſons in holy orders, who were not liable to burning in the hand. It was therefore enacted by the eighteenth of *Elizabeth*, *c.* 7. *ſ.* 2, and 3, ‘ That every perſon and perſons, which at any time, after this preſent ‘ ſeſſion of parliament, ſhall be admitted and allowed to have the benefit ‘ or privilege of his or their clergy, ſhall not thereupon be delivered to the ‘ ordinary, as hath been accuſtomed; but, after ſuch clergy allowed, and ‘ burning in the hand according to the ſtatute in that behalf provided, ‘ ſhall forthwith be enlarged, and delivered out of priſon, by the juſtices, ‘ before whom ſuch clergy ſhall be granted, that cauſe notwithſtanding.

‘ Provided, neverthleſs, and be it alſo enacted, that the juſtices, before ‘ whom ſuch allowance of clergy ſhall be had, ſhall and may, for the further correction of ſuch perſons, to whom ſuch clergy ſhall be allowed, ‘ detain and keep them in priſon, for ſuch convenient time, as the ſame ‘ juſtices in their diſcretion ſhall think convenient; ſo as the ſame do not ‘ exceed one year's impriſonment; any law or uſage, heretofore had or ‘ uſed, to the contrary notwithſtanding.’

The effect of theſe words, *ſhall for hwith be enlarged and delivered out of priſon, that cauſe notwithſtanding*, is to give the perſon ſo enlarged exactly the ſame ſtate and condition which he would have obtained, under the former diſpenſation of law, by going through the proceſs of purgation, and ſo being delivered from the offence. This part of the act carries a great effect upon the conſtruction of the whole. In converſation, I have heard the words, *after burning in the hand*, ſuppoſed to be the phraſe, upon which ſome doubt might turn, whether peers are included in the act. But, in the conſtruction of ſuch a ſtatute, it is not enough to find a phraſe, upon which ſome doubt might turn. It would be fitter for thoſe who conceive the doubt, to proceed at leaſt one ſtep further; and ſtate, to what extent their doubt goes. Is it doubted, whether purgation be taken away in the caſe of a peer, and the peer be reſtored to his law without it? Will any gentleman argue, that, at this day, a peer convicted of a clergyable crime, ſhall not be forthwith enlarged; but muſt be delivered to the ordinary to make his purgation? This point, I believe, never has, nor ever will be argued. If he is not to undergo purgation, *quo jure* is he exempt? Does any other ſtatute exempt a peer from his purgation, or diſcharge him from his attainder, but this general ſtatute of the eighteenth of *Elizabeth*; which, in its large phraſe, comprehends every body? I proteſt I know of none. Or, does this ſtatute exempt any, but thoſe, who ſhall be thereafter *admitted to Clergy?* The words, *after burning in the hand*, do not make an eſſential or neceſſary article in the deſcription of the perſons to be diſcharged; nor create any term, or condition, upon which the diſcharge is to obtain. The deſcription of the perſons to be diſcharged is abſolved in theſe words, *all perſons who ſhall be allowed the benefit of their clergy*. They are to be diſcharged abſolutely. But when? and in what manner? Why, after the allowance of clergy, and burning in the hand *according to the ſtatute*; which is to ſay, in the caſes provided by the ſtatute; of which the caſe of a peer is not one.

The whole conſequence is no more than this, that, in a caſe circumſtanced like the preſent, where the honour of the law and the purity of manners require ſome example to be made, your lordſhips may follow the bent of your diſcretion, by reſorting to the laſt clauſe in the eighteenth of *Elizabeth*. This I ſay, upon a ſuppoſition, that ſome peer ſtood convicted of the like offence, with ſimilar aggravation; or that, upon the reſt of the argument, it will be poſſible to give any woman the benefit of any ſtatute, *pari ratione*, as peers have the benefit of clergy, under the firſt of *Edward* VI. But I hope to prove ſoon, that it is impoſſible to conſtrue the ſubſequent ſtatute in that manner. Conſequently there will be due to this crime a very different ſort of puniſhment than that which I have alluded to.

It will hardly be ſaid, that theſe ſtatutes relate to women of any condition. The expreſſion excludes them diſtinctly enough. If that had been more general, the ſubject matter excludes them abſolutely. They are no more clerks, than lords of parliament. They never underwent purgation; nor were delivered to the ordinary; they were therefore incapable of receiving theſe privileges: for theſe acts were merely to regulate an old right, not to give a new one. Both the ſtatutes, which give them their exemption, recite it as a general propoſition, that women were not entitled to clergy. Nor have I even ſeen any ſtatute, caſe, or book, wherein any condition of women is ſuppoſed exempt, but by virtue of the laws I ſhall ſtate preſently. It remains then to be conſidered, whether the exemption provided by thoſe laws, has any reference to the ſtatute of *Edward* VI.

The firſt ſtatute, which exempts women from capital puniſhment in any caſe of felony, is the twenty-firſt of *James* I. *c.* 6, which runs thus:—
‘ Whereas, by the laws of this realm, the benefit of clergy is not allowed
‘ to women convicted of felony; by reaſon whereof many women do
‘ ſuffer death for ſmall cauſes; be it enacted by the authority of this
‘ preſent parliament, that any woman, being lawfully convicted by her
‘ confeſſion, or by the verdict of twelve men, of, or for the felonious taking
‘ of any money, goods, or chattels above the value of twelve-pence, and
‘ under the value of ten ſhillings; or as acceſſary to any ſuch offence;
‘ the ſaid offence being no burglary, nor robbery in or near the highway,
‘ nor the felonious taking of any money, goods, or chattels, from the perſon
‘ of any man or woman privily, without his or their knowledge, but only
‘ ſuch an offence as in the like caſe a man might have his clergy, ſhall,
‘ for the firſt offence, be branded, and marked in the hand, upon the brawn
‘ of the left thumb, with a hot burning iron, having a roman T upon the
‘ ſaid iron; the ſaid mark to be made by the gaoler, openly, in the court,
‘ before the judge; and alſo to be further puniſhed by impriſonment,
‘ whipping, ſtocking, or ſending to the houſe of correction, in ſuch ſort,
‘ manner, and form, and for ſo long time (not exceeding the ſpace of one
‘ whole year) as the judge, judges, or other juſtices, before whom ſhe ſhall
‘ be ſo convicted, or which ſhall have authority in the cauſe, ſhall, in
‘ their diſcretion, think meet, according to the quality of the offence,
‘ and then to be delivered out of priſon for that offence; any law, cuſtom,
‘ or uſage to the contrary notwithſtanding.’

This ſtatute, at leaſt, excludes all colour of reference to the firſt of *Edward* VI. Any woman convicted of grand larceny (if it be but a ſimple felony, clergyable in a man) ſhall be burnt. She was not put to demand benefit of the ſtatute; to pray her clergy would have been too abſurd; but, the larceny being ſtated in the record to be committed by a woman, judgment was forthwith entered of burning, and ſo forth. The ſtatute is, moreover, confined to ſuch larcenies, where, *in the like caſe*, a man might have his clergy. I take notice of theſe words at preſent, only for the ſake of remarking that, in this ſtatute, at leaſt, they muſt relate to the quality of the offence, not to the condition of the offender.

My lords, the only ſtatute, of which the priſoner can claim the benefits againſt judgment of death, is the third and fourth of *William* and *Mary*, *c.* 9. *ſ.* 6. which runs in theſe words: ‘ And whereas, by the laws of this
‘ realm, women convicted of felony, for ſtealing of goods and chattels of
‘ the value of ten ſhillings, and upwards, and for other felonies, where a
‘ man is to have the benefit of his clergy, are to ſuffer death; be it therefore
‘ enacted and declared by the authority aforeſaid, that, where a man,
‘ being convicted of any felony, for which he may demand the benefit of
‘ his *clergy*, if a woman be convicted for the ſame or like offence, upon her
‘ prayer to have the benefit of *this ſtatute*, judgment of death ſhall not be
‘ given againſt her upon ſuch conviction; or execution awarded upon any
‘ outlawry for ſuch offence; but ſhall ſuffer the ſame puniſhment as a
‘ man ſhould ſuffer that has the benefit of his clergy allowed him in the
‘ like caſe; that is to ſay, ſhall be burnt in the hand by the gaoler, in
‘ open court, and be further kept in priſon for ſuch time as the juſtices in
‘ their diſcretion ſhall think fit, ſo as the ſame do not exceed one year's
‘ impriſonment.’ Under this act, to avoid judgment of death, the priſoner muſt pray the benefit of this ſtatute.

I collect from converſation, perhaps too idle to be referred to, that the argument will be laid thus. A woman convict of a felony which would be clergyable in a man, ſhall ſuffer the ſame puniſhment as a man would do *in the like caſe*, that is, as a man *of the ſame condition* with herſelf: but a peer would ſuffer no puniſhment: therefore a woman *of that condition* ſhall ſuffer none.

The words, *in the like caſe*, muſt mean the ſame here, as in the twenty-firſt of *James*, *convicted of the like offence*. And the words *of the ſame condition* muſt be wholly ſuperadded, if they are admitted at all. But it is impoſſible to conceive, that, if the legiſlature had meant to create ſo important a diſtinction between different orders of women, it would have uſed no words for that purpoſe. Nor, indeed, can ſuch a diſtinction be ſo created by any operation of law.

If, in favour of the priſoner, the ſlighteſt degree of puniſhment, which *any* man can ſuffer *in the like caſe*, is to be intended, *every* woman would claim exemption from burning, becauſe inferior eccleſiaſticks are not burnt; and from forfeiture, becauſe lords of parliament are neither burnt nor forfeit. But this abſurd conſtruction happens to be thrown out by the act itſelf, which appoints the puniſhment, it means, to be burning and impriſonment. The ſtatute therefore will not ſuffer it to be underſtood, that any woman, convicted of any felony, ſhall ſuffer no other puniſhment, than thoſe who, it is now contended, are to ſuffer no puniſhment at all.

Upon theſe grounds I ſubmit to your lordſhips, that the judgment to be pronounced upon every woman, of whatever quality or denomination, is that, which is preſcribed by the third and fourth of *William* and *Mary*; and that there is no ground or warrant of law to inſiſt, that a peereſs can avoid judgment of death upon any other terms.

My lords, the whole queſtion is upon *burning*. The *impriſonment* is the ſame either way. Now, if there be prudence or propriety of any ſort in eſtabliſhing ſuch an exemption for peereſſes, let that prudence or propriety be ſtated, where by the conſtitution of this country ſuch an application ought to be made to parliament. If the parliament ſhould think fit to create new privileges, or add new diſtinctions to any order of men, or women, they are competent to do it. But it would be aſſuming too much for any court of juſtice. Your lordſhips ſit here merely as a court of juſtice, not as a houſe of legiſlature. To do that by forced and arbitrary interpretation of law, which ought only to be done by act of legiſlature, is too much enhancing the prerogative of the judge; and too much confounding thoſe authorities, which ought to have plainer marks and broader limits ſet between them.

Mr. *Wallace.*

My lords, I did not ſuppoſe it would have fallen to my ſhare to give your lordſhips any trouble upon this ſubject; and therefore I have not very lately looked into the ſtatutes which have been mentioned; but I will ſtate to your lordſhips in general, what I underſtand to be the privilege of peereſſes at this day.

By the 20th *Hen.* VIth, *chap.* 9. to obviate doubts which had ariſen upon *Magna Charta*, peereſſes are put upon a footing with peers with reſpect to trial and puniſhment; and by an equitable conſtruction, peereſſes by titles ſince created, as marchioneſſes and viſcounteſſes, are within the act.

At the time of paſſing the act of *Edward* the VIth, the lords of parliament are mentioned, which at that time of day comprehended the whole peerage. In this ſituation were peers at the time of paſſing the ſtatute of the 18th of *Elizabeth*, which ſtatute cannot relate to them. Every perſon, who is to be admitted or allowed to have the benefit or privilege of clergy, ſhould not after burning in the hand be delivered to the ordinary, as has been cuſtomary, but may be detained in priſon. This proviſion clearly refers to the ſituation of commoners, and not of peers: it refers to thoſe who were at the time of making the act liable; whereas peers were not in that condition; they were not to pray their clergy, but the benefit of that act, and to be delivered out without burning in the hand. The direction given by the act is to juſtices: an expreſſion never applied, I believe, in any act to the lords in parliament ſitting in their judicial capacity as a criminal court: the juſtices are to keep ſuch perſons in priſon after they are burnt in the hand; which is a demonſtration that inferior courts are alluded to; and it is under this ſtatute impriſonment is inflicted upon perſons intitled to their clergy.

At the time of paſſing the ſtatute of the 3d and 4th of *William* and *Mary*, peers were exempt from burning in the hand and impriſonment in clergyable caſes, which commoners were ſubject to. By this law women are put on the ſame footing with men, and the courts before whom they are tried are to inflict the ſame puniſhment as they are authorized to do upon men. Theſe proviſions make it, in my apprehenſion, extremely clear, that the peereſſes were intended to be placed in the ſame condition with peers, as they were by *Magna Charta*, explained by the ſtatute of *Edward* the VIth. Would it not be the moſt harſh and cruel interpretation, if the act was even doubtful, to ſubject a peereſs to a puniſhment for the ſame crime which her huſband is exempt from? The conditions of perſons create diſtinctions in the conſtruction of laws; but the attempt now made is to confound all ranks, and by ſuppoſed literal interpretation to involve one of your lordſhips own ſituation in the puniſhment, which the legiſlature has been ſo anxious to extricate you from.

Mr. *Mansfield.*

It is not till this moment, that I had any apprehenſion myſelf, that any queſtion of this ſort would be agitated before your lordſhips; and therefore I can only ſpeak of the ſeveral ſtatutes referred to from my general memory of them; but I apprehend that the conſtruction of theſe ſtatutes will not, cannot be ſuch as is now contended for on the part of the proſecutor. The object of the conſtruction wiſhed by the proſecutor is this: that the laws of this country are to make a difference between one ſex and the other; that they are now at this time of day to be ſo determined as to inflict a more ſevere, a more cruel puniſhment upon a woman than on a man, though the offence committed be the ſame. Now, ſuch a conſtruction your lordſhips would never ſuffer, nor any court of juſtice in this country would ſuffer to take place, unleſs there ſhould ſomething be found in the law which neceſſarily requires it: and taking the ſeveral ſtatutes together relating to this ſubject, I apprehend your lordſhips will be of opinion, that theſe ſtatutes do not only not require, but that they exclude, ſuch abſurdity, ſuch inhumanity.

My lords, the ſtatute upon which the whole muſt be founded, as I conceive, is that of the 20th of king *Henry* the VIth, which, as well as I recollect from my memory, is *chap.* 11. which firſt provides expreſsly, though I believe it is conſidered only as a declaration of the common law, but provides, that peereſſes ſhould be tried, and, if I recollect the words rightly, ſhould not only be tried, but ſhould be judged in the ſame manner as peers: and remembering what has happened upon that ſtatute, I muſt put your lordſhips in mind, that ſuch has been the benignity of the conſtruction upon it, that though only three ranks of peereſſes are named, it has been clearly held in conſtruction to extend to all. The three that are mentioned, I think, are ducheſſes, counteſſes, and baroneſſes. The conſtruction is, that it extends to marchioneſſes and viſcounteſſes, becauſe they are intitled in the ſpirit and meaning of the law to the ſame privilege which is given to the other ladies by name. The clear reſult and effect of this ſtatute is, to ſay in general terms, that women of that high rank ſhould be tried and ſhould be judged in the ſame manner as men. The terms uſed in the act are general. Whoever reads that law, will be aſtoniſhed to hear any man contending, that in impoſing judgment upon a peereſs, your lordſhips are to be guided by a different rule from that which you would follow if you were paſſing judgment upon a peer. The next ſtatute to be conſidered after this, as a general ſtatute upon the ſubject, is that of the 3d and 4th of king *William* the third. Did that ſtatute mean,—were the legiſlators that made it ſo forgetful of what was due to humanity, and to themſelves and their own characters, as to mean, that a diſtinction in puniſhment ſhould prevail between one ſex and the other, to the prejudice of that which is intitled to the greater indulgence and compaſſion? Moſt certainly not; becauſe the expreſs proviſion of that ſtatute is, that women convicted of offences intitled to the benefit of clergy ſhould ſuffer in the ſame manner as men would ſuffer convicted of the ſame offences.

My lords, no man, who can read that ſtatute, and reaſon upon it, can help concluding that it was the object of that law to ſay, that where women were convicted of clergyable offences, they ſhould be in as good a ſituation as men who were convicted of the like.

My lords, taking theſe two ſtatutes of the 20th of *Henry* the ſixth providing for the trial and judgment of peereſſes, and the general ſtatute of the 3d and 4th of *William* the third giving the benefit of clergy to women, I ſhould think it impoſſible to ſay, that peereſſes convicted of a clergyable offence were not to have preciſely the ſame privileges as peers convicted of ſuch offences.

My lords, if there be any rule of conſtruction in the law, which is indiſputable, for expounding ſtatutes, it is this; that ſtatutes, as we ſay, *in pari materiâ*, relating to one ſubject, are to be conſidered as one law, taken and interpreted together as throwing light one upon the other: no rule of conſtruction is better eſtabliſhed. Follow that rule of conſtruction here. Take firſt the general law for the trial of peereſſes and the judgment of peereſſes in the ſame manner as of peers; then take the general law, giving the benefit of clergy to women in the ſame manner as to men; and who will not ſay, that that rule of conſtruction does not neceſſarily tend to put both, upon the rank of men and women, in the ſame condition, when convicted of the ſame ſpecies of offence? But what are the particular acts of parliament, which have been referred to as requiring a different conſtruction? By the firſt of *Edward* the ſixth, it is extremely clear, that peers are not to undergo the ignominious puniſhment of burning. The ſtatute that follows that of *Edward* the ſixth, is the 18th of *Elizabeth*, which takes away the delivery to the ordinary, ſubſtitutes burning in its place, and then gives a power to impriſon. Whoever reads that act, will ſee that it certainly was confined to caſes, where puniſhment was to be inflicted by juſtices upon perſons of an ordinary deſcription, not perſons of the rank of peers; and the ſtatute ſtrictly and clearly relates only to perſons ſo having clergy allowed, as is preſcribed by that ſtatute: and if the 18th of *Elizabeth* is to have the conſtruction which is contended for, I underſtand it muſt have effect alſo to inflict the puniſhment of burning upon peers. So much, my lords, for the ſtatute of the 18th of *Elizabeth*. The 21ſt of king *James* was mentioned as firſt in part giving clergy to women: the 3d and 4th of king *William* the third is mentioned as alluding to it. It does ſo, but the proviſions of the 3d and 4th of king *William* the third are general, that is, a general law extending the benefit of clergy to women in all caſes. Now it is ſaid there, that they ſhall have the ſame puniſhment as men; they are to be in the like ſituation as men. Then the act goes on to ſay, that is to ſay, burning and impriſoning.

My lords, what is the fair conſtruction of this law? Why, that women ſhall be in the ſame ſituation as men; and where men are of ſuch condition, that they would be burnt in the hand, that they would be liable to be impriſoned, women in like manner ſhould be ſubject to burning in the hand, and ſhould be ſubject to impriſonment: but no one ever heard, that the ſevere part of a law inflicting a puniſhment ſhould be extended ſo by conſtruction, where it was not ſo expreſs. Now you muſt act againſt the clear proviſion of that law, that women ſhould be in the ſame ſituation as men, if you were to ſay, that a peereſs convicted of a clergyable offence ſhould either undergo the puniſhment of burning, or the puniſhment of impriſonment. No one can ſay upon the ſtatute of *Edward* the ſixth, that they are ſubject to either. The object of the ſtatute of *William* the third was to make the puniſhment of ſuch offenders preciſely the ſame with regard to one ſex as the other; and the true ſpirit and great object of that law muſt be directly acted againſt, if a peereſs was to be put in a different ſituation than a peer, and to have a more ſevere and cruel puniſhment inflicted upon her, than would be upon him. Theſe are the only general obſervations that occur to me now in taking the whole ſcope of the law: I therefore ſubmit to your lordſhips, that the noble lady at the bar is intitled to the benefit of theſe ſtatutes.

Mr. *Attorney General.*

My lords, concerning the point which is now depending before the houſe, I fairly confeſs, that, when your lordſhips firſt called upon me to give my reaſons why judgment of death ſhould not be ſuſpended upon the prayer of the priſoner, made in the manner in which that prayer was conceived; and upon the effects and conſequences of allowing her the benefit of the ſtatute in a more regular courſe; I would rather, if I might, have been excuſed from laying my thoughts before your lordſhips. I had heard a rumour, that men, whoſe learning and authority I greatly reverence, held a different opinion. This would not fail to raiſe much diſtruſt of my own concluſions; although I had thoroughly conſidered the ſubject; and although I never read any propoſition with more perfect conviction of the truth of it, ſince I learnt to read.

My lords, that idea, the only one I have been able to form, or adopt, is now very much ſtrengthened. That cloud, which came over it from the rumoured prevalence of contrary notion, is very much removed. Becauſe, if there be no opinion to the contrary, but what is to be founded on the argument I have heard to-day from thoſe who are beſt able to ſuſtain the contrary opinion, I am perfectly ſatisfied, it is impoſſible this ſhould paſs as a point of law, or receive the ſanction of your lordſhips concurrence.

My lords, what are the arguments? Firſt, it is utterly inconceivable, that the law ſhould put ſuch difference between the two ſexes. My lords, if the ſubject was laid by for a moment, only to make a handſome compliment to a very reſpectable part of this aſſembly, which well deſerves all the attention it commands, it is impoſſible to quarrel with a turn of gallantry. But, reſuming the ſubject, we are all agreed, that the law did actually put that very difference between the ſexes for many centuries. And this uncourtly ſtatute of *Edward* the ſixth, proceeding upon the law as it found it, did not think of aboliſhing the diſtinction. It was quite beſide the purpoſe of that act, which did not mean to qualify the ſeverity of the criminal law in general, much leſs to make an equal diſtribution of it among the ſubjects at large. But, taking the law as it ſtood, it was found inconvenient, incompatible, and ſhocking to reaſon, that lords of parliament, who were to give their voices upon the moſt arduous affairs of a great empire, ſhould do ſo under apparent ſtigmata and circumſtances of open infamy. I don't rely on the gender of the words, but on the purpoſe of the act. Women are excluded by both. They were neither liable to the ſtigmata, nor held the high office which made them intolerable. Therefore biſhops, whom the twenty-eighth and thirty-ſecond of *Henry* the eighth had, at that time, made liable to the whole caſe of other clerks convict, were included: women certainly not. The privilege was given, not to the peerage, but to the houſe of parliament, to be claimed by the members as ſuch. It was not ſubſtantive; but an ingraftment on the right to clergy, which women never had. In truth, I have not heard a hint from the counſel on the other ſide to queſtion the exiſtence of this difference down to the third and fourth of *William* and *Mary*, upon which act they have chiefly relied in argument. They lay it down, that peers convict of clergyable crimes are exempt from all puniſhment, not being within the eighteenth of *Elizabeth*; that peereſſes are to be tried and judged like peers; that the third and fourth of *William* and *Mary* puts women convict in the ſame condition as men; and that by ſome tacit reference to the former ſtatutes, peereſſes convict are not to be puniſhed at all.

I have troubled your lordſhips already with my reaſons for thinking, that, in old time, peers enjoyed the benefit of clergy in common with other men, and upon the ſame terms; that in the fourth of *Henry* the ſeventh, burning was inflicted upon them as lay-clerks; that the ſtatute of *Edward* the ſixth, in the very moment of exempting them from the penalties incurred at law by conviction, adjudges them clerks, and delivers them for purgation in the Biſhop's Court; that the ſtatute of *Elizabeth* delivers all, who ſhall thereafter be admitted to clergy, from purgation, and diſcharges them, ſubject to ſuch correction by impriſonment for leſs than a year, as the court ſhall think fit.

It is not denied, that theſe words, in their plain and natural ſenſe, embrace the caſe of peers. But, in this context, it is ſuppoſed they do not, becauſe the clerks convict are to be diſcharged after allowance of their clergy, and *after burning in the hand according to the ſtatute.* This laſt proviſion, they ſay, cannot refer to peers. Nay, one learned gentleman thought, that, if it ſhould be conſtrued to include peers, they muſt, by force of theſe words, be burnt in the hand.

I cannot follow this idea. I have no way of conceiving, how an act which inflicts, or rather reſerves a penalty, according to the law as it then ſtood, can be interpreted to create a new penalty; or, by what chain of reaſoning it is concluded, that where all convicts are to be diſcharged upon the allowance of clergy, and ſuch burning as the law directs, thoſe are not to be diſcharged at all, for whom the law has not directed burning. Suppoſe the king ſhould pardon the burning: it was thought, in lord *Warwick*'s caſe, that would be a perfect diſcharge. Burning was not ſubſtituted in the place of purgation: that was a mere ſlip: it is contrary to the hiſtory: burning exiſted before the eighteenth of *Elizabeth*, in juſt the ſame extent as after. Impriſonment, at the diſcretion of the temporal judge, was the ſubſtitute for purgation; and is extended expreſsly to all, who are diſcharged from purgation. But it ſeems too late to argue this. Was it not expreſsly decided in the caſe of *Searl* and *Williams*, when prohibition went to ſtay the deprivation of a parſon, who had been convicted of manſlaughter, and diſcharged under the eighteenth of *Elizabeth*, although he could not be burnt? ‘ For when ‘ the ſtatute ſays after burning, it imports, where burning ought to be; ‘ otherwiſe the ſtatute would do no good to clerks, for whom it was moſt ‘ intended.’ The caſe is reported in *Hobart*. The ſtatute ſpeaks univerſally of every body, thoſe who were, and thoſe who were not liable to burning; and diſcharges them all, after allowance of clergy, and burning according to law, as it had ſtood before; that is, *reddendo ſingula ſingulis*.

The next objection is, that the word *juſtices* will not apply to your lordſhips, even while you are ſitting merely in the characters of judges. Therefore a ſtatute, which is to be executed by juſtices, cannot relate to a peer, who is not triable by juſtices.

Is it then ſeriouſly contended, that your lordſhips, exerciſing your juriſdiction in the trial of a peer, will not do all the ſame acts of juſtice, which judges muſt do in the trial of a commoner? Upon reading many acts of parliament, your lordſhips will find, either, that you have no juriſdiction at all, or that you muſt exerciſe it under the character and denomination of juſtices. The ſame objection might have been made to lord *Ferrers*'s execution; the ſame to the burning a peer under the ſtatute of *Henry* the ſeventh. By the word *juſtices* I underſtand, in our law, all manner of officers who are intruſted with the adminiſtration of juſtice. So *Spelman* defines the word. In high antiquity, the name went to the greateſt ſubject in this country; for I take the *Juſtitia totius Angliæ* to have been above the *Seneſchallus Regis*. Your lordſhips therefore will not diſdain the name; for you ſit here in no higher character than that, which, by juſt and natural conſtruction, is attributed to the word *juſtices*. Therefore, if no better objections can be raiſed than theſe, I apprehend the words of the ſtatute ſufficiently comprize the peerage. This alſo was laid down in the trial of lord *Warwick*.

But, my lords, if theſe are objections, whither do they go? Not only to ſubvert the ſtatute of *Elizabeth*, in this moſt reaſonable particular of giving ſome *convenient* correction, as the ſtatute calls it, to a criminal found ſo upon record; but to reſtore a law, which has now for many ages been underſtood to be at an end; and I flatter myſelf, conſidering the account which the books all give of it, that purgation is at an end.

But I am called upon to look at the 20th of *H.* VI. *c.* 9. This was a mere declaratory law; reciting the 29th chapter of *Magna Charta*, *nullus liber homo*, and ſo forth, and a very abſurd doubt, whether *homo* included both genders; and declaring, that ‘ ladies ſhall be put to an- ‘ ſwer, and judged before ſuch judges and peers’ (here by the way *judges* and *peers* are ſynonimous) ‘ as peers ſhould be.’ But though, by *Magna Charta*, peereſſes were to be tried by their peers, as other women were by theirs, there the privilege ends. All were, upon conviction, to receive the like judgment and execution: and, in the exemption from death, the difference was not between the ranks, but the ſexes, of the convicts. And ſo the law undoubtedly continued, notwithſtanding this ſtatute.

But it was ſaid, that, by the equity of this ſtatute, marchioneſſes and viſcounteſſes were included, though not named. This was to give countenance to the rule, that all ſtatutes *in pari materiâ* ſhall be conſtrued alike. There is great good ſenſe in the rule. Marchioneſſes and viſcounteſſes were clearly within the law declared; and conſequently within the reaſon of declaring it: therefore ducheſſes, counteſſes, and baroneſſes were, by a ſort of ſynechdoche, put for all peereſſes. So where a privilege is ſaved to certain denominations of people, all others, who were before within the ſame privilege, will be within the ſaving, if there be nothing in the context to raiſe a diſtinction againſt them; particularly, if the ſaving be only declaratory, and not a poſitive exception. Nay, in a new law, things, equally within the reaſon of it, have been comprized in it by conſtruction. But this borders upon arbitrary: parliament ſeems the propereſt judge of this reaſon. If peers, diſqualified to vote, ſhould claim the benefit of the firſt of *Edward* the ſixth, it might be argued with ſome plauſibility, that they are within the reaſon of the act. They are ſo certainly, in every point, except that of voting; and yet I ſhould think it too much to overlook ſo material a diſtinction made by the ſtatute itſelf. But if women, who were not concerned in any part of the ſubject matter, make the ſame claim, it would be making a perfectly new law to include them. Where then is the *paritas materiæ* between the act of *William* and *Mary*, for exempting women from capital puniſhment, and the twentieth of *Henry* the ſixth, which had nothing to do with puniſhment; or the firſt of *Edward* the ſixth, which had nothing to do with women?

I did propoſe two ſtatutes to be conſidered *in pari materiâ*, the acts of *James* and of *William* and *Mary*; the only two, which confer upon any woman any exemption from capital puniſhment. I have not heard it denied, that if a peereſs had ſtood convicted of the crimes mentioned in the firſt act, the puniſhment there ſpecified muſt have enſued. This fixes the ſenſe of theſe words, *in the like caſe*. I am poſſeſſed therefore of this ground, that the act of *Edward* the ſixth did not touch the difference put by the law of clergy between the ſexes; nor that of *James* make any difference as to the quality of the offender. We go intirely upon the act of *William* and *Mary*. It is inaccurate to ſay, this acts puts women into the ſame condition with men; and ſtill more, with men of the ſame quality reſpectively. There is nothing in it about the condition of the perſon. Where a man, convict of any felony, has clergy, a woman, *convict of the like offence*, ſhall not have judgment of death, but ſuffer the ſame puniſhment as a man would ſuffer, with clergy, *in the like caſe*. Theſe words refer altogether to the quality of the offence. That very crime, which in one record, applied to a man, infers judgment of death, avoidable by his claim of clergy, applied in another to a woman, infers the ſpecifick judgment preſcribed by the act. Nor are the two ſexes put into the ſame condition, even as to puniſhment. All women avoided judgment of death; not ſo of all men. Some were indiſpenſably incapable of holy orders: ſuch cannot have their clergy at this day; nor had any other exemption from death before the fifth of *Anne*. Some could not prove their title to clergy by reading. Men could have their clergy but once; women the benefit of this ſtatute *toties quoties*, till a ſubſequent act altered the law in this reſpect.

Still leſs can the words be twiſted to create a difference as to rank of the offender. It is hard, ſays a learned gentleman, to put the ſevereſt conſtruction upon an act of this ſort. The act is not penal. But the ſhorter anſwer is, there are not two conſtructions to chuſe between. If the phraſe had been left general, *the ſame puniſhment as a man ſhould ſuffer that had his clergy in the like caſe*, it might have been thought uncertain what that puniſhment ſhould be; becauſe different orders of men were liable to different meaſure of puniſhment *in the like caſe*; the bulk of men to forfeiture, burning, and diſcretionary impriſonment; inferior eccleſiaſticks to forfeiture and impriſonment; lords of parliament to impriſonment only. In ſuch a text there might have been room to contend for a favourable conſtruction; and yet, even then, I ſhould have thought that the meaſure of puniſhment allotted to the bulk of mankind, undiſtinguiſhed by peculiar privileges, muſt have been deemed the meaning of the legiſlature. But whatever might have been the conſtruction of ſuch a text, it muſt have applied equally to all women. They could not have been claſſed in caſts, according to the condition of their reſpective huſbands; the wife of a lord of parliament to be impriſoned; of an inferior eccleſiaſtick to be impriſoned and to forfeit; of other men to be impriſoned, to forfeit, and be burnt. The ſtatute however has put an end to all queſtion, by ſtating expreſsly the very meaſure of puniſhment allotted to all women.

Burnt in the hand in open court, it is ſaid, ſhall not apply to peereſſes, becauſe they were never liable to be burnt at all. The poſition is true, not of peereſſes alone, but of all women. But they were liable to judgment of death; for which this ſlighter puniſhment was a deſirable commutation.

My lords, if there be any thing in the nature of the puniſhment unreaſonable, or improper to be applied to women in general, or to noblewomen in particular, let the matter come before parliament. It is a legiſlative conſideration, and parliament will entertain it according to the extent of the principle, which certainly will apply to many noblewomen of much higher rank than ſome peereſſes, who, as the law now ſtands, are liable to that puniſhment. So, I think, they ought to remain. Guilt levels rank. A noble-woman, covered with the ignominy of ſuch a conviction, cannot forfeit leſs than her eſtimation.

My lords, the only queſtion is this: has any poſitive law granted the exemption now demanded, to wind up ſuch a record as this with perfect impunity, a ridiculous diſgrace to publick juſtice? Has this been done in expreſs terms; or in terms, whoſe neceſſary conſtruction amounts to expreſs?

My lords, when I have qualified the queſtion in that manner, I have gone to the verge of judicial authority. And I do deſire to preſs this upon your lordſhips as an univerſal maxim: No more dangerous idea can creep into the mind of a judge, than the imagination, that he is wiſer than the law. I confine this to no judge, whatever be his denomination, but extend it to all. And, ſpeaking at the bar of an *Engliſh* court of juſtice, I make ſure of your lordſhips approbation, when I comprize even your lordſhips, ſitting in *Weſtminſter-Hall*. It is a grievous example to other judges. If your lordſhips aſſume this, ſitting in judgment, why not the *King's-Bench?* why not commiſſioners of *Oyer* and *Terminer?* If they do ſo, why not the *Quarter Seſſions?* Ingenious men may ſtrain the law very far——but, to pervert it----to new-model it---the genius of our conſtitution ſays, judges have no ſuch authority, nor ſhall preſume to exerciſe it.

The lords then adjourned to the chamber of parliament; and, after ſome time paſſed there,

See the Appendix,

the houſe adjourned again into *Weſtminſter-Hall*; when, after the uſual proclamation for ſilence, his grace the lord high ſteward addreſſed the ducheſs of *Kingſton* to the following effect:

Lord High Steward. Madam, the lords have conſidered of the prayer you have made, to have the benefit of the ſtatutes, and the lords allow it you.

But, madam, let me add, that although very little puniſhment, or none, can now be inflicted, the feelings of your own conſcience will ſupply that defect. And let me give you this information likewiſe, that you can never have the like benefit a ſecond time, but another offence of the ſame kind will be capital.

Madam, you are diſcharged, paying your fees.

Lord High Steward. My lords, this trial being at an end, nothing remains to be done here, but to determine the commiſſion.

Lords. Ay, ay.

Lord High Steward. Let proclamation be made for diſſolving the commiſſion of high ſteward.

Serjeant at Arms. Oyez! oyez! oyez! Our ſovereign lord the king does ſtrictly charge and command all manner of perſons here preſent, and that have here attended, to depart hence in the peace of God, and of our ſaid ſovereign lord the king, for his grace my lord high ſteward of *Great Britain* intends now to diſſolve his commiſſion.

Then the white ſtaff being delivered to the lord high ſteward by the gentleman uſher of the black rod on his knee, his grace ſtood up uncovered, and holding the ſtaff in both his hands, broke it in two, and declared the commiſſion to be diſſolved; and then, leaving the chair, came down to the woolpack, and ſaid, Is it your lordſhips pleaſure to adjourn to the chamber of parliament?

Lords. Ay, ay.

Lord High Steward. This houſe is adjourned to the chamber of parliament.

Then the peers, and others, returned back to the chamber of parliament in the ſame order they came down, except that his royal highneſs the duke of *Cumberland* walked after the lord chancellor.

APPENDIX.

Die Veneris, 19 *Aprilis* 1776.

ORDERED by the lords ſpiritual and temporal in parliament aſſembled, that the following queſtions be put to the judges, *viz.*

I. Whether a ſentence of the Spiritual Court againſt a marriage in a ſuit for jactitation of marriage is concluſive evidence ſo as to ſtop the counſel for the crown from proving the ſaid marriage in an indictment for polygamy?

II. Whether admitting ſuch ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion?

Whereupon, *the lord chief juſtice of the court of Common Pleas*, having conferred with the reſt of the judges preſent, delivered their unanimous opinion upon the ſaid queſtions, with his reaſons, as follow, *viz.*

My lords,

My lord chief baron, and the reſt of my brethren, have deſired me to deliver their anſwer to the queſtions your lordſhips have been pleaſed to propound to us.

That our opinion may be the better underſtood, it is neceſſary to make ſome obſervations on what has paſſed in argument upon the ſubject.

What has been ſaid at the bar is certainly true, as a general principle, that a tranſaction between two parties, in judicial proceedings, ought not to be binding upon a third; for it would be unjuſt to bind any perſon who could not be admitted to make a defence, or to examine witneſſes, or to appeal from a judgment he might think erroneous; and therefore the depoſitions of witneſſes in another cauſe in proof of a fact, the verdict of a jury finding the fact, and the judgment of the court upon facts found, although evidence againſt the parties, and all claiming under them, are not, in general, to be uſed to the prejudice of ſtrangers. There are ſome exceptions to this general rule, founded upon particular reaſons, but not being applicable to the preſent ſubject, it is unneceſſary to ſtate them.

From the variety of caſes relative to judgments being given in evidence in civil ſuits, theſe two deductions ſeem to follow as generally true: firſt, that the judgment of a court of concurrent juriſdiction, directly upon the point, is as a plea, a bar, or as evidence, concluſive, between the ſame parties, upon the ſame matter, directly in queſtion in another court: ſecondly, that the judgment of a court of excluſive juriſdiction, directly upon the point, is, in like manner, concluſive upon the ſame matter, between the ſame parties, coming incidentally in queſtion in another court, for a different purpoſe. But neither the judgment of a concurrent or excluſive juriſdiction is evidence, of any matter which came collaterally in queſtion, though within their juriſdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment.

Upon the ſubject of marriage, the Spiritual Court has the ſole and excluſive cognizance of queſtioning and deciding, directly, the legality of marriage; and of enforcing, ſpecifically, the rights and obligations reſpecting perſons depending upon it; but the temporal courts have the ſole cognizance of examining and deciding upon all temporal rights of property; and, ſo far as ſuch rights are concerned, they have the inherent power of deciding incidentally, either upon the fact, or the legality of marriage, where they lie in the way to the deciſion of the proper objects of their juriſdiction: they do not want or require the aid of the ſpiritual courts; nor has the law provided any legal means of ſending to them for their opinion; except where, in the caſe of marriage, an iſſue is joined upon the record in certain real writs, upon the legality of a marriage, or its immediate conſequence, ‘general baſtardy;’ or, in like manner, in ſome other particular inſtances, lying peculiarly in the knowledge of their courts, as profeſſion, deprivation, and ſome others; in theſe caſes, upon the iſſue ſo formed, the mode of trying the queſtion is by reference to the ordinary, and his certificate, when returned, received, and entered upon the record in the temporal courts, is a perpetual and concluſive evidence againſt all the world upon that point; which exceptionable extent, on whatever reaſons founded, was the occaſion of the ſtatute of the 9th of *Henry* VI. requiring certain public proclamations to be made for perſons intereſted to come in, and be parties to the proceeding. But, even in theſe caſes, if the ordinary ſhould return no certificate, or an inſufficient one; or, if the iſſue is accompanied with any ſpecial circumſtances, as if a ſecond iſſue, triable by a jury, is formed upon the ſame record; or, if the effect of the ſame iſſue is put into another form, a jury is to decide, and not the ordinary to certify, the truth; and to this purpoſe ſir *William Staunford* mentions a remarkable inſtance. Bigamy was triable by the biſhop's certificate; but if the priſoner, to avoid the charge, pleads that the ſecond eſpouſals were null and void, becauſe he had a former wife living, this ſpecial bigamy was not to be tried by the biſhop's certificate.

So that the trial of marriage, either as to legality, or fact, was not abſolutely, and from its nature, an object *alieni fori*.

There was a time, when the ſpiritual courts wiſhed that their determinations might in all caſes be received as authentic in the temporal courts; and in that ſolemn aſſembly of the king, the peers, the biſhops, and judges, convened for the purpoſe of ſettling the demands of the church, by *Edward* the ſecond, one of the claims was expreſſed in theſe words: ‘*Si aliqua cauſa, vel negotium, cujus cognitio ſpectat ad forum eccleſiaſticum, et coram eccleſiaſtico judice fuerit ſententialiter terminatum, et tranſierit in rem judicatam, nec per appellationem fuerit ſuſpenſum; et poſtmodum, coram judice ſeculari, ſuper eadem re inter eaſdem perſonas queſtio moveatur, et provetur per teſtes vel inſtrumenta, talis exceptio in foro ſeculari non admittatur.*’ The anſwer to which demand was expreſſed in this manner: ‘*Quando eadem cauſa, diverſis rationibus coram judicibus eccleſiaſticis, et ſecularibus, ventilatur, dicunt quod (non obſtante eccleſiaſtico judicio) curia regis ipſum tractet negotium, ut ſibi expedire videtur.*’ For which lord *Coke* gives this reaſon, ſecond *Inſtitute*, *c.* 22. ‘For the ſpiritual judges proceedings are for the correction of the ſpiritual inner man, and *pro ſalute animæ*, to enjoin him penance; and the judges of the common law proceed to give damages and recompence for the wrong and injury done;’ and then adds, ‘and ſo this article was deſervedly rejected.’

And the ſame demand was made, and received the ſame anſwer, in the third year of king *James* the firſt.

It is to be obſerved, that this demand related only to civil ſuits between the ſame parties; and that the ſentence ſhould be received as a plea in bar. But this attempt and miſcarriage did not prevent the temporal courts from ſhewing the ſame reſpect to their proceedings, as they did to thoſe in other courts. And therefore where, in civil cauſes, they found the queſtion of marriage directly determined by the eccleſiaſtical courts, they received the ſentence, though not as a plea, yet as proof of the fact; it being an authority accredited in a judicial proceeding by a court of competent juriſdiction; but ſtill they received it upon the ſame principles, and ſubject to the ſame rules, by which they admit the acts of other courts.

Hence a ſentence of nullity, and a ſentence in affirmance of a marriage, have been received as concluſive evidence on a queſtion of legitimacy ariſing incidentally upon a claim to a real eſtate.

A ſentence in a cauſe of jactitation has been received upon a title in ejectment, as evidence againſt a marriage, and, in like manner in perſonal actions, immediately founded on a ſuppoſed marriage.

So a direct ſentence, in a ſuit upon a promiſe of marriage, againſt the contract, has been admitted as evidence againſt ſuch contract, in an action brought upon the ſame promiſe for damages, it being a direct ſentence of a competent court, diſproving the ground of the action.

So a ſentence of nullity is equally evidence in a perſonal action againſt a defence founded upon a ſuppoſed coverture.

But in all theſe caſes, the parties to the ſuits, or at leaſt the parties againſt whom the evidence was received, were parties to the ſentence, and had acquieſced under it; or claimed under thoſe who were parties, and had acquieſced.

But although the law ſtands thus with regard to civil ſuits, proceedings in matters of crime, and eſpecially of felony, fall under a different conſideration: firſt, becauſe the parties are not the ſame; for the king, in whom the truſt of proſecuting public offences is veſted, and which is executed by his immediate orders, or in his name by ſome proſecutor, is no party to ſuch proceedings in the Eccleſiaſtical Court, and cannot be admitted to defend, examine witneſſes, in any manner intervene, or appeal: ſecondly, ſuch doctrines would tend to give the ſpiritual courts, which are not permitted to exerciſe any judicial cognizance in matters of crime, an immediate influence in trials for offences, and to draw the deciſion from the courſe of the common law, to which it ſolely and peculiarly belongs.

The ground of the judicial powers given to eccleſiaſtical courts is, merely, of a ſpiritual conſideration, *pro correctione morum, et pro ſalute animæ*. They are therefore addreſſed to the conſcience of the party. But one great object of temporal juriſdiction is the public peace; and crimes againſt the public peace are wholly, and in all their parts, of temporal cognizance alone. A felony by common law was alſo ſo. A felony by ſtatute becomes ſo at the moment of its inſtitution. The temporal courts alone can expound the law, and judge of the crime, and its proofs; in doing ſo, they muſt ſee with their own eyes, and try by their own rules, that is, by the common law of the land; it is the truſt and ſworn duty of their office.

When the acts of *Henry* the eighth firſt declared what marriages ſhould be lawful, and what inceſtuous, the temporal courts, though they had before no juriſdiction, and the acts did not by expreſs words give them any upon the point, decided, incidentally, upon the conſtruction, declared what marriages came within the *Levitical* degrees, and prohibited the ſpiritual courts from giving or proceeding upon any other conſtruction.

Whilſt an ancient ſtatute ſubſiſted (2 *H.* IV. 15.) by which perſonal puniſhment was incurred on holding heretical doctrines, the temporal courts took notice, incidentally, whether the tenet was heretical or not; for ‘the king's courts will examine all things ordained by ſtatute.’

When the ſtatute of *W.* III. made certain blaſphemous doctrines a temporal crime, the temporal courts alone could determine, whether the doctrine complained of was blaſphemous ſo as to conſtitute the crime.

If a man ſhould be indicted for taking a woman by force and marrying her; or for marrying a child without her father's conſent; or for a rape, where the defence is, that ‘the woman is his wife;’ in all theſe caſes, the temporal courts are bound to try the priſoner by the rules and courſe of the common law, and incidentally to determine what is heretical, and what is blaſphemous; and whether it was a marriage within the ſtatute; a marriage without conſent; and whether, in the laſt caſe, the woman was his wife: but if they ſhould happen to find, that ſentences, in the reſpective caſes, had been given in the Spiritual Court upon the hereſy, the blaſphemous doctrines, the marriage by force, the marriage without conſent, and the marriage on the rape; and the court muſt receive ſuch ſentences as concluſive evidence, in the firſt inſtance, without looking into the caſe, it would veſt the ſubſtantial and effective deciſion, though not the cognizance of the crimes, in the Spiritual Court, and leave to the jury, and the temporal courts, nothing but a nominal form of proceeding, upon what would amount to a pre-determined conviction or acquittal; which muſt have the effect of a real prohibition, ſince it would be in vain to prefer an indictment, where an act of a foreign court ſhall at once ſeal up the lips of the witneſſes, the jury, and the court, and put an entire ſtop to the proceeding.

And yet it is true, that the ſpiritual courts have no juriſdiction, directly or indirectly, in any matter not altogether ſpiritual; and it is equally true, that the temporal courts have the ſole and entire cognizance of crimes, which are wholly and altogether temporal in their nature.

And if the rule of evidence muſt be, as it is often declared to be, reciprocal; and that in all caſes, in which ſentences favourable to the priſoner, are to be admitted as concluſive evidence for him; the ſentences, if unfavourable to the priſoner, are in like manner concluſive evidence againſt him; in what ſituation muſt the priſoners be, whoſe life, or liberty, or property, or fame reſts on the judgments of courts, which have no juriſdiction over them in the predicament in which they ſtand? and in what ſituation are the judges of the common law, who muſt condemn, on the word of an eccleſiaſtical judge, without exerciſing any judgment of their own?

The Spiritual Court alone can deprive a clergyman. Felony is a good cauſe of deprivation: yet in lord *Hobart*'s *Reports* it is held, that they cannot proceed to deprive for felony, before the felony has been tried at law; and although, after conviction, they may act upon that, and make the conviction a ground of deprivation, neither ſide can prove or diſprove any thing againſt the verdict; becauſe, as that very learned judge declares, ‘ it would be to determine, though not capitally, upon a capital crime, ‘ and thereby judge of the nature of the crime and the validity of the ‘ proofs; neither of which belongs to them to do.’

If therefore ſuch a ſentence, even upon a matter within their juriſdiction, and before a felony committed, ſhould be concluſive evidence on a trial for a felony committed after, the opinion of a judge, incompetent to the purpoſe, reſulting (for aught appears) from incompetent proofs (as ſuppoſe the ſuppletory oath) will direct, or rule, a jury and a court of competent juriſdiction, without confronting any witneſſes, or hearing any proofs: for the queſtion ſuppoſes, and the truth is, that the temporal court does not and cannot examine, whether the ſentence is a juſt concluſion from the caſe, either in law or fact; and the difficulty will not be removed by preſuming, that every court determines rightly, becauſe it muſt be preſumed too, that the parties did right in bringing the full and true caſe before the court; and if they did, ſtill the court will have determined rightly by eccleſiaſtical laws and rules, and not by thoſe laws and rules by which criminals are to ſtand or fall in this country.

If the reaſon for receiving ſuch ſentence is, becauſe it is the judgment of a court competent to the enquiry then before them; from the ſame reaſon, the determination of two juſtices of the peace upon the fact or validity of a marriage, in adjudging a place of ſettlement, may hereafter be offered as evidence, and give the law to the higheſt court of criminal juriſdiction.

But if a direct ſentence upon the identical queſtion, in a matrimonial cauſe, ſhould be admitted as evidence (though ſuch ſentence againſt the marriage has not the force of a final deciſion, that there was none) yet a cauſe of jactitation is of a different nature; it is ranked as a cauſe of defamation only, and not as a matrimonial cauſe, unleſs where the defendant pleads a marriage; and whether it continues a matrimonial cauſe throughout, as ſome ſay, or ceaſes to be ſo on failure of proving a marriage, as others have ſaid, ſtill the ſentence has only a negative and qualified effect, *viz.* ‘ that the party has failed in his proof, and that the libel‘ lant is free from all matrimonial contract, *as far as yet appears*;’ leaving it open to new proofs of the ſame marriage in the ſame cauſe, or to any proofs of that or any other marriage in another cauſe: and if ſuch ſentence is no plea to a new ſuit there, and does not conclude the court which pronounces, it cannot conclude a court, which receives the ſentence, from going into new proofs to make out that or any other marriage.

So that admitting the ſentence in its full extent and import, it only proves, that it did not yet appear that they were married, and not that they were not married at all: and, by the rule laid down by lord chief juſtice *Holt*, ſuch ſentence can be no proof of any thing to be inferred by argument from it; and therefore it is not to be inferred, that there was no marriage at any time or place, becauſe the court had not then ſufficient evidence to prove a marriage at a particular time and place. That ſentence, and this judgment, may ſtand well together, and both propoſitions be equally true: it may be true, that the Spiritual Court had not then ſufficient proof of the marriage ſpecified, and that your lordſhips may now, unfortunately, find ſufficient proof of ſome marriage.

But if it was a direct and deciſive ſentence upon the point, and, as it ſtands, to be admitted as concluſive evidence upon the court, and not to be impeached from within; yet, like all other acts of the higheſt judicial authority, it is impeachable from without: although it is not permitted to ſhew that the court was *miſtaken*, it may be ſhewn that they were *miſled*.

Fraud is an extrinſic, collateral act, which vitiates the moſt ſolemn proceedings of courts of juſtice. Lord *Coke* ſays, it avoids all judicial acts, eccleſiaſtical or temporal.

In *civil ſuits* all ſtrangers may falſify, for covin, either fines, or real or feigned recoveries; and even a recovery by a juſt title, if colluſion was practiſed to prevent a fair defence; and this, whether the covin is apparent upon the record, as not eſſoining, or not demanding the view, or by ſuffering judgment by confeſſion or default; or extrinſic, as not pleading a releaſe, collateral warranty, or other advantageous pleas.

In *criminal proceedings* if an offender is convicted of felony on confeſſion, or is outlawed, not only the time of the felony, but the felony itſelf may be traverſed by a purchaſer, whoſe conveyance would be affected as it ſtands; and, even after a conviction by verdict, he may traverſe the time.

In the proceedings of the Eccleſiaſtical Court the ſame rule holds. In *Dyer* there is an inſtance of a ſecond adminiſtration, fraudulently obtained, to defeat an execution at law againſt the firſt; and the fact being admitted by demurrer, the court pronounced againſt the fraudulent adminiſtration. In another inſtance, an adminiſtration had been fraudulently revoked; and the fact being denied, iſſue was joined upon it; and the colluſion being found by a jury, the court gave judgment againſt it.

In the more modern caſes, the queſtion ſeems to have been, whether the *parties* ſhould be permitted to prove colluſion; and not ſeeming to doubt but that ſtrangers might.

So that colluſion, being a matter extrinſic of the cauſe, may be imputed by a ſtranger, and tried by a jury, and determined by the courts of temporal juriſdiction.

And if fraud will vitiate the judicial acts of the temporal courts, there ſeems as much reaſon to prevent the miſchiefs ariſing from colluſion in the eccleſiaſtical courts, which, from the nature of their proceedings, are at leaſt as much expoſed, and which we find have been, in fact, as much expoſed, to be practiſed upon for ſiniſter purpoſes, as the courts in *Weſtminſter-hall.*

We are therefore unanimouſly of opinion:

Firſt, That a ſentence in the Spiritual Court againſt a marriage in a ſuit of jactitation of marriage is not concluſive evidence, ſo as to ſtop the counſel for the crown from proving the marriage in an indictment for polygamy.

But ſecondly, Admitting ſuch ſentence to be concluſive upon ſuch indictment, the counſel for the crown may be admitted to avoid the effect of ſuch ſentence, by proving the ſame to have been obtained by fraud or colluſion.

Die Sabbati, 20° *Aprilis* 1776.

ORDERED by the lords ſpiritual and temporal in parliament aſſembled, that the lord chief juſtice of the court of *Common-Pleas* be, and he is hereby deſired to, favour this houſe with a copy of his argument upon the queſtions propoſed to the judges by this houſe yeſterday.

Die Lunæ, 22° *Aprilis* 1776.

ORDERED by the lords ſpiritual and temporal in parliament aſſembled, that the following queſtion be put to the judges, *viz.*

> Whether a peereſs convicted by her peers of a clergyable felony, is by law intitled to the benefit of the ſtatutes, ſo as to excuſe her from capital puniſhment, without being burnt in the hand, or being liable to any impriſonment?

Whereupon *the lord chief baron of the court of Exchequer,* having conferred with the reſt of the judges preſent, delivered their unanimous opinion upon the ſaid queſtion, with his reaſons, as follow, *viz.*

My lords,

THE queſtion propoſed by your lordſhips for our opinion is,

> Whether a peereſs convicted by her peers of a clergyable felony, is by law intitled to the benefit of the ſtatutes, ſo as to excuſe her from capital puniſhment, without being burnt in the hand, or being liable to any impriſonment?

My lords, your lordſhips would probably expect, that on a queſtion of this importance the judges would have deſired time to have conſidered of it; but, as it was eaſy to foreſee from the firſt appointment of this trial, that a queſtion of this ſort would probably ariſe, we have all looked into the ſeveral ſtatutes, from which any light could be expected: and as on ſuch a conſideration we have been able to form an opinion, in which we all concur, we thought it our duty to deliver it immediately, and not obſtruct the public buſineſs by unneceſſarily protracting this trial, which has already taken up ſo much of your lordſhips time.

I am therefore authorized by my brothers to ſay, we all concur in opinion, that a peereſs convicted by her peers of a clergyable felony is by law intitled to the benefit of the ſtatutes, ſo as to excuſe her from capital puniſhment, without being burnt in the hand, or being liable to any impriſonment.

My lords, the queſtion depends on ſeveral acts of parliament. The firſt I ſhall trouble your lordſhips with, is the 29 *Hen.* VIII. *c.* 9. which recites, ‘ that by *Magna Charta* no freeman ſhall be taken, or impriſoned, ‘ or diſſeiſed of his freehold, or his liberties or free cuſtoms, or ſhall be ‘ outlawed, or in any wiſe deſtroyed, that is, forejudged of life or limb, ‘ or put to death, or ſhall be condemned at the king's ſuit, either before ‘ the king in his bench, that is, the *King's Bench*, or before any other ‘ commiſſioner or judge whatſoever, but by the lawful judgment of his ‘ peers, or by the law of the land; in which ſtatute, that is, *Magna* ‘ *Charta*, no mention is made how women, ladies of great eſtate in re‘ ſpect of their huſbands peers of the land, married or ſole, that is to ſay, ‘ ducheſſes, counteſſes, or baroneſſes, ſhall be put to anſwer, or before ‘ what judges that they ſhall be judged upon indictments of treaſons or ‘ felonies by them committed or done; in regard whereof it is a doubt ‘ in the law of *England*, before whom and by whom ſuch ladies ſo in‘ dicted ſhall be put to anſwer and be judged: our ſaid lord the king, ‘ willing to put out ſuch ambiguities and doubts, hath declared by au‘ thority aforeſaid, that ſuch ladies ſo indicted, or hereafter to be indicted, ‘ of any treaſon or felony by them done or hereafter to be done, whether ‘ they be married or ſole, that they thereof ſhall be brought to anſwer, ‘ and put to anſwer and judged before ſuch judges and peers of the realm, ‘ as peers of the realm ſhould be, if they were indicted or impeached of ‘ ſuch treaſons or felonies done or hereafter to be done, and in like *(autiel)* manner and form, and none otherwiſe.’

Your lordſhips will obſerve, that this ſtatute does not introduce a new law, but is a declarative law, explaining what the true meaning of *Magna Charta* was. Peers in that ſtatute means equals; and therefore any of the nobility muſt by *Magna Charta* be tried by the nobility who are their peers; for all nobility, whether barons the loweſt, or dukes the higheſt, degree of nobility, are all equals in this reſpect: and lord *Coke*, 2d *Inſt.* 45, ſays, ‘ though ducheſſes, counteſſes, and baroneſſes are only named in this declaratory ſtatute, and marchioneſſes and viſcounteſſes are omitted, notwithſtanding, they are alſo comprehended in this 29th chapter of *Magna Charta.*’

Peers, though originally meaning only equals, is now by common uſe applied to a particular part of the nation, diſtinguiſhed from the reſt by ſuperior rank and privileges, which they derive from the king originally by writ or letters patents granted to them or their anceſtors; and in caſes of ſuch ladies as are not ſo ennobled, they obtain that nobility by marriage to thoſe who are ſo ennobled.

As the next ſtatute, 1 *E.* VI. *c.* 12, *ſ.* 14, ſpeaks of the benefit of clergy, it will be neceſſary to ſay ſomething upon that ſubject. Lord *Hale*, in his ſecond volume of his *Hiſtory of Pleas of the Crown*, page 323, ſays, that ‘ anciently princes and ſtates converted to Chriſtianity granted the clergy exemptions of places conſecrated to religious duties from arreſts for crimes, which was the original of ſanctuaries; and ſecond, exemptions of their perſons from criminal proceedings in ſome caſes capital before ſecular judges, which was the true original of this *privilegium clericale.* The clergy increaſing in wealth, power, honour, number, and intereſt, claimed as a right what they at firſt obtained by the favour of princes and ſtates, and by degrees extended theſe exemptions to all that had any kind of ſubordinate miniſtration relative to the church.’

Theſe exemptions never roſe to ſo great an height in this kingdom as in other places; and therefore the clergy were not exempted here from civil ſuits, nor was this *privilegium clericale* allowed in the loweſt crimes not capital, nor wherein they were not to loſe life or limb, nor in high treaſon touching the king himſelf, or his royal majeſty: but by 25 *E* III. *c.* 4, *de Clero*, in all other felonies the ordinary might demand the priſoner as a clerk, or the priſoner himſelf might demand the benefit of the clergy. The canon law gave the privilege only to men in holy orders: our law, in favour to learning and the deſire of the *Engliſh* biſhops, extended to lay clerks, *i. e.* any layman, that by reaſon of his ability to read was in a poſſibility of being made a prieſt. C. J. *Treby*, *State Trials*, Vol. V. 171. The means of trying, whether he was intitled to it, was by reading. If he could read, he was delivered to the ordinary, that is, the biſhop, or the perſon who had ordinary juriſdiction there: but the ordinary was ſo much the miniſter of the temporal courts, and ſo ſubordinate to them, that if the ordinary refuſed to let the priſoner read, the temporal court could controul, and order a book to be delivered to him; and if the ordinary ſaid he could read when he could not, or *vice verſâ*, that he could not read when in reality he could, the temporal courts gave judgment according to the truth of the caſe; and thoſe courts likewiſe directed, whether the priſoner ſhould be delivered to the ordinary with purgation, or without purgation: in the laſt caſe they were to be kept in the ordinary's priſon for life. If delivered with purgation, then the ordinary tried him for the fact whereof he was accuſed, by a jury of twelve clerks; and if he was acquitted, as was generally the caſe, he was diſcharged out of priſon. Purgation was the convict's clearing himſelf of the crime by his own oath, and the oaths or verdict of an inqueſt of twelve clerks as compurgators. The proceeding was before the ordinary; and old books ſpeak of their making proclamation for perſons to come in againſt his purgation, and of their enquiring into his life, converſation, and fame, and of other formalities; in all which, ſeveral ſtatutes ſay, there were great abuſes.

The ſtatute 4 *H.* VII. *c.* 13, reciting that ‘ upon truſt of the privilege of the church divers perſons have been the more bold to commit murder, rape, robbery, theft, and all other miſchievous deeds, becauſe they have been continually admitted to the benefit of the clergy, as oft as they offended:’ it enacts, that ‘ every perſon not being within orders, which hath once been admitted to the benefit of his clergy, being again arraigned of any ſuch offence, be not admitted to have the benefit or privilege of the clergy; and that every perſon ſo convicted for murder (which was then a clergyable offence) ſhould be marked with an M on the brawn of the left thumb; and if he be for any other felony, to be marked with a T in the ſame place of the thumb; and thoſe marks to be made by the gaoler openly in the court before the judge, before that ſuch perſon be delivered to the ordinary.’

This ſtatute prevented laymen having their clergy more than once; and the branding anſwered the purpoſe of diſcovering, whether they had the benefit of their clergy before, though it was neceſſary to prove it by other means, to prevent their having clergy a ſecond time.

The 1 *E.* VI. *c.* 12, will come next to be conſidered; which, after repealing ſeveral new-created treaſons and felonies, and taking away clergy in ſeveral other felonies, in *ſec.* 14, enacts, that ‘ in all and every caſe, where any of the king's majeſty's ſubjects ſhall and may, upon his prayer, have the privilege of clergy as a clerk convict that may make purgation; in all theſe caſes and every of them, and alſo in all and every caſe and caſes of felony, wherein the privilege and benefit of clergy is reſtrained, excepted, or taken away by this ſtatute (wilful murder and poiſoning of malice prepenſed only excepted) the lord and lords of the parliament, and peer and peers of the realm, having place and voice in parliament, ſhall by virtue of this preſent act, of common grace, upon his or their requeſt or prayer, alledging that he is a lord or peer of this realm, and claiming the benefit of this act, though he cannot read, without any burning in the hand, loſs of inheritance, or corruption of his blood, be adjudged, deemed, taken, and uſed, for his firſt time only, to all intents, conſtructions, and purpoſes as a clerk convict, and ſhall be in caſe of a clerk convict which may make purgation, without any further or other benefit or privilege of clergy to any ſuch lord or peer from thenceforth at any time after for any cauſe to be allowed, adjudged, or admitted; any law, ſtatute, uſage, or cuſtom, or any other thing to the contrary notwithſtanding: provided always, that if any of the ſaid lords of the parliament, or any of the peers of this realm for the time being, ſhall fortune to be indicted of any of the offences limited in this act, that then they and every of them ſhall have his or their trial by their peers, as it hath been uſed heretofore in caſes of treaſon.’

From the time of this ſtatute, whenever a peer has been convicted of any felony, for which a commoner might have the benefit of clergy, ſuch peer, on praying the benefit of this ſtatute, has always been diſcharged without burning or delivering to the ordinary: and there are a ſeries of precedents from lord *Morley*'s caſe, 1666, till one in this reign as late as 1765; and C. J. *Treby* ſays, ‘ the ſtatute 1 *E.* VI. exempts the peers convict of clergyable felonies from burning in the hand, and virtually repeals the ſtatute, 4 *H.* VII. as to ſo much; and the ſtatute 18 *Eliz.* requires burning in the hand only according to the ſtatute in that behalf before provided: and there being no ſtatute then or now in force to ſubject peers to ſuch brand, they are in ſuch caſe (upon the allowing the benefit of the ſaid ſtatute of *E.* VI. which is as much as clergy without reading or burning) freed from diſcredit and other penalties of the felony, as much as commoners are by having clergy formally allowed, and being burnt. *State-Trials*, Vol. V. 170.’ And he ſays, ‘ a peer ſhall have this benefit without either clergy or burning, a clerk in orders upon clergy alone without burning, and a lay-clerk not without clergy and burning. *Ib.* 172—3.’ And I believe no body can diſpute but the law is ſo. The queſtion therefore is, whether a peereſs is not entitled to the ſame privilege? and we are of opinion that ſhe is.

Peers is a word capable of including the whole body of the peerage, females as well as males; and every perſonal privilege conferred on peers is by operation of law communicated to peereſſes, whether by blood or marriage, though only males are mentioned. As trial by peers, though only recognized in *Magna Charta*, as belonging to the male ſex, *nec ſuper eum ibimus, nec ſuper eum mittemus*, did by conſtruction of law belong to females, as appears by 20 *H.* VI. which is only a declaratory law; ſo any other perſonal privilege, granted or confirmed to peers generally, is communicated to females, if it is of a nature capable of being communicated to and enjoyed by them; as trial by peers, freedom from arreſt: counteſs of *Rutland*'s caſe: *Moor* 769, and 2 *Co.* 52. And if thoſe privileges are ſo communicated, as they certainly are, why ſhould not this given by 1 *E.* VI. the conſequence of which is ſo reaſonable and agreeable to juſtice, that a female offender ſhall not undergo a greater puniſhment than a male of her own rank would do for a crime of the ſame ſort? But it was inſiſted at the bar, that between 1 *E.* VI. and 18 *Eliz.* a peer found guilty of a clergyable offence ſhould be delivered to the ordinary as a clerk convict: and *Staunford*, 130, is quoted for that purpoſe, that by the words of this ſtatute a peer ought to make his purgation; and if ſo, he ought to be delivered to the ordinary to be kept till he has made his purgation. That opinion of *Staunford* ſeems contrary to law in many particulars. The 1 *E.* VI. *c.* 3. had in effect ſuſpended purgation, even as to commoners: therefore the legiſlature could never mean to introduce and eſtabliſh purgation as to a peer, which *Hobart* ſays, 289, ‘ is no ordinance of the common law, but is a practice among themſelves, *i. e.* the clergy, rather overſeen and winked at than approved by the common law:’ and page 291, he ſays, ‘ the perjuries were ſundry in the witneſſes and compurgators, in the jury of clerks, and the judge himſelf was not clear, all turning the ſolemn trial of truth by oath into a ceremonious and formal lie.’ It is not probable the parliament, intending a great diſtinction in favour of peers, ſo as to diſpenſe with reading and burning in the hand, meant to leave a peer a priſoner in the cuſtody of the ordinary, and to have his credit and capacity to acquire perſonal property, and enjoy the profits of his lands, to be decided upon in ſuch a mock trial; and in fact there is no inſtance in any of the law books, where a peer convicted of a clergyable felony has ever been delivered to the ordinary, or has made purgation: and the juriſdiction of the ordinary to purge the clerk only relates to clerks in orders, or ſuch as the common law conſidered as clerks; and a peer not being a clerk, he could not make purgation, the ordinary having no juriſdiction over him; and the words here, ‘ have the privilege of clergy as a clerk convict that may make purgation, and ſhall be adjudged, deemed, taken, and uſed for his firſt time only to all intents, conſtructions, and purpoſes as a clerk convict, and ſhall be in caſe of a clerk convict which may make purgation,” do not import or direct that he ſhall make purgation; but give a peer the ſame advantage as a clerk convict who might make purgation, *i. e.* an abſolute diſcharge from all further puniſhment; and the ſtatute, as to him, is to be conſtrued to be a pardon: and it ſeems moſt probable, that peers never did make purgation; becauſe, as all who made purgation were to be tried by a jury of clerks, ſuch trial would be derogatory to their inherent privilege of being tried by their peers. Lord chief juſtice *Hale*, on this ſtatute (2 *H. H. P. C.* 376) ſays, I think, ‘ it was never meant that a peer of the realm ſhould be put to read, or be burnt in the hand, where a common perſon ſhould be put to his clergy;” neither is it ſaid, that he ſhall be diſcharged by his praying of the benefit of this ſtatute, where a common perſon ſhall have the privilege of clergy, and may make his purgation; but only where he may have the benefit of his clergy in the firſt clauſe of the ſtatute: the other clauſe (ſhall be in caſe of a clerk convict that may make purgation) is only for his ſpeedier diſcharge, and farther advantage, and not to reſtrain the general clauſe. But it is objected, that the ſtatute 1 *E.* VI. *c.* 12, gives this privilege only to ‘ lord and lords of the parliament, and peer and peers of the realm having place and voice in the parliament;’ and that a peereſs, not having place and voice in parliament, cannot have the benefit of this ſtatute. This expreſſion, ‘ having place and voice in parliament,’ cannot mean to exclude all peers but ſuch as ſat in parliament; but to deſcribe ſome of the incidents of peerage, or to include biſhops, who are lords of parliament though not peers: and if theſe words ſhould confine the benefit of this ſtatute to thoſe only who actually ſat in parliament, it would exclude peers minors, and papiſt peers, who, by ſtatute 30 *Car.* II. *ſtat.* 2. *c.* 1, are now rendered incapable of ſitting or voting in parliament: the words therefore are merely deſcriptive, and not reſtrictive. And what makes it very plain is, that, in the 4th and 5th *P.* and *M. c.* 4, which takes away clergy from acceſſaries before the fact in murder and ſeveral other offences, there is a proviſo that every lord and lords of the parliament, and peer and peers of this realm, having place and voice in parliament, upon every indictment for any of the offences aforeſaid, ſhall be tried by their peers, as hath been accuſtomed by the laws of this realm. Here are the very words uſed in 1 *E.* VI. *c.* 12; yet it could never be doubted, but notwithſtanding thoſe words, peereſſes muſt be tried by their peers for offences againſt that ſtatute; and lady *Somerſet* was tried by her peers for being acceſſary to the murder of Sir *Thomas Overbury*, which was an offence againſt that very ſtatute. What gave riſe probably to this ſtatute, 1 *E.* VI. *c.* 12, was another ſtatute paſſed the ſame year, *c.* 3. providing for the puniſhment of vagabonds, by making them ſlaves for two years; in which act was a clauſe, that no clerk convict ſhall make his purgation, but ſhall be a ſlave for one year to him who will become bound with two ſureties to the ordinary to take him into his ſervice, and he ſhall be uſed like a vagabond; and a clerk attainted or convict, which by law cannot make his purgation, may by the ordinary be delivered to any man, who will give ſecurity to keep him as his ſlave for five years; and it ſhall be lawful to every perſon, to whom any ſhall be adjudged a ſlave, to put a ring of iron about his neck, arm, or leg. To avoid all poſſible queſtion whether a peer could be ſubject to any of theſe proviſions, this act, 1 *E.* VI. *c.* 12, provides for their immediate delivery, on praying the benefit of this ſtatute. This ſtatute 1 *E.* VI. *c.* 3, was repealed 3d and 4th *E.* VI. *c.* 16, but was in force when 1 *E.* VI. *c.* 12, was made. The next ſtatute, 18 *Eliz. c.* 7. provides, that every perſon which ſhall be admitted and allowed to have the benefit of privilege of his clergy, ſhall not thereupon be delivered to the ordinary, as has been accuſtomed; but, after ſuch clergy allowed and burning in the hand, according to the ſtatute in that behalf provided, ſhall forthwith be enlarged and delivered out of priſon by the juſtices, before whom ſuch clergy ſhall be granted, that cauſe notwithſtanding. Then follows the proviſo, that the juſtices, before whom any ſuch allowance of clergy ſhall be had, ſhall and may, for the further correction of ſuch perſons to whom clergy ſhall be allowed, detain and keep them in priſon for ſuch convenient time as the ſame juſtices in their diſcretions ſhall think convenient, ſo as the ſame do not exceed one year's impriſonment. This proviſo plainly relates only to thoſe perſons mentioned in the clauſe, that is, *ſuch* perſons as had been burnt in the hand according to the ſtatute in that caſe made and provided, meaning 4 *H.* VII. As peers therefore are not to be burnt in the hand, they cannot be impriſoned; for thoſe only are to be impriſoned who have been burnt in the hand; and the word, *juſtices*, is more properly applicable to other courts of judicature than to this houſe. The 21 *Ja.* I. *c.* 7, cannot relate to this queſtion; for it relates to common perſons, and was intended to put women on the ſame footing with men, as to ſmall larcenies; and 3d and 4th *W.* and *M. c.* 9, does the ſame in all clergyable felonies. This ſhews the juſtice of allowing to the peereſſes the ſame benefit of 1 *E.* VI. *c.* 12, as peers have; and it is natural to ſuppoſe, that when the legiſlature were putting women of inferior rank on the ſame footing as men, they would have put peereſſes on the ſame footing with peers, had it not been conceived that the ſame privileges were already extended to both.

Upon the whole therefore, by ſtat. 1 *E.* VI. a peer convicted of a clergyable felony is intitled to his immediate diſcharge, without reading or burning in the hand, or being liable to impriſonment by 18 *Eliz.*

This privilege, given by ſtatute, being ſuch as may be enjoyed by a peereſs, is by operation of law communicated to her, and puts her in the ſame ſituation as a peer; the conſequence of which is, that a peereſs, convicted of a clergyable felony, praying the benefit of this ſtatute, is not only excuſed from capital puniſhment, but ought to be immediately diſcharged, without being burnt in the hand, or liable to any impriſonment.

XXXI. *Proceedings againſt* John Horne, *Eſquire, on an Information in the* King's Bench *by the Attorney-General for a Libel,* 4 July, *and* 19 *and* 24*th of* November, 1777.

[*Theſe proceedings were publiſhed by the defendant Mr.* Horne *from Mr.* Gurney's *ſhort-hand notes. The firſt part of them contains the trial of Mr.* Horne *at* Guildhall, *before lord* Mansfield, *in his court of* niſi prius *as chief juſtice of the* King's Bench *at* Guildhall. *The ſecond part is an account of the proceedings in the court of* King's Bench Weſtminſter, *when the attorney-general moved for judgment againſt Mr.* Horne.]

1. *The trial at* Guildhall (*a*).

LONDON, }
to wit. }

BE it remembered, That *Edward Thurlow*, Eſq; attorney-general of our preſent ſovereign lord the king, who for our ſaid preſent ſovereign lord the king proſecutes in this behalf in his proper perſon, comes into the court of our ſaid preſent ſovereign lord the king before the king himſelf, at *Weſtminſter*, in the county of *Middleſex*, on *Thurſday* next after fifteen days from the day of St. *Martin* in this ſame term, and for our ſaid lord the king giveth the court here to underſtand and be informed, that *John Horne*, late of *London*, clerk, being a wicked, malicious, ſeditious, and ill-diſpoſed perſon, and being greatly diſaffected to our ſaid preſent ſovereign lord the king and to his adminiſtration of the government of this kingdom and the dominions thereunto belonging, and wickedly, maliciouſly, and ſeditiouſly intending, deviſing, and contriving to ſtir up and excite diſcontents and ſeditions among his majeſty's ſubjects, and to alienate and withdraw the affection, fidelity, and allegiance of his ſaid majeſty's ſubjects from his ſaid majeſty, and to inſinuate and cauſe it to be believed that divers of his majeſty's innocent and deſerving ſubjects had been inhumanly murdered by his ſaid majeſty's troops in the province, colony, or plantation of the *Maſſachuſets-Bay* in *New-England*, in *America*, belonging to the crown of *Great-Britain*, and unlawfully and wickedly to ſeduce and encourage his majeſty's ſubjects in the ſaid province, colony, or plantation, to reſiſt and oppoſe his majeſty's government, on the eighth day of *June*, in the fifteenth year of the reign of our preſent ſovereign lord *George* the third, by the grace of God of *Great-Britain*, *France*, and *Ireland*, king, defender of the faith, *&c.* with force and arms at *London* aforeſaid, in the pariſh of St. *Mary-le-bow*, in the ward of *Cheap*, wickedly, maliciouſly, and ſeditiouſly did write and publiſh, and cauſe and procure to be written and publiſhed, a certain falſe, wicked, malicious, ſcandalous, and ſeditious libel of and concerning his ſaid majeſty's government and the employment of his troops, according to the tenor and effect following: ‘ *King's-Arms* tavern, *Cornhill*, *June* 7, 1775. At a ‘ ſpecial meeting this day of ſeveral members of the *Conſtitutional Society*, ‘ during an adjournment, a gentleman propoſed that a ſubſcription ſhould ‘ be immediately entered into by ſuch of the members preſent who might ‘ approve the purpoſe, for raiſing the ſum of 100*l.* to be applied to the ‘ relief of the widows, orphans, and aged parents of our beloved *American* ‘ fellow-ſubjects, who, faithful to the character of *Engliſhmen*, preferring ‘ death to ſlavery, were for that reaſon only inhumanly murdered by the ‘ king's (meaning his ſaid majeſty's) troops at or near *Lexington* and *Concord*, in the province of *Maſſachuſets* (meaning the ſaid province, colony, or plantation of the *Maſſachuſets-Bay* in *New-England*, in *America*) ‘ on the nineteenth of laſt *April*; which ſum being immediately collected, ‘ it was thereupon reſolved that Mr. *Horne* (meaning himſelf the ſaid ‘ *John Horne*) do pay to-morrow into the hands of Meſſ. *Brownes* and ‘ *Collinſon*, on account of Dr. *Franklin*, the ſaid ſum of 100*l.* and that ‘ Dr. *Franklin* be requeſted to apply the ſame to the above-mentioned ‘ purpoſe; *John Horne*,’ (meaning himſelf the ſaid *John Horne*) in contempt of our ſaid lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like caſe offending, and alſo againſt the peace of our ſaid preſent ſovereign lord the king, his crown and dignity: and the ſaid attorney-general of our ſaid lord the king for our ſaid lord the king further gives the court here to underſtand and be informed, that the ſaid *John Horne* being ſuch perſon as aforeſaid, and again unlawfully, wickedly, and ſeditiouſly intending, deviſing, and contriving as aforeſaid, afterwards, to wit, on the ninth day of *June* in the fifteenth year aforeſaid, with force and arms at *London* aforeſaid, in the pariſh and ward aforeſaid, wickedly, maliciouſly, and ſeditiouſly printed and publiſhed, and cauſed and procured to be printed and publiſhed, in a certain news-paper, intitled, *The Morning Chronicle and London Advertiſer*, a certain other falſe, wicked, malicious, ſcandalous, and ſeditious libel, of and concerning his ſaid majeſty's government and the employment of his troops, according to the tenor and effect following; that is to ſay, ‘ *King's Arms* tavern, *Cornhill*, *June* 7, 1775. ‘ At a ſpecial meeting this day of ſeveral members of the *Conſtitutional*

(*a*) This trial was publiſhed in 1777, with the following title: ‘ The trial at large of *John Horne*, Eſquire, upon an information filed *ex officio* by his majeſty's ‘ attorney general, for a libel, before the right honourable *William* earl of *Mansfield*, in the court of *King's Bench*, *Guildhall*, on *Friday* the 4th of *July*, 1777. Publiſhed by the defendant from Mr. *Gurney*'s ſhort-hand notes.

‘ ——— *Nec bellua tetrior ulla eſt,*
‘ *Quam ſervi rabies in libera colla furentis.*’

Society, during an adjournment, a gentleman propoſed that a ſubſcription ſhould be immediately entered into by ſuch of the members preſent who might approve the purpoſe, for raiſing the ſum of 100*l.* to be applied to the relief of the widows, orphans, and aged parents of our beloved *American* fellow-ſubjects, who, faithful to the character of *Engliſhmen*, preferring death to ſlavery, were for that reaſon only inhumanly murdered by the king's (again meaning his majeſty's) troops at or near *Lexington* and *Concord*, in the province of *Maſſachuſets* (meaning the ſaid province, colony, or plantation of the *Maſſachuſets-Bay* in *New-England*, in *America*) on the nineteenth of laſt *April*; which ſum being immediately collected, it was thereupon reſolved that Mr. *Horne* (again meaning himſelf the ſaid *John Horne*) do pay to-morrow into the hands of Meſſ. *Brownes* and *Collinſon*, on the account of Dr. *Franklin*, the ſaid ſum of 100*l.* and that Dr. *Franklin* be requeſted to apply the ſame to the above-mentioned purpoſe; *John Horne*' (again meaning himſelf the ſaid *John Horne*) in contempt of our ſaid lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like caſe offending, and againſt the peace of our ſaid lord the king, his crown and dignity: and the ſaid attorney-general of our ſaid lord the king for our ſaid lord the king further gives the court here to underſtand and be informed, that the ſaid *John Horne* being ſuch perſon as aforeſaid, and contriving and wickedly and maliciouſly deviſing and intending as aforeſaid, afterwards, to wit, on the ninth day of *June*, in the fifteenth year aforeſaid, with force and arms at *London* aforeſaid, in the pariſh and ward aforeſaid, wickedly, maliciouſly, and ſeditiouſly did print and publiſh, and cauſe and procure to be printed and publiſhed, in a certain other news-paper, intitled, *The London Packet, or New Lloyd's Evening-Poſt*, a certain other falſe, wicked, ſcandalous, malicious, and ſeditious libel of and concerning his ſaid majeſty's government and the employment of his troops, according to the tenor and effect following; that is to ſay, '*King's-Arms Tavern*, *Cornhill*, *June* 7, 1775. At a ſpecial meeting this day of ſeveral members of the *Conſtitutional Society*, during an adjournment, a gentleman propoſed that a ſubſcription ſhould be immediately entered into (by ſuch of the members preſent who might approve the purpoſe) for raiſing the ſum of 100*l.* to be applied to the relief of the widows, orphans, and aged parents of our beloved *American* fellow-ſubjects, who, faithful to the character of *Engliſhmen*, preferring death to ſlavery, were for that reaſon only inhumanly murdered by the king's (meaning his ſaid majeſty's) troops at or near *Lexington* and *Concord*, in the province of *Maſſachuſets* (meaning the ſaid province, colony, or plantation of the *Maſſachuſets-Bay* in *New-England*, in *America*) on the nineteenth of laſt *April*; which ſum being immediately collected, it was thereupon reſolved, that Mr. *Horne* (again meaning himſelf the ſaid *John Horne*) do pay to-morrow into the hands of Meſſ. *Brownes* and *Collinſon*, on the account of Dr. *Franklin*, the ſaid ſum of 100*l.* and that Dr. *Franklin* be requeſted to apply the ſame to the above-mentioned purpoſe; *John Horne*' (again meaning himſelf the ſaid *John Horne*) in contempt of our ſaid lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like caſe offending, and alſo againſt the peace of our ſaid lord the king, his crown and dignity: and the ſaid attorney-general of our ſaid lord the king for our ſaid lord the king further gives the court here to underſtand and be informed, that the ſaid *John Horne* being ſuch perſon as aforeſaid, and contriving and wickedly and maliciouſly deviſing and intending as aforeſaid, afterwards, to wit, on the ninth day of *June* in the fifteenth year aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, wickedly, maliciouſly, and ſeditiouſly did print and publiſh, and cauſe and procure to be printed and publiſhed, in a certain other news-paper, intitled, *The Public Advertiſer*, a certain other falſe, wicked, ſcandalous, malicious, and ſeditious libel of and concerning his ſaid majeſty's government and the employment of his troops, according to the tenor and effect following; that is to ſay, '*King's-Arms Tavern*, *Cornhill*, *June* 7. 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At a ſpecial meeting this day of ſeveral members of the *Conſtitutional Society*, during an adjournment, a gentleman propoſed that a ſubſcription ſhould be immediately entered into (by ſuch of the members preſent who might approve the purpoſe) for raiſing the ſum of 100*l.* to be applied to the relief of the widows, orphans, and aged parents of our beloved *American* fellow-ſubjects, who, faithful to the character of *Engliſhmen*, preferring death to ſlavery, were for that reaſon only inhumanly murdered by the king's (again meaning his ſaid majeſty's) troops at or near *Lexington* and *Concord*, in the province of *Maſſachuſets* (meaning the ſaid province, colony, or plantation of the *Maſſachuſets-Bay* in *New-England*, in *America*) on the nineteenth of laſt *April*; which ſum being immediately collected, it was thereupon reſolved that Mr. *Horne* (again meaning himſelf the ſaid *John Horne*) do pay to-morrow into the hands of Meſſ. *Brownes* and *Collinſon*, on account of Dr. *Franklin*, the ſaid ſum of 100*l.* and that Dr. *Franklin* be requeſted to apply the ſame to the above-mentioned purpoſe; *John Horne*' (again meaning himſelf the ſaid *John Horne*) in contempt of our ſaid lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like caſe offending, and alſo againſt the peace of our ſaid preſent ſovereign lord the king, his crown and dignity: and the ſaid attorney-general of our ſaid preſent ſovereign lord the king for our ſaid lord the king further gives the court here to underſtand and be informed, that the ſaid *John Horne* being ſuch perſon as aforeſaid, and contriving and wickedly and maliciouſly deviſing and intending as aforeſaid, afterwards, to wit, on the ninth of *June* in the fifteenth year aforeſaid, with force and arms at *London* aforeſaid, in the pariſh and ward aforeſaid, wickedly, maliciouſly, and ſeditiouſly did print and publiſh, and cauſe and procure to be printed and publiſhed, a certain other falſe, wicked, malicious, ſcandalous, and ſeditious libel, in which ſaid laſt-mentioned libel are contained, amongſt other things, divers falſe, ſcandalous, malicious, and ſeditious matters of and concerning his Majeſty's government, and the employment of his troops, according to the tenor and effect following; that is to ſay, '*King's Arms Tavern*, *Cornhill*, *June* 7. At a ſpecial meeting this day of ſeveral members of the *Conſtitutional Society*, during an adjournment, a gentleman propoſed that a ſubſcription ſhould be immediately entered into (by ſuch of the members preſent who might approve the purpoſe) for raiſing the ſum of 100l. to be applied to the relief of the widows, orphans, and aged parents of our beloved *American* fellow-ſubjects, who, faithful to the character of *Engliſhmen*, preferring death to ſlavery, were for that reaſon only inhumanly murdered by the king's (again meaning his ſaid majeſty's) troops at or near *Lexington* and *Concord*, in the province of *Maſſachuſets* (meaning the ſaid province, colony, or plantation of the *Maſſachuſets Bay* in *New England*, in *America*) on the 19th of laſt *April*,' in contempt of our ſaid lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like caſe offending, and alſo againſt the peace of our ſaid preſent ſovereign lord the king, his crown and dignity: and the ſaid attorney-general of our ſaid lord the king for our ſaid lord the king further gives the court here to underſtand and be informed, that the ſaid *John Horne* being ſuch perſon as aforeſaid, and again unlawfully, wickedly, maliciouſly, and ſeditiouſly intending, deviſing, and contriving as aforeſaid, afterwards, to wit, on the 14th day of *July*, in the 15th year aforeſaid, with force and arms at *London* aforeſaid, in the pariſh and ward aforeſaid, wickedly, maliciouſly, and ſeditiouſly did write and publiſh, and cauſe and procure to be written and publiſhed, a certain falſe, wicked, malicious, ſcandalous and ſeditious libel of and concerning his ſaid majeſty's government and the employment of his troops, according to the tenor and effect following: 'I (meaning himſelf the ſaid *John Horne*) think it proper to give the unknown contributor this notice, that I (again meaning himſelf the ſaid *John Horne*) did yeſterday pay to Meſſieurs *Brownes* and *Collinſon*, on the account of Dr. *Franklin*, the ſum of 50l. and that I (again meaning himſelf the ſaid *John Horne*) will write to Dr. *Franklin*, requeſting him to apply the ſame to the relief of the widows, orphans, and aged parents of our beloved *American* fellow-ſubjects, who, faithful to the character of *Engliſhmen*, preferring death to ſlavery, were for that reaſon only inhumanly murdered by the king's (meaning his ſaid majeſty's) troops at or near *Lexington* and *Concord*, in the province of *Maſſachuſets*, (meaning the ſaid province, colony, or plantation of the *Maſſachuſets Bay* in *New England*, in *America*) on the 19th of laſt *April*; *John Horne*,' (again meaning himſelf the ſaid *John Horne*) in contempt of our ſaid lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like caſe offending, and alſo againſt the peace of our ſaid preſent ſovereign lord the king, his crown and dignity: and the ſaid attorney-general of our ſaid lord the king for our ſaid lord the king further gives the court here to underſtand and be informed, that the ſaid *John Horne* being ſuch perſon as aforeſaid, and again unlawfully, wickedly, and ſeditiouſly intending, deviſing, and contriving as aforeſaid, afterwards, to wit, on the 15th day of *July*, in the 15th year aforeſaid, with force and arms at *London* aforeſaid, in the pariſh and ward aforeſaid, wickedly, maliciouſly, and ſeditiouſly printed and publiſhed, and cauſed and procured to be printed and publiſhed, in a certain other news-paper, intitled, *The Public Advertiſer*, a certain other falſe, wicked, malicious, ſcandalous, and ſeditious libel of and concerning his ſaid majeſty's government and the employment of his troops, according to the effect following; that is to ſay, 'I (meaning himſelf the ſaid *John Horne*) think it proper to give the unknown contributor this notice, that I (again meaning himſelf the ſaid *John Horne*) did yeſterday pay to Meſſ. *Brownes* and *Collinſon*, on the account of Dr. *Franklin*, the ſum of 50l. and that I (again meaning himſelf the ſaid *John Horne*) will write to Dr. *Franklin*, requeſting him to apply the ſame to the relief of the widows, orphans, and aged parents of our beloved *American* fellow-ſubjects, who, faithful to the character of *Engliſhmen*, preferring death to ſlavery, were (for that reaſon only) inhumanly murdered by the king's (again meaning his ſaid majeſty's) troops at or near *Lexington* and *Concord*, in the province of *Maſſachuſets* (meaning the ſaid province, colony, or plantation of the *Maſſachuſets Bay* in *New England*, in *America*) on the 19th of laſt *April*; *John Horne*,' (again meaning himſelf the ſaid *John Horne*) in contempt of our ſaid lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like caſe offending, and alſo againſt the peace of our ſaid lord the king, his crown and dignity: and the ſaid attorney-general of our ſaid preſent ſovereign lord the king for our ſaid lord the king further gives the court here to underſtand and be informed, that the ſaid *John Horne* being ſuch perſon as aforeſaid, and contriving and wickedly and maliciouſly deviſing and intending as aforeſaid, afterwards, to wit, on the ſaid 15th day of *July* in the 15th year aforeſaid, with force and arms at *London* aforeſaid, in the pariſh and ward aforeſaid, wickedly, maliciouſly; and ſeditiouſly did print and publiſh, and cauſe and procure to be printed and publiſhed, a certain other falſe, wicked, malicious, ſcandalous, and ſeditious libel of and concerning his majeſty's government and the employment of his troops, according to the tenor and effect following; that is to ſay, ' I (meaning himſelf the ſaid *John Horne*) think ' it proper to give the unknown contributor this notice, that I ' (meaning himſelf the ſaid *John Horne)* did yeſterday pay to Meſſieurs *Brownes* and *Collinſon*, on the account of Dr. *Franklin*, the ' ſum of 50 *l.* and that I (again meaning himſelf the ſaid *John Horne)* ' will write to Dr. *Franklin*, requeſting him to apply the ſame to the relief ' of the widows, orphans, and aged parents of our beloved *American* ' fellow-ſubjects, who, faithful to the character of *Engliſhmen*, preferring ' death to ſlavery, were for that reaſon only inhumanly murdered by the ' king's (again meaning his ſaid majeſty's) troops at or near *Lexington* ' and *Concord*, in the province of *Maſſachuſets* (meaning the ſaid province, colony, and plantation of the *Maſſachuſets-Bay* in *New* ' *England*, in *America)* on the 19th of laſt *April*; *John Horne*' (again meaning himſelf the ſaid *John Horne)* in contempt of our ſaid lord the king, in open violation of the laws of this kingdom, to the evil and pernicious example of all others in the like caſe offending, and againſt the peace of our ſaid preſent ſovereign lord the king, his crown and dignity: whereupon the ſaid attorney-general of our ſaid lord the king, who for our ſaid preſent ſovereign lord the king proſecutes in this behalf, prays the conſideration of the court here in the premiſes, and that due proceſs of law may be awarded againſt him the ſaid *John Horne* in this behalf, to make him anſwer to our ſaid preſent ſovereign lord the king touching and concerning the premiſes aforeſaid, *&c.*

E. THURLOW.

Friday, July 4, 1777.

AS ſoon as the court was opened, the ſpecial jury were called over: eleven only appearing, Mr. Attorney-General prayed a tales. The box containing the names of the common jury ſtanding open upon the table, the aſſociate took out a paper, and, ſhewing it to Mr. *Horne*, aſked, if he had any objection to that man's being ſworn on the jury? Mr. *Horne* replied, ' I object to that name, and for this reaſon: I deſire that the box may be ſhut and ſhaken; and when that is done, I ' ſhall have no objection to any name.' The box was accordingly ſhut and ſhaken, and a name drawn out; but another of the ſpecial jury coming into court, the taleſman was not ſworn.

The following ſpecial jury were ſworn.

Joſeph Dalmer,	*Curſitor-ſtreet*,	Merchant,
Philip Bulkley,	*Fleet-ſtreet*,	Druggiſt,
James Brant,	*Cheapſide*,	Silkman,
David Buffar,	*Cheapſide*,	Woollen-draper,
William Watts,	*Fore-ſtreet*,	Goldſmith,
Nathaniel Lucas,	*Fore-ſtreet*,	Merchant,
William Abdy,	*Out-lane*,	Goldſmith,
Thomas Smith,	*Milk-ſtreet*,	Merchant,
Thomas Brooks,	*Cateaton-ſtreet*,	Linen-draper,
Matthew Stanton,	*Aldermanbury*,	Warehouſeman,
William Loydd,	*Chriſt-church*,	Woollen-draper,
Henry Morris,	*Fleet-ſtreet*,	Silverſmith.

Then the information was opened by Mr. Buller.

Mr. *Horne.* My lord, with your lordſhip's permiſſion, I believe it is proper for me, at this time, before Mr. Attorney-General proceeds, to make an objection; and to requeſt your lordſhip's deciſion concerning a point of practice in the proceeding of this trial. Have I your lordſhip's leave?

Lord *Mansfield.* Certainly.

Mr. *Horne.* Gentlemen of the jury——

Lord *Mansfield.* No. Not to the jury. If you make an objection to the irregularity of the proceedings, you muſt addreſs me.

Mr. *Horne.* I am well aware of it: and I hope that your lordſhip will, upon this and other occaſions, hear me before you ſuppoſe me to be in the wrong. I was not going to addreſs my argument nor my objection to the jury: if your lordſhip will only permit me to requeſt their attention; becauſe I have frequently obſerved upon trials, that in all caſes almoſt, when application has been made to the judge to decide upon any objection, the jury have been generally ſuppoſed to be in a manner out of court; and I therefore now addreſs myſelf to the jury, only to requeſt their attention, and for no other purpoſe.

Lord *Mansfield.* Very well. Go on.

Mr. *Horne.* Gentlemen of the jury, what I have ſaid to his lordſhip, if you heard it, may perhaps make it unneceſſary for me to addreſs you. Gentlemen, though what I am going to ſay to his lordſhip reſpects a matter of law and practice of the court, yet I meant to requeſt your attention, becauſe you may find perhaps that the deciſion may concern you to hear it.—My lord, I underſtand (and I think I ſee good reaſons why it ſhould be ſo) that it is the uſual practice and wholſome cuſtom of the court, in trials of this kind, that unleſs the defendant examines witneſſes in his defence, the defendant's anſwer cloſes the pleading: and it is not the practice, in that caſe, that the counſel for the proſecution ſhould reply. But, my lord, in the late trials of the printers, for printing and publiſhing the advertiſement now in queſtion, I obſerved that Mr. Attorney-General claimed and exerciſed the peculiar privilege of replying, notwithſtanding that no witneſſes had been called for the defendant. My lord, with your lordſhip's permiſſion, I mean to ſubmit my reaſons to your lordſhip in ſupport of my objection to this claim of Mr. Attorney-General in the preſent trial.

Lord *Mansfield.* You come too early for the objection; becauſe the objection, if there is any foundation in it, ſhould be when he gets up to reply.

Mr. *Horne.* My lord, I own I did expect that Mr. Attorney-General would urge ſomething of that kind againſt what I have ſaid. I ſtopped, expecting that anſwer from him; becauſe, my lord, he may, very likely, imagine it to be a part of the duty of his office to baffle me in any manner, and to take all advantages which he can, whether fair or unfair, againſt me, and to obtain a verdict againſt me by any means---there are reaſons why he ſhould attempt to do ſo;--and therefore, I own, I expected that the attorney-general would have urged that againſt me. But, my lord, I apprehend, with great ſubmiſſion, that this, and this only, is the proper moment——

Lord *Mansfield.* Mr. *Horne*, I will do ſo far for you. If the defence that you are to make, may in any manner be guided or governed by a knowledge, whether the attorney-general has or has not a right to reply; if Mr. Attorney-General acquieſces in it, I have no objection to your being apprized how it ſtands beforehand; becauſe otherwiſe it would come after you had made your defence: and if you mean to calculate your defence in ſome way different, upon the expectation of his having or his not having a right to reply, I will willingly (I dare ſay the attorney-general makes no objection to it) hear you upon that point now.

Mr. *Attorney-General.* None in the world.

Mr. *Horne.* Your lordſhip has hit upon one of the very reaſons that I was going to lay before you. But, my lord, I had rather that this had come as a matter of juſtice, than as an acquieſcence from the attorney-general; becauſe I ſuppoſe that every defendant, who ſhall hereafter ſtand in my ſituation, will have the ſame right; and, if it comes as a matter of favour from the attorney-general, thoſe for whom I am much more concerned than myſelf, may not perhaps meet with that genteel acquieſcence. However, I thank the attorney-general. I ſhall beg then, my lord, at preſent to make my objection. I am ſure I ſhould have been permitted to make it, becauſe the arguments which I had to uſe would have been ſuch as would more particularly have affected your lordſhip's mind. If then I am permitted, I ſuppoſe that I am now to object to the right of reply.

Lord *Mansfield.* You are now to object to the right of reply.

Mr. *Horne.* My lord, if I ſhould forget any thing upon this occaſion, ſo new to me, and make any miſtakes, I ſhall beg leave to refreſh my memory with what I have written down. My lord, I have been taught by the beſt authorities, that the eſtabliſhed practice and approved rules of the court are ſo, only becauſe they are reaſon, and reaſon approved by long experience; and they obtain as rules and practice only for that cauſe. My lord, I believe I ſhall not be contradicted by your lordſhip, when I aver, that it is the eſtabliſhed practice and approved rule of the court, in trials of this kind (where the attorney-general does not proſecute) that if the evidence brought for the proſecution is not controverted by any other evidence on the part of the defendant, but the fact, as far as it depends upon teſtimony, taken as the proſecutor's evidence left it; that then the defendant's anſwer cloſes the pleading. And this, my lord, has obtained and been eſtabliſhed as the approved rule and practice of the court, becauſe it is ſuppoſed the method beſt calculated for the obtaining of juſtice; that is, for the conviction of the guilty and the acquittal of the innocent; for both are to be regarded: and when that is done, then only, I ſuppoſe, is juſtice done. Now, my lord, the reaſon of this practice is not, like ſome others, ſo covered over by the ruſt of ages, or diſguiſed by the change of circumſtances, as that it ſhould be difficult now to diſcover it. On the contrary, it is, to my underſtanding and apprehenſion, as plain and evident now as it was the firſt day that it was introduced. But that is no part of my buſineſs to enter into: the reaſon of the practice it does not belong to me to give. It is ſufficient for me to ſay that ſuch is the practice, and being the practice, it muſt be ſuppoſed the beſt method of obtaining juſtice. Then, my lord, I humbly ſubmit it to your lordſhip, that if this is the beſt method for obtaining of juſtice, a contrary method muſt be attempted for ſome other end; and that end muſt be injuſtice, or the conviction of the accuſed by any means. My lord, the practice, and this exemption from it, which Mr. Attorney-General claims, cannot both ſtand: one or the other muſt be given up; becauſe they cannot both be the beſt method and moſt likely means for the obtaining of juſtice. Now, my lord, that the king, or that the attorney-general in his name, ſhould be permitted to purſue any other method or practice than that eſtabliſhed method which is beſt calculated for the obtaining of juſtice, ſeems to me compleatly abſurd. For the king, ſuch as the law and ſuch as reaſon conceive him, can have no other intereſt but in the obtaining of juſtice, impartial juſtice. And if it was poſſible, my lord, to conceive a king even with a leaning or an inclination on either ſide, it muſt rather be that his ſubjects ſhould be found innocent than guilty. But this claim of Mr. Attorney-General, my lord, abſurdly ſuppoſes the contrary; and that the king has an intereſt in their being convicted; and that therefore eaſier and readier means, and greater means, are to be allowed to the king for obtaining a conviction, than are allowed to any other perſon, my equal or my inferior. And yet, my lord, I muſt acknowledge that the claim which I am now objecting to, is not a new one. My lord, in the reign of *James* the ſecond, that man (for he never was for one moment a *king)* claimed the peculiar right, prerogative, and power of diſpenſing with the laws of the land. Sir *Edward Herbert*, the chief juſtice of thoſe days, and the other judges decided in favour of that claim. Thank

God, my lord, the glorious Revolution—(and I call it ſo: it ſhall not have leſs praiſe from me becauſe it is now grown uncourtly)—the glorious Revolution put an end to that iniquity. Unfortunately for this country, the principles which produced that and many other iniquities are now again revived and foſtered; and amongſt many other moſt ſhameful doctrines, this doctrine of diſpenſing power is now revived again—under another ſhape and form indeed; but it is the ſame power. It is *now* a prerogative to diſpenſe with the rules and methods of proceeding; that is, my lord, to diſpenſe with the laws: for the rules and methods of proceeding (and I have heard your lordſhip ſay it in other caſes) are parts of the laws of the land. My lord, I have been told (and that by a greater authority than any almoſt that now lives) that 'the methods and forms 'of juſtice are eſſential to juſtice itſelf.' And, my lord, the forms and methods of proceeding are particularly that tender part of the laws which is calculated for the protection of innocence. My lord, the penal laws are made to bring criminals and offenders to juſtice; but the forms and methods of proceeding of the courts of juſtice are appointed ſingly to diſtinguiſh the innocent from the guilty, and to protect them againſt exorbitant power. My lord, in the caſe of this particular privilege which the attorney-general claims, I think I could ſpend a day in ſhewing how many received legal maxims and truths it violates: for truth is of ſuch a nature that it has a thouſand branches iſſuing from it; and falſhood, let it be as careful as it can, will run againſt ſome one or other of them. I do really believe I could fairly ſpend a day in ſhewing the abſurdity of this claim. But yet, to my great diſadvantage and my great ſorrow, when, in the late trial of the printers, the defendant's counſel objected to this claim of Mr. Attorney-General, your lordſhip interfered haſtily, and ſaved Mr. Attorney-General the trouble of vindicating his claim. Your lordſhip ſaved him from the embarraſſment he would then have found, and which I am confident he will now find, to produce one ſingle argument of reaſon or juſtice in behalf of his claim: and this your lordſhip did by an abſolute overbearing of the objection, without even permitting an argument. And, my lord, that is a very great diſadvantage to me, as well as it was to the defendant in whoſe cauſe he made it: for, my lord, the very ingenious counſel—(I beg the gentleman's pardon for attempting to diſtinguiſh him by that epithet; there is no want of ingenuity at the bar)—but the very *honeſt* counſel who made that objection, would have been able to ſupport it in a very different manner from any in which I can expect to do it. My lord, the trial may take up ſome time; therefore I will no longer hold you on this objection. I ſhall reſerve to myſelf the right, which I did exerciſe in condemning the action of the king's troops (which I did then call, and do ſtill, and will to-morrow call, becauſe contrary to law, a *murder*) ſo I ſhall reſerve it to myſelf, and not now take up more of the time, to ſay what I ſhall think proper by argument and reaſon on the deciſion of your lordſhip; which deciſion muſt come after your lordſhip ſhall have heard the attorney-general's anſwer, and my reply:—for I take it I have a right to reply. I ſhall then reſerve that power to myſelf to ſpeak as freely of it as I ſhould do of any other indifferent action in the world.

Lord *Mansfield.* There is no occaſion for Mr. Attorney-General to ſay any thing. I am moſt clear that the attorney-general has a right to reply if he thinks fit, and that I cannot deprive him of it; and there is no ſuch rule, that in no caſe a private proſecutor or private plaintiff ſhall not reply, if new matter is urged which calls for a reply; new queſtions of law, new obſervations, or any matter that makes a reply neceſſary. No authority at law has been quoted to the contrary. A party that begins has a right to reply; there is not a *State Trial* where the ſolicitor-general or the attorney-general have not replied; and I know of no law that ſays in any caſe the proſecutor may not reply. But, for the ſaving of time, rules by uſage of the bar are received. Two gentlemen don't examine the ſame witneſs, but yet they do very often. They don't reply when there is no evidence for a defendant, and nothing new to make it neceſſary to reply, then they don't do it; but if a queſtion of law was ſtarted, which nobody thought of in the beginning, they do it then: then they have a right to reply, and muſt reply, for the ſake of juſtice; and therefore I apprize Mr. *Horne* that the attorney-general certainly has a right to reply.

Mr. *Horne.* Your lordſhip muſt be very ſenſible how untoward is my ſituation in this caſe. This is only a repetition of what happened before; if your lordſhip will thus do the buſineſs of Mr. Attorney-General for him. My lord, you now take from me what you give to him; you take from me that right of reply which by the practice of the court I have, whilſt you give to him that right of reply which by the practice of the court he has not. I have a right to reply to the attorney-general's anſwer to my objection, but I have no right to reply upon the judge. I beg the attorney-general may do his own buſineſs. He is full of reaſon and argument. He ſmiles. Indeed he well may. My lord, he can ſurely prove the juſtice of his claim himſelf, if there is any in it. My lord—

Lord *Mansfield.* Sir—hear—Your proper reply to the judgment I have given is a motion to the *court*; I never here decide.—It is ſpeaking to no purpoſe to perſuade me where I have no doubt.—The attorney-general here will be of the ſame opinion with me. But your proper reply to *me*, is a motion to the *court*; and if the ſuffering him to reply is againſt law, it is an irregularity in the trial, for which the verdict will be ſet aſide. You will have a remedy.

Mr. *Horne.* O, my lord, I have already ſuffered under your lordſhip's directing me to remedies. The moſt cruel of all poiſoners are thoſe who poiſon our remedies. Has your lordſhip forgotten?---I am ſure you have not forgotten that I have, once before in my life, had the honour to be tried before your lordſhip for a pretended libel. My lord, this matter of reply I know ſo well to be the practice, not only from the intelligence I have had upon that ſubject, but from that very trial at *Guildford*, on the action brought againſt me by the preſent lord *Onſlow*. My lord, I could then have contradicted his evidence. I will juſt mention two or three particulars in this caſe.---It was the moſt ſcandalous one that ever came before a court.---(Your lordſhip cannot forget the particulars in that trial.) I was proſecuted by him for a libel. On the firſt action which he brought, I obtained a nonſuit. Upon that, a freſh action was brought. To that freſh action (in order to try it in *Surrey*, where the plaintiff had his influence) in that freſh action, words ſpoken a year or two before were added, words of a different nature, and upon a different ſubject. We came to trial before your lordſhip, and I do remember ſome very ſtrong caſes (which indeed I intended to have publiſhed) of your lordſhip's practice in that trial. But, my lord, however impatient I may be thought to be, I am very patient under perſonal injuries. I have never complained of the practices uſed againſt me on that trial, nor of the miſtakes (to ſpeak gently) which your lordſhip made. Your lordſhip then told me, as now, that I ſhould have a *remedy*—

Mr. *Attorney-General.* I beg leave to object to this way of proceeding in a trial. What can it be to the iſſue that is joined in this cauſe, any part of the hiſtory of what related to the trial at *Guildford?*

Lord *Mansfield.* If I remember right, you had a remedy there, for it was determined not to be actionable.

Mr. *Horne.* True, my lord; but it coſt me 200*l.* The remedy was almoſt as bad as the verdict would have been.

Lord *Mansfield.* There muſt be an end.

Mr. *Horne.* Not of this objection.

Lord *Mansfield.* No; an end of going out of the cauſe. You muſt behave decently and properly.

Mr. *Horne.* I will ſurely behave properly.

Lord *Mansfield.* This is over.---I tell you beforehand, I apprize you of it (which is going out of the way) that it is not in my power to deprive the proſecutor of replying, if he ſees cauſe to deſire it.

Mr. *Horne.* Now then, my lord, I entreat you to let me *decently* tell you of the ſituation you put me into. When I offer to prove by argument the right which I have to make my objection at this time, your lordſhip kindly ſtops me, and takes it for granted. Then, afterwards, it ſeems, it is you who apprized me. You tell me you have, out of the rule, apprized me: yet, becauſe I accepted that which I knew to be my right as an appriſal which you were willing to give me, not meaning however to preclude myſelf from the argument, your lordſhip makes uſe of my acceptance of this appriſal to defeat my objection. Firſt, your lordſhip interferes to ſave Mr. Attorney-General from attempting to give a reaſon, which you both know he cannot give; and then Mr. Attorney-General gets up to ſave your lordſhip in his turn, and to ſtop me from explaining your lordſhip's conduct. Thus between your lordſhip and Mr. Attorney-General, a defendant is in a bleſſed ſituation! *(Here ſome promiſcuous altercation enſued, after which Mr* Horne *proceeded.)* What I was ſpeaking of was merely this; that the practice ——*(Here again ſome interruption)* I was going to ſhew your lordſhip (in anſwer to what fell from you, and not diſtinct from this cauſe, nor from what your lordſhip had ſaid) I was going, and *decently* going, to ſhew your lordſhip, that it was the practice of the court that the proſecutor ſhould not reply unleſs evidence is called for the defendant. I was going to ſhew it to your lordſhip from my own particular caſe before your lordſhip at *Guildford*, and that I ſuffered under it conſiderably; and I mentioned the inſtance. I am ſure that is not wandering from the point, when your lordſhip has ſaid, that it was not the practice of the court. If the attorney-general had ſaid ſo, I ſhould have had a right to reply to him. But I muſt ſay, as before, if your lordſhip is to do the attorney-general's buſineſs, and ſo cut off my reply, and then Mr. Attorney-General is to get up and ſay, This has nothing to do with the cauſe; between the chief juſtice and the attorney-general, what am I to do? My lord, I beg leave to mention to your lordſhip, that if the attorney-general had ſaid truly, and that I had wandered from the caſe, it would not be wonderful if I, unuſed to theſe matters, ſhould wander a little; and your lordſhip ſhould have ſome indulgence to my ſituation. My lord, I was going to mention to your lordſhip my own caſe: all I know of law is from my own caſe, and from what I have been a witneſs of myſelf. I, in that caſe, at *Guildford*, did ſuffer a falſe evidence to procure (by your lordſhip's miſtaken direction) a bad, falſe verdict; becauſe I was told by my counſel (ſome of the firſt counſel in this country) that the words themſelves were not actionable; and therefore, tho' I could have proved by gentlemen in court that the words ſworn againſt me were not ſpoken by me; yet my counſel told me it was better for me to let thoſe words go as proved, than, by calling evidence, to give to the proſecutor a right of reply, which otherwiſe he would not have: therefore I ſuffered the words to be ſuppoſed to have been ſpoken, rather than to give to my adverſary a right to a reply. But now I find he had that right without my calling evidence; that is, I am told ſo by your lordſhip, though I have been told otherwiſe by all the counſel and all the trials I have ever been at. My lord, as for quoting laws for the practice, I hope your lordſhip does not expect me to quote law in a matter of practice, and indeed in hardly any other matter, except the law that I have learned from your lordſhip. I was a conſtant attender of your lordſhip ſome years ago, and I have gathered from your practice ſome things which I take to be, and ſome which I take not to be maxims of law. Now, in that caſe I mentioned at *Guildford*, I ſuffered words to go as proved, which I could have diſproved---and there are gentlemen in court now who know the fact, and would have been the evidences---I ſuffered words to go as proved, becauſe I would not give the proſecutor a right to reply. Your Lordſhip directed the jury to find a verdict for the words; and your lordſhip ſaid, if your direction was miſtaken (becauſe my counſel had argued that the words were not actionable) your lordſhip told my counſel--(he publiſhed a pamphlet afterwards:--he was much hurt at it) you ſaid that what he had advanced ſurprized you; that it was *new* law; ſuch as you had never heard before---(he was much hurt at it; he felt it: he was hurt at your lordſhip's declaration: he publiſhed a pamphlet afterwards addreſſed to your lordſhip, which I am ſure you muſt remember).---My lord, in conſequence of your lordſhip's direction, a verdict was given againſt me for 400*l.*; and you ſaid, if you were miſtaken in your directions, that I had a *remedy*; I need only appeal to the court: I had a remedy. What ſort of a remedy? The expence of the remedy was almoſt equal to the verdict. The verdict was ſet aſide, that is true; but your lordſhip knows that a verdict makes the defendant pay his own coſts. I ſhould have had the coſts, if the verdict had not been given againſt me. What ſort of remedies are theſe, that are worſe than the fair honeſt puniſhment that can be inflicted upon the charge? Therefore I do intreat that your lordſhip will not ſend me to remedies which I hardly know how to take; eſpecially as I have always found that ſuch kind of remedies from your lordſhip are like giving a man a wound, and then telling him where he may find a plaiſter: it is not a thing that I ſhould wiſh to do, nor would your lordſhip like to ſuffer. And as your lordſhip ſays that no law has been quoted to prevent his reply, I intreat that I may hear from Mr. Attorney-General, or from yourſelf, that law that gives him a right to reply.

Lord *Mansfield (to the attorney-general).* Go on with the trial.

Mr. *Horne.* I ſhall hear no reaſon then from either of you? Well! if ſo, I muſt ſubmit under it.

Mr. *Attorney-General.*

My lord, and gentlemen of the jury, there is nothing in this caſe (unleſs the behaviour of the defendant ſhould conſtitute that ſomething) that can make it at all different from the moſt ordinary caſe of a plain delinquent in a moſt groſs offence being brought before a court of juſtice. I have looked round with a degree of examination to ſee if I could ſee whether there was one amongſt the numerous byſtanders that I ſaw here, who had conceived a favourable impreſſion from ſo extraordinary an interpoſition as one has heard to-day. I certainly ſhould not riſe to take off or repel looſe ſlander ſcattered about without being pointed at any one individual particularly, much leſs ſhould I take notice of that ſort of ſlander which, affecting to point itſelf, only diſgraced itſelf in the manner of that affectation. For my own part, I ſhould think I was ſtooping exceedingly below that character and that ſituation in the world which I hope I am entitled to, if I were to ſet myſelf to defend my own peculiar part from any aſperſions that have been thrown upon me. It is the duty of my office to proſecute with integrity thoſe whom, according to the beſt of my judgment, I believe to be fair objects of proſecution. It is the duty of my office, as far as I can govern that duty, to conduct the proſecution with the utmoſt clearneſs and the fulleſt honour. And if I have taken a part in this, or in any proſecution that any man can fairly ſtand forth, in a manly ſtyle, and challenge directly and pointedly, let it be challenged, and let me be called upon to anſwer it. But to be told that I ſtand here ready to take all manner of advantages, fair or unfair, againſt the delinquents whom I call into juſtice, it is a ſort of aſperſion below refutation; and I will not ſtoop to take notice of it, unleſs it would condeſcend upon ſome particular act in my conduct that makes me an object of that ſpecies of animadverſion. Whether I am or whether I am not to reply in ſuch a cauſe as this, it is, in this moment of it, not only not ſo much irregular to advance it, as impoſſible to foreſee. When I read over the caſe, when I conſider the effect of it, I cannot foretel the ſlighteſt occaſion to trouble you by way of reply; for of all the plain and ſimple matters that ever I had occaſion to lay before a court of juſtice, there is the leaſt degree of complication in that which I am about to ſtate to you now.

This is an information brought againſt Mr. *Horne* for being the author and the original publiſher of this libel. The crime that I put moſt upon is that which I ſtated laſt, that he was *the original publiſher of this libel.* It is in that reſpect that his crime appears to me to differ moſt from thoſe that have been called into juſtice before. The circumſtance of his name being printed at the bottom of the libel was an additional aggravation in this reſpect, becauſe it ſeemed to imply a bolder inſult upon manners and decency, and the laws of the country, than a ſimple publication of a libel without that name would have been. It *ſeemed* to imply, becauſe, while that name lay hid behind the printer of the paper, the ſtouteſt champion for ſedition could not have defied the laws with greater ſecurity; for, though it ſtood in capitals upon the front of many thouſand pages, yet it was as inſcrutable as impoſſible for me to follow, as if the name had not appeared upon the paper at all. For the reſt of it, I put it upon the publication, chiefly becauſe that ſeems to be the whole object and drift of the compoſer of the libel: for as a compoſition it is abſolutely nothing. I do not mean to ſpeak of it by way of derogation from the parts and talents of the ingenious gentleman (whoſe parts and talents I never heard ſo much of as I have done to-day) I do not mean to ſpeak it in derogation of them; no doubt but he could have writ a better thing: but his underſtanding was induſtriouſly let down and ſuppreſſed; and the very purpoſe of this writing was to make it ribaldry and traſh. For the intention of it was (as it appears to me) the intention of it was nothing more than to defy the laws and juſtice of the country, proclaiming, as it were, thus: either puniſh this libel, or confeſs that there are no laws in the country by which a libel can be puniſhed. Others have entertained ſufficient malice againſt this country; others have been anxious enough to excite ſedition; but this is written chiefly with the purpoſe of telling mankind—‘ Thus I dare do! I dare inſult the laws ‘ without having any earthly thing to ſtate to the public, except an ‘ inſult upon the laws.’ Sometimes a libel is covered (though thinly covered enough) with the pretence of informing mankind, or of diſcuſſing public ſubjects for the uſe of mankind: here is not even the affectation of giving information: here is not even the affectation of diſcuſſion: but the writer tells you in ſo many blunt words (of no kind of meaning in the world, but to convey reproach and ſcandal) that the perſons who were employed by the government are guilty of murder; and the perſons who employed them conſequently involved in the ſame guilt. For what is the nature of the libel that is publiſhed—‘ *King's* ‘ *Arms* tavern—At a meeting held during an adjournment’ (I did not mean to make any obſervation upon the meeting during an adjournment)—‘ a gentleman propoſed that a ſubſcription ſhould be entered ‘ into’—(this I conceive to be a device—not a very rich one in point of invention—but a device to introduce that which follows) ‘ a gentleman ‘ propoſed that a ſubſcription ſhould be entered into by ſuch of the ‘ members preſent who might approve of the ſame, for the purpoſe of ‘ raiſing the ſum of 100*l.* to be applied to the relief of the widows, or‘ phans, and aged parents of our beloved *American* fellow-ſubjects, who, ‘ faithful to the character of *Engliſhmen*, preferring death to ſlavery, ‘ were for that reaſon only inhumanly murdered by the king's troops.’ —Murdered by the king's troops! What kind of palliation (juſtification it is abſurd and nonſenſe to talk of) but what kind of palliation can be given to the charging men with the crime of murder, by writing againſt them in a news-paper? Is it to be laid down for law, or a thing to be tolerated in a civilized country, that crimes of the moſt heinous ſort ſhall be imputed to men by a public reviler in a news-paper, who yet dares not ſtand forth as an accuſer? Is that to be tolerated in a civilized country, the writing againſt men that they are guilty of murder who are not to be accuſed of that crime? Is it to be tolerated in a country where an orderly government prevails, and while the form of government ſubſiſts, to write againſt the tranſactions of that government, as if ſtained with all the crimes under heaven, and calculated for no earthly purpoſe but of committing thoſe crimes? To ſuppreſs liberty (the only object for which government is or ought to be erected) to ſuppreſs that liberty by the means of murder, is imputed to the tranſactions of the government of the freeſt country now under heaven! and it is called liberty to do that! whereas men muſt be ſhort-ſighted indeed, a man muſt be drivelling like an idiot that does not ſee that the maintaining of regular government is the true, the only means of maintaining liberty. Is it liberty to put the characters of perſons, the properties of every individual, under the tyrannous hand of anarchy, and of every man that thinks proper to ſeize them uncontrouled by law? Is that liberty? And, is there any one byſtander of the moſt ordinary underſtanding that hears me now ſpeak, that has ſo groſs an underſtanding as to imagine that he would be more free if it were in the power of any man that thought proper to revile his character? (which is the queſtion which is now immediately ſubjected to you) or to injure him in his perſon or fortune, or in any other manner whatever? This therefore is not to be coloured, as far as I can foreſee, by any kind of argument whatever. The nature of the libel is too groſs to be commented upon; it does no honour to any body that has been concerned in making it.

I ſhall content myſelf with proving the fact of this paper having been written, of this paper having been publiſhed originally by Mr. *Horne*; and the concluſion to be made upon that is too obvious a one, and too broad a one, for me to foreſee at leaſt any kind of difficulty about it. It was my duty to lay it before you. I, charged with the duty of my office, have brought it here; it is your duty to judge of it. You, charged by the oath that you have taken, are to determine upon it. If you can be of opinion that this licentiouſneſs is fit to be tolerated, according to the old and eſtabliſhed laws of this country; if you are of opinion that the fact is not proved upon the defendant in the manner in which it is ſtated by the witneſſes; it will be your duty, your oaths will bind you to acquit him: but if the fact ſhould be proved, if it ſhould ſtand as clear as to my judgment and apprehenſion it now ſtands, you will be conſtrained by the ſame neceſſity of duty, and by the additional ſanction of an oath, to entertain exactly the opinion of it which I have found myſelf conſtrained to entertain. I have no wiſh (I did not know Mr. *Horne)* I have no wiſh to proſecute any one individual; nor have I been deſired, if I had ſuch a wiſh, to proſecute him. And I hope I may add, that *no deſire could have compelled me to proſecute a man whom I myſelf had not thought guilty*, notwithſtanding any thing that has been ſaid on the contrary ſide. I go upon the evidence as it is in my poſſeſſion; I go upon the evidence as it is in my power to produce. If there be any evidence on the other ſide, and if that is ſufficient to refute the imputation which the evidence that I have to produce lays upon him, I ſhall be as ready to examine that with exactly the ſame degree of candour, and, I hope, of uprightneſs, as I have done the preſent. My duty is done by laying the matter before you. Your duty, I am ſure, will be done to your own honour and the ſupport of public juſtice by the verdict you will give upon the occaſion.

Evidence for the proſecution.

THOMAS WILSON, *ſworn.*

Examined by Mr. Solicitor General.

Mr. *Solicitor General.* Look at thoſe papers.

(The ſeveral manuſcripts from which the advertiſements were printed in the news-papers. The witneſs inſpects them).

Q. Do you know whoſe hand-writing thoſe papers are?

A. They look like Mr. *Horne*'s hand-writing.

Q. Do you know Mr. *Horne*?

A. I have ſeen him write.

Q. Do you take theſe to be his hand-writing?

A. They are like his hand-writing. I will not upon my oath ſay that they are his hand-writing; I believe that they are.

(The manuſcripts of the two advertiſements read in court.)

HENRY SAMPSON WOODFALL, *ſworn.*

Examined by Mr. Wallace.

Q. What buſineſs are you?

A. A printer.

Q. Do you print any news-paper?—*A.* Yes.

Q. What paper?

A. *The Public Advertiſer.*

Mr. *Wallace.* Look at theſe two papers *(ſhewing the witneſs the manuſcripts of the advertiſements. The witneſs inſpects the manuſcript).*

Q. Have you ever ſeen theſe papers before?—*A.* Yes.

Q. When did you ſee the firſt of them?

A. About the 7th of *June* 1775, as near as I can recollect.

Q. By what means did you come by the ſight of it?

A. Mr. *Horne*, the defendant, gave it me.

Q. For what purpoſe?

A. To publiſh in the *Public Advertiſer*.

Q. Did you accordingly publiſh it?—*A.* I did.

Q. Had you any other directions from Mr. *Horne*?

A. Yes. He deſired me to ſend it to ſeveral other papers, which I did.

Q. Do you recollect the names of any of them?

A. The whole, I believe, of them; I cannot exactly recollect.

Q. Did you follow his directions?—*A.* I did.

Q. Was any thing paid for it?

A. Yes. Mr. *Horne* paid the bill.

Q. For the publication?—*A.* Yes.

Mr. *Wallace.* Look at thoſe news-papers *(ſhewing the witneſs the* Public Advertiſer *of* June *the 9th, and of* July 14, 1775. *The witneſs inſpects news-papers).*

Q. Are thoſe papers publiſhed by you?

A. I print that paper, and I ſuppoſe they are.

HENRY SAMPSON WOODFALL *croſs-examined by the defendant.*

Mr. *Horne.* I am very glad to ſee you, Mr. *Woodfall.* I deſire to aſk you ſome queſtions. Pray what was your motive for inſerting that advertiſement?

A. Your deſire.

Q. Had you no other motive?

A. I was paid for it, as the advertiſement is paid for.

Q. Pray was it by accident, or by my deſire, that there ſhould be witneſſes to ſee me write that advertiſement?

A. By your deſire.

Q. And did I, or did I not, formally, before that witneſs, when called in, deliver that paper as my act and deed, as if it had been a bond?

A. Yes.

Q. It is true, I did. Did I not always direct you, if called upon, to furniſh the fulleſt proof that you could give?

A. You did, ſir.

Q. Now then, ſir, if you pleaſe, ſay whether I have ever written any thing in your news-paper before?

A. Yes, frequently.

Q. How many years ago, do you think?

A. The firſt remarkable thing that I remember, was ſomething about ſir *John Gibbons*, about his miſtaking *Eaſter* for a feaſt or a faſt.

Q. How long ago is that?

A. About the year 1768, about the election time.

Q. That is about nine years ago?—*A.* Yes.

Q. Have I at any time deſired you to ſcreen me from the laws?

A. No.

Q. Has not the method of my tranſactions with you at all times been, that you ſhould at all times, for your own ſake, if called upon, give me up to juſtice?

A. Certainly; that has always been your deſire.

Q. Pray, ſir, was you not once called upon by the houſe of commons for ſomething that I wrote in your paper?—*A.* Yes, ſir.

Q. Do you remember that I did or did not, when I took care to furniſh ſuch full proof of *this* advertiſement, give you the reaſon for it?

A. I cannot ſay I recollect the reaſon.

Q. I will mention it. Whether was this the reaſon? That in the laſt tranſaction before the houſe of commons it was pretended they let me off, becauſe they could not get full evidence. Do you remember whether I rehearſed that or not; and ſaid, that if they now choſe to take notice of *this* advertiſement, they ſhould not want full evidence?

A. I do recollect that converſation.

Q. You remember that was the reaſon I gave?—*A.* I do.

Q. Will you pleaſe to look at theſe news-papers? *(ſhewing ſeveral papers of the* Public Advertiſer *to the witneſs. The witneſs inſpects them.)*

Q. Do you know theſe news-papers?—*A.* I do.

Q. Do you believe that you publiſhed them?—*A.* I do.

Q. Look at the dates. I will call them over to you from a liſt—*May* the 30th and the 31ſt; *June* the 6th, the 9th, the 10th, the 12th, the 15th, and the 16th, 1775.

A. I have looked at the papers: they are all my publication:—the date of one of them I cannot make out; it is *June* ſomething.

Q. We will go on—*June* the 21ſt and the 27th, 1775; then there is *January* the 11th, *February* the 8th, *February* the 7th, the 11th, *June* the 2d, and *June* the 30th, 1777.

A. They are likewiſe my publiſhing.

Q. Pray, Sir, do you recollect the contents of the paper of *May* 30, 1775?

A. No, upon my ſoul, I do not.

Q. You are upon your oath.

A. I know that indeed.

Q. Read that part *(pointing a part out)* read from "In provincial congreſs, *April* 26, 1774, down to that part *(pointing it out).*

Mr. *Wallace.* The officer ſhould read it; though not now. You will be intitled to read it when you come to your defence.

Mr. *Horne.* Pray do you know Mr. *Arthur Lee?*—*A.* Yes.

Q. Did you ever receive any account from him relative to the perſons who were killed at *Lexington* and *Concord?*

A. I really do not recollect.

[*Q.* Do you recollect that you ever publiſhed his name to an account?

A. I think I did; relating to his agency for ſome colony.

Q. Look at that, and ſee whether you remember that, and how you received it? *(Witneſs inſpects* Public Advertiſer *of* May 31, 1775.)

A. Yes. I think I received this from Mr. *Arthur Lee.*

Q. Pray who was Mr. *Arthur Lee?*

A. He is of the bar. I have ſeen him in *Weſtminſter Hall.* He was there at the trial of Mr. *Wright* the printer, upon this very affair. I believe he was retained there.

Q. Pray was he retained upon your cauſe when you were to be proſecuted for this advertiſement?

A. He was.

Q. And why did you retain him? Had you any particular reaſon?

A. I preſumed he knew more of the ſubject of the advertiſement than I did.

Q. Did he ever tell you any thing upon the ſubject?

A. We have had private converſation together as a matter of news.

Q. Did he ever tell you he had lodged affidavits with the lord mayor of *London?*—*A.* He did.

Q. Sir, did you ever tell me ſo?

A. I do not recollect.

Q. Pray when had you, for the firſt time, any notice of a proſecution for the publiſhing of this advertiſement?

A. About two years ago.

Q. Pray did that proſecution go on?---*A.* No.

Q. Do you know why?

A. Yes. I let judgment go by default.

Q. The firſt time?

A. I was never called upon till laſt *January.*

Q. It began two years ago; and you were never called forward upon it till laſt *January?*

A. I think that was about the month.

Q. As near as you can recollect?---*A.* Yes.

Q. When was you firſt applied to, or was you ever applied to, to be a witneſs in this cauſe?

A. I was not.

Q. You never was?---*A.* No.

Q. How came you to be an evidence?

A. I heard that if I could produce my author, matters might be better for me; and as you had no ſort of objection (which you told me at the time) I did of courſe produce thoſe copies that appeared there to meſſieurs *Chamberlayne* and *White*, the ſolicitors for the Treaſury.

Q. Should you at any time, if you had been called upon, have declared that I was the author of that advertiſement?

A. Moſt certainly; for you deſired it.

Q. And have given your evidence?---*A.* Yes.

Q. Who was the application made by?

A. It was no ſort of application at all; I heard of it.

Q. By whom?

A. My brother.

Q. You never refuſed to furniſh evidence againſt the author?

A. No.

Q. You never were applied to, to do it?

A. No; I was not.

Q. You have ſaid that I never deſired you to conceal me from the law for any thing you publiſhed from me---Did you ever receive any letter or meſſage from ſir *Thomas Mills* in your life?

A. A private letter I have.

Q. But did not that private letter relate to the public paper?

A. Never.

Q. Did you never receive any meſſage not to inſert any thing in your paper about lord *Mansfield's* earldom?

A. No.

Q. Upon your oath?

A. Upon my oath, to the beſt of my recollection, I never did.

Q. From any quarter?---*A.* No.

Q. Sir, was you ever ſent for by lord *Bute?*

A. No; I never ſaw him.

Q. Was you not ſent for for inſerting a paragraph about the king's marriage?

A. No; I am not conſulted by the higher powers, I aſſure you.

Q. If I had thought you were, I never ſhould have truſted you; I do not think you are.

A. I am much obliged to you for your good opinion.

Mr. *Horne.* I will give you no more trouble.

WILLIAM WOODFALL *ſworn.*

Examined by Mr. WALLACE.

Q. Pleaſe to look at that paper *(ſhewing the witneſs the manuſcript of the advertiſement. The witneſs inſpects it).*

Q. Have you ſeen that paper before?

A. I have.

Q. When did you firſt ſee it?

A. Mr. *Horne* delivered it into my hands in my brother's compting-houſe on the 8th of *June*, to be inſerted in the *London Packet* and *Morning Chronicle*; both which papers I print.

Q. Was it accordingly inſerted in thoſe papers?

A. It was.

Q. Look at thoſe papers *(ſhewing the witneſs ſeveral papers of the* Morning Chronicle *and* London Packet. *The witneſs inſpects them).*

Q. Are thoſe papers publiſhed by you?

A. They are.

WILLIAM WOODFALL *croſs-examined by the defendant.*

Mr. *Horne.* Mr. *William Woodfall*, I will not repeat all the ſame queſtions to you. Did you ever receive any application——*A.* No.

Q. Your anſwer is of the quickeſt. Had you not better hear the queſtion?

A. I preſume you meant to the ſame queſtion you put to my brother; as you laid an emphaſis upon the word *you.*

Q. Did you ever receive any letter, or meſſage, or deſire, or requeſt, of any kind, in any manner, not to inſert any thing in your paper relative to lord *Mansfield*'s earldom? on your oath?

A. On my oath, I never received any letter.

Q. Meſſage, or requeſt, of any kind, in any manner, ſir, from ſir *Thomas Mills*, I aſk you?

A. No,—I think not.

Q. You muſt be a little more poſitive, becauſe my queſtion will not admit of *a think.*

A. I do not recollect I did.

Q. Then take a little time.

A. I don't recollect that I did. I know very well, that ſome perſon or other, once, mentioned it to me.

Q. That is an application. To mention it to you is a ſtronger application than a letter.

A. I had ſome converſation about it. I don't recollect that I was deſired not to publiſh it.

Q. Was it to requeſt you not to inſert ſquibs or any thing?

A. I recollect I did inſert it.

Q. What?

A. Lord *Mansfield*'s promotion to an earldom.

Q. What was that application? That you *would* inſert paragraphs about it, or *would not?*

A. It was a converſation, not of the nature of buſineſs; nor no expreſs deſire to me; or ſome converſation as might be between two friends.

Q. Upon your oath, you had never any application to omit inſerting any thing of that kind?

A. Upon my oath, I don't recollect that I had.

Q. Nor you have never ſaid that you had?

A. If I don't recollect that I received any application to keep out any thing relative to it, I conſequently cannot have ſpoken of it.

Q. Did you, or did you not, ever ſpeak of it?

A. Not that I am aware of.

Q. But you will not ſwear poſitively you never did?

A. I had no *direct* application to me to keep out any thing.

Q. *Direct?* My queſtion was *direct* or *indirect*, or of any kind.

A. I mean to anſwer direct. I don't recollect that I was ever applied to, to keep out any thing; nor that I ever ſaid I was applied to, to keep out any thing.

Q. More than that you cannot recollect?

A. No.

[*The aſſociate read the advertiſements in the ſeveral papers that had been proved and put into court on the part of the proſecution.*]

Mr. *Attorney-General.*

My lord, we have done.

Mr. *Horne.*

Gentlemen of the jury,

I Am much happier, gentlemen, in addreſſing myſelf to you, and I hope and believe I ſhall be much more fortunate as well as happy, than in addreſſing myſelf to the judge. I have been betrayed, gentlemen, I hope, into no unſeemly warmth; but yet into ſome warmth. I have felt myſelf like a man firſt put into hot water; but I have now been long enough in it to be perfectly cool. And, gentlemen, ſome ſmall allowances might have been made for me by my judge who preſides upon this cauſe, when he conſiders the peculiar diſadvantages in which I ſtand here before him. Gentlemen, I am an abſolute novice in theſe matters; and yet oppoſed to gentlemen ſome of the moſt eminent in their profeſſion, and ſome of the moſt converſant in practice. But that is not all; I have a farther diſadvantage. I ſtand here, gentlemen, before you, a culprit as well as a pleader; perſonally and very materially intereſted in the iſſue of the cauſe which I have to defend. And every gentleman in the court muſt know—(ſome perhaps by their own experience, all by the reaſon of the thing)—how very different is the ſportful combat with foils from that which is ſeriouſly diſputed with unbated ſwords; and how frequently the fluttering of the heart, in the latter ſituation, has been known to enfeeble the ſteadieſt wriſt, and to dazzle the cleareſt and moſt quick-ſighted eye. Gentlemen, I have read even of counſel, eminent in their profeſſion, converſant in practice, approved and applauded for their ingenuity in the defence of others, who, when they came to ſtand in the ſame ſituation in which I now ſtand, have complained to the court (and met with an indulgence which I have not), they have complained to the court of the ſame diſadvantage which I now feel. Gentlemen, I have liſtened to Mr. Attorney-General's declamation with as much patience, and, I believe, with much more pleaſure, than any one in the court. That pleaſure I do acknowledge was perſonal to myſelf; ariſing from the futility of the ſupport which Mr. Attorney-General has attempted to give to the ſerious charge which he has brought againſt me; a pleaſure, however, mixed with ſome pain, when I conſider the wretched times at which we are arrived; when a gentleman of his natural ſagacity is, I own, juſtified by recent experience for ſuppoſing it poſſible to obtain from a *London* jury a verdict for the crown, upon a mere common-place declamation againſt ſcandal and indecency in general, without one ſingle ſyllable of reaſon, or law, or argument, applicable to that particular charge which he has brought againſt me, and which you are now upon your oaths to decide. Gentlemen, you know, as well as I do, that I am perſonally and in all reſpects an abſolute ſtranger to every one of you. I am glad of it. I do not expect or deſire from you either friendſhip, or favour, or indulgence. It is your duty to do impartial juſtice, and I only requeſt your attention. I began with requeſting it; and I requeſted your attention, that you may be able to judge for yourſelves, and that the verdict which you ſhall give—(perſonally as it reſpects myſelf it is totally indifferent to me)—but that the verdict which you ſhall give, may be really your own, as it ought to be, and not the judge's. That is the only thing I requeſt of you, and I requeſt it becauſe it is your duty and your oath.

Gentlemen, as for the charge that is brought againſt me, you cannot be ignorant that I am charged with the only unpardonable crime which can, at this time, be committed. I am accuſed of a libel.

Murder and ſodomy, you know, have in theſe our days often found ſucceſsful ſolicitors: and the laws againſt popery (though unrepealed and in full legal force) are, when reſorted to, thought, by the magiſtrate who preſides here, too rigorous to be ſuffered to have their free courſe againſt a religion ſo deſtructive of the civil rights of mankind, and ſo favourable to abſolute and arbitrary power. But whilſt that has been favoured beyond the laws, nothing beyond the laws has been thought rigorous and ſevere enough againſt the charge of libel. Murder, attended with the moſt aggravating circumſtances, has been repeatedly pardoned; and treaſon, the blackeſt treaſon, againſt the family on the throne, and (what is of much more conſequence to us than *any* family) againſt the free conſtitution of this country, has been not only pardoned, but taken into favour; and the eſtates of convict traitors have been reſtored to them and to their families. Whilſt mercy and forgiveneſs, gentlemen, have been thus flowing unnaturally in a full ſtream over the higheſt mountains of iniquity, has any one of you ever ſpied the ſmalleſt rivulet deſcending towards the valley of the libeller? Has any man charged with a libel (and what has not been charged as a libel?) has any man ſo charged ever yet met with mercy? Gentlemen, I do not call back again theſe things to your remembrance in order to arraign them; that is not my preſent buſineſs: I only mention them to gain from you, the only thing I wiſh, your attention. You will be pleaſed then, gentlemen, as one motive for your attention, to remember the nature of the crime charged.

Gentlemen, if the nature of the crime and the rancour with which it is purſued, if that affords a ſtrong reaſon for your particular caution and care and attention in this ſort of trials, a much ſtronger reaſon indeed will be afforded you by the nature of the proſecution. It is called an information *ex officio.* The term *ex officio* is a very gentle expreſſion for a very harſh thing. *Ex officio* (the gentleman well explained it to you, when he boaſted of his conſcience, and his integrity, and duty; for it is certainly ſo)—*ex officio* means, that which he does from a ſenſe of duty. If in this you conſider only juſt what meets the ear, there is no harm in it; it is a good thing: duty is a good thing. But if you examine the real force and conſequences of the term, as here applied, you will find it to contain every thing that can be imagined illegal, unjuſt, wicked, and oppreſſive. For my own part, I am aſtoniſhed that any man, at this time of day, exerciſing ſuch powers as are not according to law, and are much leſs according to reaſon, ſhould talk to you, with an open face, of integrity, of honour, of duty, of conſcience; and that, inſtead of aggravating and ſhewing you in what the charge which he has brought againſt me, in what my crime conſiſts, he has employed half his harangue in boaſting of his own character. If any man in the court who had not known that I was the defendant had come in at the time that that gentleman was talking of his integrity, his conſcience, and his duty; I aſk, would he not immediately have concluded that Mr. Attorney-General was the defendant then making his defence? He muſt. Let the gentleman's integrity and honour be as great as he tells you it is; what has that to do with me? What has that to do with the charge which he has brought againſt me? except indeed this; that, having nothing really to charge me with, he ſets up his own great, immaculate character in oppoſition to mine; that you may give a verdict againſt me, becauſe he is a man of honour, an uncorrupt man, a pure man of integrity, and would not charge me, if he did not think me guilty. Let him think what he pleaſes; if you do not think me guilty, I care very little what he profeſſes to think. I know that he is manly enough; and I honour that part of his character. He bears a man's heart in his boſom, and (though his office has made him hold the language he does) I defy him not to reſpect me. I know he does. I am ſure of it.

Gentlemen, I ſaid that *ex officio* contained every thing that was illegal, unjuſt, wicked, and oppreſſive; and I will prove it to you. *Ex officio*---(a little ſpecimen of it you have ſeen)---*ex officio* means a power to diſpenſe with all the forms and proceedings of the courts of juſtice, with all thoſe wiſe precautions which our laws have taken to prevent the innocent from being oppreſſed by exorbitant and unjuſt power——

Gentlemen, I was thrown off my guard. I own I was. I had prepared an argument; which I believe his lordſhip perceived: he therefore granted me what I intended to have inforced; and, having granted it to me, that grant was made uſe of to prevent me from gaining any argument in anſwer, of any kind. You muſt have taken notice of it; it is your duty to take notice. Juries have been too much conſidered as men out of court; and when an application has been made to the judge, to determine upon a point of law, the jury has been conſidered as having nothing to do with the matter. No more they have, indeed, to decide it. But the jury has this to do with the matter: they are to make a true deliverance; and they will ſee and will judge whether the defendant has juſtice done him or not, even in the practice of the court. I know nothing of the law: I am not ſorry for that: this is not a queſtion of law; and I am happy to have Mr. Attorney-General's authority to ſay, that it is ‘ the plaineſt, the ſimpleſt queſtion; and that it was too obvious for ‘ him to foreſee a difficulty in it.’ He ſaid, it was ‘ the plaineſt of all ‘ the plain and ſimple matters that were ever laid before a court;’ and being ſo, you are the beſt judges of it. And indeed the nature of a libel always makes a jury the beſt judges of it; for a libel (if it be ſo) is intended for miſchief: it muſt therefore be intelligible to the people, or no miſchief could be produced by it. If a man writes a libel that a common jury could not underſtand, (and you are a ſpecial jury, gentlemen) he muſt fail in his deſign. Obſerve then, gentlemen, this advertiſement is the plaineſt and ſimpleſt of all the matters that were ever laid before a court in which the attorney-general was concerned: and in theſe two years and a quarter that he has had to bring it to trial, he has not been able to ſee a difficulty in it; and yet he has had a *ſpecial* jury to determine it: a common jury could not be left to determine it: and that I will explain to you hereafter. I know very well, that not only juries, but many other perſons who apply even to the practice of the law, never trouble their heads to take into conſideration all together the enormous wickedneſs of the powers claimed in this ſort of proſecution. It ſhall be my buſineſs therefore to explain it to you. You ſhall judge of the honour, and integrity, and conſcience of the gentlemen who uſe them and enjoy them.

And, firſt of all, an information means no more than an accuſation. Appeal, indictment, information, are, as I take it (and I ſhall be corrected if I am wrong, it will be well corrected both by the attorney-general and the judge)---I take it they mean no more than accuſation; and they have a different ſpecific name becauſe of the different manner in which that accuſation is brought forwards. Then, gentlemen, this is an accuſation by duty, out of duty; and by this means, by this his duty, the attorney-general is enabled, contrary to the laws of the land, to accuſe whom he pleaſes, and what he pleaſes, and when he pleaſes. And (if he pleaſes) he only accuſes them, and never brings it to trial: he goes on harraſſing the ſubject with information upon information, if he pleaſes, and never brings that man to trial, If however, out of his mercy, or out of his reſentment, he does chuſe at laſt to bring it to a trial; why, gentlemen, he, in general, tries it by whom he pleaſes. Gentlemen, when it comes to trial, he tries it in what manner he pleaſes, he takes what advantages he pleaſes, and no reaſon will be given for thoſe advantages. Gentlemen, during the courſe and progreſs of the trial, if, notwithſtanding thoſe advantages he has already taken, he ſees ſome reaſon to ſuſpect that the verdict is likely to go againſt him, he claims a right to ſtop it if he pleaſes, without any deciſion; for he claims a right to withdraw a juror, as it is called; that is to ſay, You ſhall not come on to a verdict. The attorney-general muſt not deny it, unleſs indeed the practice of the court is changed in that particular.

The practice of the court we ſee does ſometimes change; for I have it now from the judge, that in all caſes the proſecutor has a right to reply; which truly I did not before think to be the practice: but, however, the Bar will take notice now; for they will ſoon have caſes in which they may enjoy that benefit and privilege, if it be one: the proſecutor has a right to reply, even though no evidence is called for the defendant.---I ſhall ſee ſome more new methods of proceeding in trials; I have ſeen a good many. I think there muſt be ſomewhere or other in the court a gentleman with ſpirit enough,---ſome gentleman or other---many I hope there are, who will (upon ſome trial where they may be proſecutors) who will take that advantage that has been allowed to-day, and will offer to reply where no evidence is called. There were ſome half words I know dropped about *matter of law*, but I hope that will be made plain.

Well, but if the attorney-general does not ſtop the cauſe without coming to a deciſion, but thinks he ſhall get a verdict in his own favour, and therefore ſuffers the cauſe to go on; if he loſes the verdict, he ſuffers none of thoſe diſpleaſing conſequences which other men muſt ſuffer; for the crown pays no coſts---none at all:---he can proſecute as often as he pleaſes, and whom he pleaſes, and pays no coſts! But that is not all.---Suppoſe he has convicted ſix, ſeven, or eight men for the ſame offence, he exerciſes the ſovereign power of pardon; he calls to judgment which of them he pleaſes, and lets go by which of them he pleaſes.---It has happened in the proſecution for this very paper:---out of ſeveral convicts, but three have been called up to judgment. That in ſome part I ſhall explain to you. But that is not all: the man or the men whom he calls up to judgment, he, *the proſecutor*, aggravates their puniſhment as he pleaſes; and that I will prove to you. In that, I think, I ſhall not be contradicted, becauſe I have the authority of the judge who is now trying this cauſe.

So that in every ſtage of the buſineſs you will find that there is an unjuſt, an illegal, a wicked, and an oppreſſive advantage. And that you may not think that I am declaiming without any proofs, I will ſo far treſpaſs upon your time as to come a little more to particulars.

And firſt, gentlemen, for the beginning of ſuch a proſecution.---He brings it on as he pleaſes; he has no reſort to a grand jury, or the country to accuſe; but, contrary to expreſs law, and what is much ſtronger, contrary to the ſtrongeſt and the very fundamental reaſon of that law, he has no recourſe at all to a grand jury; and that becauſe it is the pretended ſuit of the crown. Now, gentlemen, if we want to enquire (which is not often done, I know, in courts of juſtice) why any grand jury? why a grand jury at all? It is not owing to the nature of the offence; grand juries are in capital offences and in ſmall offences. Why are a grand jury to find the accuſation? for you muſt not be led away by technical terms. Information, appeal, indictment, all mean one and the ſame thing;---accuſation brought by different perſons---that is the only reaſon of their different appellations.---If that is not the reaſon of the difference of the names, I ſhall be corrected.

Then why a grand jury? I would tell you in my own words, if I had not the words of a perſon more to be relied upon. Sir *John Hawles* ſays, theſe are his words: ‘ the true reaſon of a grand jury---’

But, gentlemen, I ſhall juſt obviate an objection firſt, becauſe I ſhall not have an opportunity after it is made. It may be objected, that I have taken this from the *State Trials*; and I have heard from the bench that the *State Trials* are no authority. I have alſo heard from an officer very high in the law, and of very great acknowledged abilities, who ſits by the ſide of the attorney-general, that they are a much better authority (I ſpeak it becauſe I heard him ſay ſo) that they are a much better authority than the ſcrawl of a nameleſs Reporter. But I will tell you why the *State Trials* in certain caſes are the beſt authority; and that is, for this reaſon: becauſe they are equally good authority, whether what they relate is true or is falſe. It is a ſtrange aſſertion, but their authority is equally good for the purpoſe for which they are brought, whether the things they tell are true or falſe. I have heard them called from the bench (and called ſo for very good reaſons) ‘ libels upon the judges.’------‘ The *State Trials* are ſo far from being an authority, that they are ‘ libels upon the judges.’---Are they ſo? Then they are ſtill better authority than if they were true; that is, authority for the purpoſes for which they are brought; that is, for the condemnation of the wicked doctrines which they expoſe. For are they libels upon the judges? Was the intention of thoſe who wrote them to blacken their characters? Would the libellers then at that time of day (ſome a hundred, two, or three hundred years back, or according to the length of time) would an enemy have put into the judges mouths doctrines which were honourable? No; if he intended to libel them, he has falſely made them the propagators of thoſe doctrines which their ſouls abhorred. Can there then be a ſtronger evidence about the opinion which men had formerly concerning theſe doctrines? If there cannot, then there can be no ſtronger authority againſt the doctrines expoſed by the *State-Trials*. True or falſe, the *State-Trials* are the beſt authority which can be had; and better if they are falſe than if true.

Then, gentlemen, I will proceed to my authority: ‘ The true reaſon of ‘ a grand jury is the vaſt inequality of the plaintiff and defendant; and ‘ therefore the law has given this privilege to the defendant on purpoſe, ‘ if it were poſſible, to make them equal in the proſecution and defence, ‘ that equal juſtice may be done between both. It conſiders that the ‘ judges, the witneſſes, and the jury, are more likely to be influenced by ‘ the king than by the defendant: the judges, as having been made by ‘ him, and as it is in his power to prefer or reward them higher: and ‘ though there are no *juſt* cauſes for them to ſtrain the law, yet there ‘ are *ſuch* cauſes which, in all ages, have taken place, and probably always will. Nor was it, nor is it, poſſible but that the great power of ‘ enriching, honouring, and rewarding, lodged in the king, always had ‘ and yet muſt have an influence on the witneſſes and jury; and therefore it is that the law has ordered that at the king's proſecution no man ‘ ſhall be *criminally* queſtioned’ (this is a criminal queſtion) ‘ no man ‘ ſhall be criminally queſtioned unleſs a grand jury, upon their own ‘ knowledge, or upon the evidence given them, ſhall give a verdict that ‘ they really believe the accuſation is true.’

If, gentlemen, there are *other* reaſons for a grand jury than theſe, if there are *others*, you will have them; and though it will not be permitted to me to do (what with the utmoſt extent of my ignorance of the law, which is very great, I am ſtill ſure I could do by common-ſenſe and reaſon—I mean, refute thoſe other reaſons;) I ſay, though I ſhall not be permitted to do that here, you and all the world will be able, at your cooler hours, to determine upon the force of thoſe reaſons that ſhall be given, from whatever authority they may come. And in this reſpect I ſhall be happy; for I ſhall have the honeſty and the underſtanding of the public at large to judge of thoſe doctrines which my imbecility might not permit me ſufficiently to refute.

Gentlemen, it is true that the court of *King's Bench* has alſo aſſumed a power of accuſing men. They ſay they may ſafely be truſted with it. I believe *their* claim illegal; but I have nothing to do with it: and I acknowledge that it is much ſafer *there*, than in the hands of an attorney-general, who is whipped in and whipped out juſt as the miniſter, whoſe friend he is, goes in or out.

But that is not all. The court of *King's Bench* cannot grant an information without an affidavit, without an accuſation upon oath; no *one* of the judges of the court of *King's Bench* can do it; and yet they are a little more independent (they have fewer hopes, and therefore fewer fears) than the attorney-general; yet no *one* of the judges of the court can accuſe a man. It muſt be the *whole* court, and they muſt do it in conſequence of an oath. If I am wrong, you will have the pleaſure of contradicting it *(turning to the attorney-general)*. But the attorney-general accuſes men neither upon the oath of others, nor yet upon his own oath. If he believes the matter of the accuſation true, it is but the belief of one man, and he a prejudiced man, and the moſt improper man in the kingdom for his authority to be taken in ſuch a caſe. But, gentlemen, what is much worſe, it frequently happens that no man whatever avows the accuſation, or believes it; no, not the attorney-general himſelf who files the information. I will prove it by-and-bye, even in the caſe of the attorney-general who filed this declaration. Gentlemen, I ſhall deſire by-and-bye, for your ſatisfaction and mine, to find out whether there is *one* man in the country that believes me guilty of the crime laid to my charge; a crime of that nature that is to have a puniſhment which is called by the law a temporary death, an excluſion from ſociety, impriſonment. The apparent object of this proſecution is to take what little money out of my pocket I may have there, and to impriſon me, and ſo exclude me from that ſociety of which I have rendered myſelf unworthy. However, I have the pleaſure to ſee that there ſits a gentleman by the judge who is now trying me, who, as well as myſelf, has charged the king's troops with murder; a charge which at that time excited great abhorrence and deteſtation againſt him. The judge and that gentleman have been laughing all the time of this trial; they have enjoyed each other's company exceedingly *(a great laugh for ſome minutes of the whole audience)*. Well, gentlemen, *(turning towards lord* Mansfield *and Mr.* Wilkes) I have cauſed another laugh between the gentlemen; but it gives me pleaſure to think, that if ever I am to come out of priſon again (if you are ſo kind as to put me there) I too may have the honour (if it be one) of ſitting cheek by cheek with the judge, and laughing at ſome other libeller. I ſaid, if I come out again---becauſe if it is poſſible that I ſhould be put there for this charge, I believe that will never happen.---I will never ceaſe repeating the charge I have made, till thoſe men are legally tried and acquitted who are guilty of what I call murder. I will not be contented with one, nor with two, nor with twenty juries. I will repeat the charge of murder upon the troops every day, if this doctrine gets ſo far even as to a doubt; and I call upon the attorney-general now, if he may, if he can, if he will venture without the permiſſion of thoſe miniſters whoſe humble ſervant alone he is; if he may venture, I call upon him to pledge himſelf to bring an information for a ſeditious libel againſt the *King* and the *Government* every time I charge the troops with murder. I promiſe him I will give him buſineſs enough, and I hope he will (if he may venture to do it) promiſe to file an information every time I charge them with murder when they commit it.

But, gentlemen, I have wandered; though if I am to be ſhut up ſo ſoon, a few excurſions before it may be excuſed me.

The attorney-general does not apply then to the grand jury, and there is no perſon whoſe accuſation upon oath it is.

When he has filed his information, he proceeds or not upon it as he pleaſes; he files freſh informations if he pleaſes, when he pleaſes, as often as he pleaſes; he uſes it if he pleaſes as a vexatious method which may harraſs and ruin and deſtroy the greateſt fortune in this country. It has been uſed vexatiouſly. I do not ſay by the preſent attorney-general; I do abſolutely acquit him of that; he never, that I know of, has been guilty of *that* practice: but I do know attorney-generals who have: but that I may not ſeem to libel all the world, I will not mention them nor the caſe. When the attorney-general has brought his accuſation, and renewed and delayed it as much as he pleaſes, if he chuſes to try it, I ſaid, he tries it by almoſt whom he pleaſes. It may ſeem perhaps a ſtrange thing for me to ſay to a jury who are trying my cauſe; but it is a fact; for he is always ſure to have a *ſpecial* jury for the trial of this ſort of charge. Libel is always tried by a *ſpecial* jury. Now this ſeems a very comical thing; for there is an expence attending it. The gentleman, I ſuppoſe, would not be thought to be unneceſſarily laviſh of the income of the crown, which has lately been found ſo deficient; he ſurely would not voluntarily throw it away. And yet a man that came from *Brentford* (my clerk formerly) had two guineas for his expences. He is a very honeſt man; it was a very lucky matter for him: I wiſh, for his ſake, that he might be called a witneſs againſt me once a week upon ſuch a proſecution. Now if the ground of the charge happens to be, as this is, ‘ of all plain and ſimple matters ‘ that ever were laid before a court the moſt ſimple;’ it is a very ſtrange circumſtance that the attorney-general ſhould chuſe to have a ſpecial jury to try a thing in which there is nothing *ſpecial! Special* juries were never intended or appointed for that purpoſe. They were intended to examine into merchants accounts, or any critical or nice matter; for you know we are told that you have nothing to do with the *law:* you do not therefore want any legal education; and yet *ſpecial* juries are always made uſe of in matters of libel. And indeed why ſhould they not? It coſts the attorney-general nothing. In the caſe of any other proſecutor, it would be at his expence; but the crown pays this, that is, the people pay it againſt themſelves. However, that is no objection to Mr. Attorney-General; for if you look at the law-expences in the Civil Liſt of the laſt year 1776, as they are delivered in to parliament, you will find that they amount to the little inſignificant ſum of 60,000 *l.* A defendant againſt the crown is in a bleſſed ſituation! But as the expence is no reaſon againſt the attorney-general chuſing to try it by a ſpecial jury, he has a very ſtrong reaſon for chuſing a ſpecial jury; and that is, becauſe, by that means, he tries it by almoſt whom he pleaſes: I do not mean by the particular individuals whom he pleaſes, but generally by that deſcription of men that he pleaſes. Now this, gentlemen, is particularly unfortunate in my caſe; for the attorney-general ſaid (I heard him ſay it upon the firſt trial for this advertiſement) that nine-tenths of the people approved of all the meaſures of the miniſtry relative to *America.* The method of ſtriking a ſpecial jury ſeems at firſt ſight fair enough. Forty-eight men are ſtruck from a book. The defendant and the proſecutor each ſtrikes off twelve. That ſeems very fair and juſt; but it is very far from being ſo fair; for if nine-tenths of the people (which he himſelf acknowledged) are of that way of thinking (a way of thinking contrary to what I may well ſeem to be) you will obſerve that the attorney-general ſtrikes off two tenths and half a tenth out of the forty-eight; ſo that he will be ſure not to have one man of my way of thinking concerning *America:* I mean, it will be ſo, if at leaſt they know what they are about: ſo that you ſee there is ſure to be a little prejudice againſt the defendant in the minds of the jury. It is true, indeed, that the opinion of the jury concerning the meaſures relative to *America* has nothing fairly to do in this cauſe; but the prejudice may be extended from one thing to the other. We all know very well how men's minds are apt to run. But that is not all. This prejudice will be the caſe, even though the ſpecial jury are fairly ſtruck; but they are not fairly ſtruck. I believed ſo; but I never was ſure of it till this caſe of mine: and whatever I may ſuffer, I think it a cheap purchaſe to know what I now know by this means. The ſpecial juries in the counties, eſpecially in *Middleſex,* great numbers of them are qualified by the crown; they are eſquired by the crown; and theſe crown eſquires always attend upon the ſpecial juries. In the city, gentlemen, to which you belong, you know very well whether the deſcription of merchant has or has not changed within ſome years paſt. You know, I dare ſay many of you, what merchants *were*—what merchants *are.* You all know well that the very numerous and extenſive contracts which are going forward bring a ſwarm of merchants in amongſt you. Every man that has a contract becomes a merchant; every man that has a contract is liable to be ſtruck upon a ſpecial jury, and he is ſure to attend, if he is taken: and you muſt obſerve beſides, that the ſolicitor of the Treaſury, who is in this conſtant employ of ſtriking ſpecial juries, knows all the men, their ſentiments, their ſituations, their deſcriptions, and the diſtinction of men.

Now, gentlemen, for the method of ſtriking a ſpecial jury, which I ſhall not wonder that you are not acquainted with; and for the counſel, it is a matter that they are not concerned in. Obſerve, I do not lay theſe things to the charge of the attorney-general; he only uſes the powers which others put into his hands.—The ſpecial jury, you may imagine, are taken indifferently, and as it may happen, from a book containing all the names of thoſe who are liable to ſerve. I thought ſo, when I read the act of parliament appointing the manner in which they ſhould be taken; but when I came to attend to ſtrike the ſpecial jury, a book with names was produced by the ſheriff's officer. I made what I thought an unexceptionable propoſal: I deſired the maſter of the *Crown-Office* (whom I do entirely acquit, and do not mean the ſlighteſt charge upon) I deſired the maſter of the *Crown-Office* that he would be pleaſed to take that book; open it where he would; begin where he would, at the top or at the bottom; and only take the firſt forty-eight names that came. I ſaid, I hoped that to ſuch a propoſal the ſolicitor of the Treaſury could have nothing to object. I was miſtaken; he had ſomething to object. He thought that not a fair way (*turning round to the attorney-general*). There were witneſſes enough preſent; and I ſhould ſurely be aſhamed to miſrepreſent what eight or nine people were preſent at. He thought that not a fair way. He thought and propoſed as the faireſt way, that two ſhould be taken out of every leaf. That I objected to. I called that *picking,* and not ſtriking, the jury. To what end or purpoſe does the law permit the parties to attend, if two are to be taken by the maſter of the *Crown-Office* out of every leaf? Why then need I attend? Two may as well be picked in my preſence as in my abſence. I objected to that method. The maſter of the *Crown-Office* did not ſeem to think that I had propoſed any thing unreaſonable. He began to take the names; but objected that he could not take the firſt forty-eight that came, becauſe they were not all ſpecial jurymen; and that the names of common and ſpecial jurymen were mixed together, and that it would be a hard caſe that the party ſhould pay the expence of a ſpecial jury and not have one; that they were expected to be perſons of a ſuperior rank to common jurymen. I could have no objection to that, provided they were indifferently taken. I ſaid, Take then the firſt forty-eight ſpecial jurymen that come. He ſeemed to me that he meant to do it. He began; but as I looked over the book, I deſired him to inform me how I ſhould know whether he did take the firſt forty-eight ſpecial jurymen that came, or not; and what mark or deſcription or qualification there was in the book, to diſtinguiſh a *ſpecial* from a common juryman? He told me, to my great ſurprize (and he ſaid he ſuppoſed I ſhould wonder at it) that there was no rule by which he took them. Why then how can I judge? You muſt go by ſome method. What is your method? At laſt the method was this: That when he came to a man a woollen-draper, ſilver-ſmith, a merchant (if merchant was oppoſite to his name, of courſe he was a ſpecial juryman) but a woollen-draper, a ſilver-ſmith, &c. he ſaid that there were perſons who were working-men of thoſe trades, and there were others in a ſituation of life fit to be taken. How then did he diſtinguiſh? No otherwiſe than this: if he perſonally knew them to be men in reputable circumſtances, he ſaid, he took them; if he did not know them, he paſſed them by. Now, gentlemen, what follows from this?

But this is not all. The ſheriff's officer ſtands by, the ſolicitor of the Treaſury, his clerk, and ſo forth; and whilſt the names are taken, if a name (for they know their diſtinction) if a name which they do not like occurs and turns up, the ſheriff's officer ſays, ‘ O, ſir, he is dead.’ The defendant, who does not know all the world, and cannot know all the names in that book, does not deſire a dead man for his juryman. ‘ Sir, ‘ that man has retired.’ ‘ That man does not live any longer where ‘ he did.’ ‘ Sir, that man is too old.’ ‘ Sir, this man has failed, and ‘ become a bankrupt.’ ‘ Sir, this man will not attend.’ ‘ O (it is ſaid ‘ very reaſonably) let us have men that will attend, otherwiſe the pur‘poſe of a ſpecial jury is defeated.’ It ſeemed very extraordinary to me. I wrote down the names, and two of them which the officer objected to I *ſaved.* ‘ I begged him not to kill men thus without remorſe, as they ‘ have done in *America,* merely becauſe he underſtood them to be friends ‘ to liberty; that it was very true, we ſhall ſee them alive again next ‘ week and happy; but let them be alive to this cauſe.’ The firſt name I took notice of was Mr. *Sainſbury,* a tobacconiſt on *Ludgate-hill.* The ſheriff's officer ſaid, he had been dead ſeven months. That ſtruck me. I am a ſnuff-taker, and buy my ſnuff at his ſhop; therefore I knew Mr. *Sainſbury* was not ſo long dead. I aſked him ſtrictly if he was ſure Mr. *Sainſbury* was dead, and how long he had been dead? ‘ Six or ſeven ‘ months.’ ‘ Why, I read his name to-day; he muſt then be dead ‘ within a day or two: for I ſaw in the news-papers that Mr. *Sainſbury* ‘ was appointed by the city of *London* one of the committee’ (it happened to be the very ſame day) ‘ to receive the toll of the *Thames* navigation:’ and as the city of *London* does not often appoint dead men for theſe purpoſes, I concluded that the ſheriff's officer was miſtaken; and Mr. *Sainſbury* was permitted to be put down amongſt you, gentlemen, appointed for this ſpecial jury.

Another gentleman was a Mr. *Territ.* The book ſaid he lived, I think, in *Puddle-dock.* The ſheriff's officer ſaid, ‘ that gentleman was ‘ retired; he was gone into the country; he did not live in town.’ It is true, he does (as I am told) frequently go into the country (for I enquired). His name was likewiſe admitted, with ſome ſtruggle. Now what followed? This dead man and this retired man were both ſtruck out by the ſolicitor of the Treaſury; the very man whom the ſheriff's officer had killed and ſent into the country were ſtruck out, and not admitted to be of the jury. Now, gentlemen, what does that look like? There were many other names of men that were dead, and had retired, which were left out.

There is ſomething more unfortunate in the caſe of a ſpecial jury. The ſpecial jurymen, if they fail to attend that trial for which they are appointed, are never cenſured, fined, nor puniſhed by the judge. In the trial of one of the printers, only four of the ſpecial jury attended. This is kind in the chief juſtice, but it has a very unkind conſequence to the defendant, eſpecially in a trial of this nature; for I will tell you what the conſequence is. The beſt men and the worſt men are ſure to attend upon a ſpecial jury where the crown is concerned; the beſt men, from a nice ſenſe of their duty; the worſt men, from a ſenſe of their intereſt. The beſt men are known by the ſolicitor of the Treaſury: ſuch an one cannot be in above one or two verdicts; he tries no more cauſes for the crown. There is a good ſort of a man, who is indeed the moſt proper to try all this kind of cauſes; an impartial, moderate, prudent man, who meddles with no opinions. That man will not attend; for why ſhould he get into a ſcrape? He need not attend; he is ſure not to be cenſured; why ſhould he attend? The conſequence follows, that frequently only four or five men attend, and thoſe ſuch as particularly ought not to attend in a crown cauſe. I do not ſay that it happens now. Not that

I care: I do not mean to coax you, gentlemen: I have nothing to fear. You have more to fear in the verdict than I have, becauſe your conſciences are at ſtake in the verdict. I will do *my* duty, not for the ſake of the verdict. Now what follows this permiſſion to ſpecial jurymen to attend or not, as they like beſt? Why, every man that is gaping for a contract, or who has one, is ſure to ſhew his eagerneſs and zeal.

It happened ſo in the trial of the firſt cauſe for this advertiſement. The printer ſhewed me the liſt. Amongſt them, one of the firſt I obſerved, was Sir *James Eſdaile*, alderman of *London*, and a contractor for the army (there were ſeveral others; I do not mention the gentlemen's names). He would have ſtruck him out. I ſaid, No; there are ſo many bad that ought to be ſtruck out, leave in ſir *James:* it is impoſſible that a magiſtrate of *London!* with ſo much buſineſs! a contractor under the crown! if he has any modeſty! he cannot, an alderman of *London!* go down to be a ſpecial juryman in *Middleſex!*—He was the foreman of the jury. He was ſure to attend. And ſo they got the firſt verdict, in order to give them this influence upon men's minds.—'We have got a verdict. 'This queſtion has been determined by a jury.'——

Well, gentlemen, having then got ſuch a ſpecial jury as he uſually does get (for it ſeldom happens that twelve gentlemen have ſenſe enough of their duty to attend, as happens to be now my caſe)—the attorney-general brings on the trial. He then claims, amongſt other things, *a right to reply*, though no evidence is called for the defendant. You have heard what paſſed upon this ſubject with the judge. I will leave that matter now, though I think I have enough to ſay upon it; however, I will leave it unexamined now: I hope to live to argue that point for my client, and therefore will not now trouble you with that argument. You will yourſelves judge whether any reaſon was given to me, or to you, or to any man, why the attorney-general, proſecuting for the crown, having all the influence, power, and advantage that he can poſſibly have, why he ſhould have that advantage of reply—which my equal or inferior ſhall not have!

But beſides this, I told you before, that he claims a right of ſtopping it, when he pleaſes, *by withdrawing a juror*. I ſhould be glad to hear that contradicted and given up.

But further, if he loſes the verdict, he *pays no coſts:* the crown pays no coſts. The miſerable man that is harraſſed, even though innocent, though gaining a verdict under all theſe diſadvantages (if it is poſſible, and which ſeldom happens), yet ſtill he muſt ſtand by his coſts; and they may be, you ſee, whatever they pleaſe to make them.

Again, if the attorney-general gains a verdict, he puniſhes whom he pleaſes, and when he pleaſes. I think there were eight convictions for this advertiſement, yet but three have been called up to judgment. One, I think, was let off, becauſe there was a little falſe-ſwearing in the caſe by an officer under the crown—(I allow it to have been certainly a miſtake, becauſe he is a gentleman of character)—and therefore it is accounted for how this one got off: but how the other printers eſcaped, whether from the benevolence of the attorney-general, I do not know.

That is not all. He aggravates the puniſhment of the perſon againſt whom he gets a verdict, if he pleaſes. I was preſent in court when I heard the judge who now tries me (and who will perhaps give the ſame intelligence in my caſe) tell the attorney-general of that time (who is now chief juſtice of the *Common-Pleas)* when he moved that the convict (who was the gentleman who now ſits next to the judge) when the attorney-general moved that Mr. *Wilkes* might be committed to the *King's Bench* priſon, lord *Mansfield* inſtantly ſaid to Mr. *De Grey*—'The king's attorney-general may chuſe his priſon: all the priſons are the king's. The attorney-general may, if he pleaſes, move to have him ſent to *Newgate*.' His lordſhip mentioned *Newgate:* I heard it. And obſerve, this was an inſtruction to the attorney-general, who ſurely, of all men in the world, leaſt needs inſtruction: and it was in a caſe where he was proſecutor; and in a criminal matter, and proſecutor too for the crown. And this inſtruction was not in order to obtain juſtice againſt the offender; that was paſt; he had been convicted many years before;—but it was merely in aggravation of puniſhment. I did not know nor believe that the attorney-general had that right: I ſhould not have known it, if I had not learned it from ſo great an authority.

Gentlemen, having rehearſed what theſe claims are, I intreat you to conſider *who* it is that enjoys theſe powers; ſuperior to the powers which any one judge in this country enjoys; ſuperior to the powers which even the courts enjoy. It is the attorney-general! Now, who is the attorney-general? who is he? whoſe officer is he? what ſort of officer is he? I will tell you what a *Scotch* author of merit—(this is not law, but it is very good reaſon and great truth)—I will tell you what he ſays of the office of the attorney-general. What I ſay now, gentlemen, does not go againſt the perſon now intruſted with it; it goes againſt his office. I do not ſpeak of this gentleman particularly; all attorney-generals, at leaſt moſt of them (ſome of them indeed would not, but moſt of them will) uſe theſe unjuſt powers. *Mallet* ſays, in the preface to his life of lord chancellor *Bacon*—'The offices of attorney and ſolicitor general have 'been rocks upon which many aſpiring lawyers have made ſhipwreck of 'their virtue and human nature. Some of theſe gentlemen have acted 'at the bar, as if they thought themſelves, *by the duty* of their places' (that is, *ex officio*) 'abſolved from all the obligations of truth, honour, 'and decency'—(but not abſolved you find from *talking* of them)—'but 'their names (he ſays) are upon record, and will be tranſmitted to after 'ages with thoſe characters of reproach and abhorrence that are due to'—(to whom? This man is as unfortunate in his ſtyle as myſelf) 'the worſt 'ſort of *murderers*, thoſe that *murder* under the ſanction of juſtice.'—He was never proſecuted for it. He charged the office of attorney-general (which is ſomething more reſpectable than the office of a common ſoldier) with being the worſt ſort of *murderers*.

But the attorney-general, it is ſaid, is choſen by the king: that is what is pretended. He is the king's officer; but he holds it by a very precarious tenure: his future hopes are greater than thoſe of any man in this country; his fears therefore muſt be in proportion. Obſerve too, he enjoys theſe powers on the behalf of the king, againſt whom, particularly, all thoſe precautions were taken; for theſe precautions are not taken between ſubjects who are upon a footing; but all theſe precautions and advantages for innocence (that it may not be oppreſſed) they are all taken, not againſt the king, but againſt the crown; againſt that power which is more often abuſed than any other power; more liable to be abuſed, becauſe greateſt. But, gentlemen, the matter is a great deal worſe than this. He is not the king's officer. He knows better where his obligations lie. He is not ſo ungrateful. He would not, at a table with his friends, ſay that he is the *king*'s officer: he knows a great deal better than that. He is in truth the officer of the miniſter: and if the miniſter goes out to-morrow, out goes the attorney-general. We cannot poſſibly have a ſtronger inſtance, and a happier for me, of this very thing. There ſits here in court a gentleman who ſhould now have been attorney-general (he loſt not the place, I ſuppoſe, for want of abilities) who refuſed a brief in this very cauſe; becauſe he thought it ſcandalous at the diſtance of two years and a quarter.—I ſuppoſe he might have ſtill ſtronger reaſons. If I knew them, I would uſe them. If I knew *his* reaſons why he thought this proſecution ſcandalous, you would hear a very different defence from any which I can give you. Put in then another miniſter, and the attorney-general thinks me a very honeſt man: but if there comes a different miniſter and a different attorney-general, —'O, put him out of the world; he is not fit for human ſociety; ſhut 'him up like a mad dog.'—You ſee it is not the king's officer, it is the miniſter's officer. Gentlemen, it is very well known that the attorney and ſolicitor general make a conſiderable part of every adminiſtration. They ſit there in the houſe of commons on each ſide of the miniſter; the two brazen pillars, the *Jachin* and *Boaz* of the miniſter in the houſe of commons. However, gentlemen, though this ſituation of theirs may make us ſmile, it is a very ſerious thing, eſpecially when their honour and conſcience are to go to you for proof, and inſtead of argument.

Now let us ſee, how have thoſe powers been exerciſed? I have ſhewn you what they are; I have ſhewn you who enjoys them: now let us ſee how they have uſed them; I mean the preſent attorney-general. I will not go back to tell you that the biſhops were reckoned guilty of a libel, not becauſe they oppoſed the introduction of the Popiſh religion, but becauſe they would not lend their own hands to the introduction of it. But how has it been uſed by the preſent attorney-general? I am driven to this inquiry. He has talked much of his conſcience, and that if he had not imagined that he was executing his duty, he never ſhould have thought of the proſecution: he did not know me; it was merely a matter of duty. Now I did not apprehend that it was a matter of his ſtirring, and that his motive was duty; but as he takes it upon himſelf, upon himſelf it muſt lie. Now therefore, how has he exerciſed this power which he enjoys in right of being the king's officer? I ſay, that he has then equally betrayed his own conſcience, and the dignity and prerogative of the crown (if injuſtice muſt paſs by theſe names)—I ſay that he has betrayed them all: for he has acted, not as the attorney-general of the king, but as the attorney-general of the houſe of commons. Never before this gentleman's time did any houſe of commons, I believe, I am ſure, never did they direct any attorney-general to file an information. Who enjoys the power then? The houſe of commons files informations! Worſe ſtill; the attorney-general files informations, not from his own mere motion, not from the direction of the crown, but by the direction of the moſt corrupt aſſembly of men that ever exiſted upon the face of the earth.—It may be called indecent to call them ſo; but, gentlemen, I know, that if every man was to ſpeak but one word expreſſive of his opinion concerning what I ſay, there are thoſe, perhaps within hearing, whoſe hearts would ſink within them. There is no man doubts it, and I ſhall not be afraid to ſay it.—But, gentlemen, now obſerve; this officer, the attorney-general, was never permitted to have a ſeat in the houſe of commons till the time of ſir *Francis Bacon*. He is no officer of the houſe of commons; he never was permitted to ſit there till that time; and out of the extreme veneration which they paid to the greateſt of mankind (for he was ſo), they permitted him, for the firſt time, to have a ſeat as a private member in the houſe. Now where have we got? He has no longer a ſeat in the houſe as a private member; he is the officer of the houſe of commons: that power which is pretended to be exerciſed for the crown, is exerciſed for the miniſter. The houſe of commons is the miniſter's; for he would not be miniſter, if he had not a majority. The attorney-general is brought in by him; the houſe directs the proſecution: whereas the method formerly was, that the houſe of commons uſed to addreſs the crown, to deſire the crown to order the attorney-general to file an information or to proſecute. Never till this time did the houſe think of directing the king's officer to file an information. The conſequence happened to be, what at the very time it was natural to foreſee would happen. The attorney-general proſecuted men whom he thought innocent. I happened by ſtealth (I am not often permitted to be there) I happened by ſtealth to hear the gentleman in the houſe of commons ſpeak a language which no man could miſtake. What is ſtill more, on one of the proſecutions brought, the vote for it was either reſcinded, or ſome healing vote was afterwards put into the journals of the houſe of commons, for having cauſed a proſecution to be brought againſt a perſon who was found to be innocent. Here is a dangerous power indeed! Who may not, if this is permitted, file an information againſt the ſubject? What a power is this in the hands of a miniſter to ruin! for if I am not ruined, it is the gentleman's mercy. I thank him for *that* mercy; for he might every term file an information, if he pleaſes.

Now, gentlemen, conſider in what ſort of a charge does he enjoy theſe extraordinary powers. You will find, that as he is the laſt man in the world (I ſpeak not of the man, but the office) that ought to be truſted with theſe powers, ſo he enjoys them in that kind of charge in which he ſhould leaſt of all enjoy them. For, gentlemen, *libel* as well as *attorney-general* depends very much upon the miniſter. Why, don't we all know very well, that they who were *pilloried* for libel in the laſt reign are *penſioned* in this? What then, is this the kind of charge in which this open door to oppreſſion ſhould be left to the attorney-general and to the miniſter? It is not for crimes againſt the ſtate that this power interferes, but for partial political opinions; and the man who is pilloried or impriſoned to-day, may, for the ſame act, be penſioned to-morrow, juſt as the hands change. If this party goes down, it is libel; if it comes up, it is merit. Is it in this kind of charge that an attorney-general ſhould enjoy all theſe unjuſt powers? I need not bid you conſider and recollect what ſort of things have been charged as libels: there is nothing that has not been ſo charged. Sermons,—petitions,—books againſt plays,—ſaying that money will corrupt men, nothing but barely mentioning the effects of money,—all have been proſecuted, and puniſhed, and ears cut off, and thoſe things, for libels. In ſhort, gentlemen, you will always find (your memories will go back enough to find it without reading) that whatever is contrary to the inclinations, intereſts, or even the vices of a miniſter, has always been, and ever will be, charged as libel. Even at this time, if the attorney-general's friend, Mr. *Rigby*, had been attorney-general, or to direct the attorney-general to file informations for libels, the preſent ſpeaker of the houſe of commons would have been accuſed of a libel, for recommending œconomy to the crown. We know that he would; and there is nothing extraordinary that a ſpeaker of the houſe of commons ſhould have an information *ex officio* filed againſt him for a libel. The ſpeaker, *Williams*, had one filed againſt him for publiſhing the journals of the houſe. They are now wiſer. Indeed that caſe has been ſcouted.

If then, gentlemen, theſe conſiderations ſhould make you careful and attentive in a trial upon a proſecution of this kind; the frequency of proſecution for libels, I ſuppoſe, ſhould add to your care and attention. For, gentlemen, when is it that libels are moſt frequent? When is it that proſecutions for libels have been moſt frequent? Have they been under the beſt governments, under the beſt adminiſtrations (for government is a word abuſed: I mean under the miniſters)? Have they been moſt frequent under the beſt, or always under the worſt? It is only bad men that will accuſe the good: good men don't accuſe good things: notwithſtanding which, you will find that under the beſt adminiſtrations there are few libels, and much fewer proſecutions; and under the worſt adminiſtrations you will always find them ſwarm. Whether it happens that under the worſt adminiſtrations (for there is always folly with wickedneſs) the miniſter is ſo fooliſh, as that, not attending to the principles of the perſon recommended to him, he, by miſtake, chuſes a good attorney-general, who has ſkill to diſcover and honeſty to purſue thoſe crimes which are detrimental to ſociety; or whether it happens, that a good miniſter chuſes a bad attorney-general, who has no honour or underſtanding to care for or to diſcover their evil tendency, and therefore does not proſecute at all;---but ſo it happens, that under a good miniſter there are no proſecutions for libel, under a bad miniſter you meet with little elſe.

Gentlemen, if the general nature of this kind of proſecution calls for your particular attention, the particular unfairneſs of *this* proſecution more ſtrongly demands it. Gentlemen, you will be pleaſed to remember, that the advertiſement which is now brought before you was publiſhed on the 9th of *June* 1775. Obſerve too, what is the charge. Not any harm that it has done; no, but only a *tendency*. The charge of the libel is a *tendency* to excite ſedition; a tendency to alienate the minds of his majeſty's ſubjects; a tendency to do a great many other bad things: I do not recollect them, nor care about them. What! come two years and a quarter afterwards to proſecute for a *tendency* (not actual miſchief, but a *tendency* to miſchief). It was ſo dangerous a thing, that it was ſuffered to rage and have its full influence without any check or controul; and then two years after (when its tendency muſt long ſince have ceaſed) comes the proſecution to check the *tendency!* I believe no grand jury would have found a bill for this proſecution at this diſtance of time: nay, I believe that *all* the judges of the *King's-Bench* would not have done it. The attorney-general was well aware of this objection upon the trial of the firſt printer. 'Why not?' ſaid the attorney-general---'Will folly ſay, that that which was a crime in 1775 is no crime in 1777? Will folly ſay?'---Why, what will not folly ſay? Folly will ſay any thing: and what wonder? when even a man of his natural good underſtanding, if placed in his peculiar ſituation, is often obliged to ſay what a moderate folly would bluſh at. 'Was it a crime, ſays he, two years ago, and is it no crime now?' That is not the queſtion: but, whether it ſhould be proſecuted now, after two years delay? That was the queſtion which he ſhould have ſpoken to. And would that be thought ſo ridiculous a poſition to be heard in a court of common law? You all know very well, that a ſimple contract debt cannot be recovered after ſix years is ſuffered to elapſe. Now, will folly ſay of that money, and the benefits of it which a man has enjoyed for ſix years, was it a debt ſix years ago and is it no debt now? No; no man will pretend that the debt is not accumulated. But what then? If you have ſuffered that time to paſs by, you ſhall not ſue for it now. So the unjuſt poſſeſſion of an eſtate for forty or ſixty years (according to the rules which the courts have laid down) the unjuſt poſſeſſion of an eſtate quiets the poſſeſſion. What then, does it become juſt? Have I robbed another family for ſo many years; retained the principal and the income; and does it now become juſt? No, but you ſhall not recover it; the door is ſhut againſt your ſuit. Appeals for felony, for rape, and for murder, they muſt be brought within a year and a day. If you let ſlip that year, you ſhall not proſecute. What! Does it ceaſe to be felony? Does it ceaſe to be rape? Does it ceaſe to be murder? No; there never was any ſuch folly that ſaid that; no folly ever ſaid it: but the law ſays, You ſhall not proſecute: you have loſt your time. But there is ſtill a ſtronger circumſtance concerning this doctrine, which I love beſt, becauſe it came from the gentleman himſelf. The eſtate of a man, the moſt obnoxious for the blackeſt treaſon, by an act of parliament, was propoſed to be reſtored to the ſon. I rejoice that he has it: but the argument of this very gentleman was, that---"oblivion ought to paſs over it: it was treaſon, to be ſure; but it was twenty years ago." Good God! if twenty years ſhall preſcribe againſt treaſon, or ſilence; or put oblivion upon it; if forty years poſſeſſion, for a large landed eſtate; if ſix years, for a ſimple contract debt; if one year, for appeal in caſes of rape, felony, or murder; what ſhall not the mere tendency---(not actual miſchief)---but the mere tendency of an inſignificant libel in a news-paper (if it was a libel; but it is not) what, ſhall not that be permitted a two years preſcription? I ſhall have others beſides folly, I believe, think with me in this queſtion.

But, gentlemen, whether it ſhall be proſecuted or not, the hardſhip is equal to me. I do not ſay, that it is abſolute law that it ſhould not be proſecuted; for this has never been adjudged: indeed the caſe has never happened before. The attorney-general has produced no precedent of ſuch a proſecution as this; he can produce none to you. But I deſire the attorney-general to remember what I now ſay to you and to the court. I ſay, that this abuſe of his power and prerogative, and of his unjuſt claims, will cauſe ſome method of quieting men in reſpect of libels, as men have been quieted in reſpect of poſſeſſions againſt the crown. It will be neceſſary: for it will be conſidered that the nature and the effects of the charge of *libel* have been very conſiderably changed in the preſent time. The charge of libel now affects both houſes of parliament. Privilege is gone; expulſion may be the conſequence; incapacitation follows! To what are they expoſed! I caſt my eyes by accident towards one---I beg the gentleman's pardon---there ſits near the judge one of the moſt diſtinguiſhed members of the houſe of commons: he is as liable to an information for a libel as I am at this minute.---In his book, in his book the charge of *murder* is as compleatly made as in my advertiſement: it is *lately* publiſhed in his *Letter to the Freemen of Briſtol:* he ſtands as liable to be expelled, to be puniſhed, to be ſhut up from ſociety as a mad dog as I do, and with the ſame pretence. Gentlemen, there are now great officers of ſtate whom I know to be more liable to a proſecution for libel than I am; who have written what has much more the aſpect of a libel, than any thing to be found in my advertiſement; and which may be proved againſt them by the ſame man that has proved my publication. It is true, thoſe, who are not concerned in the *Gazette*, may at preſent have left off the practice: but what ſignifies that? The attorney-general will tell them, that the number of years ſignifies nothing: it is folly only that will ſay that; even though it was written ten or twenty years ago, (for he has drawn no line) it is only folly that will ſay, it is not a crime now, if it was a crime then. Gentlemen, I muſt beg you particularly for your own direction to obſerve, the ſtrong reaſons againſt this practice of bringing a proſecution for a libel, long after the cauſe of the charge was given. Conſider the changes which are made both in the perſons charged, and the appearance of change which there may be in the thing charged. A man hereafter to be charged with an offence ſo uncertain as a libel, may, thinking himſelf in perfect ſecurity, change his ſituation; which he would not have done, if he had known that there was a proſecution for libel hanging over his head: and perhaps the attorney-general would not have brought that proſecution, if he had not changed his ſituation, and thereby made himſelf vulnerable, who was not ſo before. Why, a man might have had a wife and children ſince the publication of this libel; and it is known that to have them is called---'giving 'hoſtages to fortune.'---A man might have given hoſtages to fortune, and then comes a vindictive attorney-general and drags him away from his peaceful family and fire-ſide, drags him away for a libel written ten years ago: for he has drawn no line! Is this to be borne? is this to be ſuffered? I thank God, that is not my ſituation. There is, however, a change in *my* ſituation; but of that I ſhall ſay nothing; though I firmly believe, that that change in my ſituation cauſed this proſecution: and you yourſelves ſhall conſider. It is now two years and a month ago, or thereabouts, upwards of two years ago, that this advertiſement was publiſhed. They were very ſore at it; it was conſidered as an affront by thoſe who were glad that the men were killed. However, of them I know nothing; I have not accuſed them. A proſecution was ſoon after commenced againſt the printer who has here been evidence againſt me; and it ſtopped: he heard no more of it; it went faſt to ſleep, and was taken up again. When?---Immediately after it was known *ſomewhere*, that I had (after an interval of twenty years) entered again into commons at the *Temple*, in order to do that for others which I am now brought here to do for myſelf. *Then* re-commenced the proſecution; *then* am I become a libeller: but it ſleeps till then; it was brought again freſh into life by that act.

But beſides this, gentlemen, there is a great change not only in the perſon charged, but there is a great change alſo in the appearance of the thing which is charged to that perſon, by length of time. This advertiſement was written in a time of profound peace. A civil war has ſince taken place: much blood has been ſhed: much miſchief of all ſorts has been ſuffered; and I wiſh I could ſay, that there was not much more in proſpect. You cannot yourſelves therefore eaſily put back your minds to that ſituation in which they would have been, had the proſecution followed cloſe upon that publication. You cannot recollect the dates when certain proclamations iſſued; you cannot recollect the dates when certain injuries took place: unleſs one made it his particular ſtudy, there is not one of you can tell, whether this act paſſed at this time, or this proclamation at that time. If there is one of you who can recollect, you will find, that all thoſe meaſures which take place againſt rebels, have all been ſince that advertiſement. General *Gage*, whom I ſubpœna'd, and who would not attend you, who ſays, that he is gone away to *Germany*, he ſhould have proved to you, that he publiſhed a proclamation in which he gives notice to the *Americans* themſelves, long after this affair at *Lexington* and *Concord*. He gives them notice to come in, and warns them not to do ſo and ſo, otherwiſe they ſhould be conſidered as rebels: it was not therefore known that they were conſidered, in *America*, as rebels till that proclamation came. That proclamation was to work ſome effect: it muſt either be *intended* to make them rebels who were otherwiſe not; or to make them known to be ſo, who were ſo. If they did not in *America* know that they were rebels, till that proclamation came, how ſhould I here in *England* know it long before that proclamation did come? There is a great change in the appearance of this advertiſement brought forward for proſecution now, from what it would have had to your minds at that time. This you are bound to conſider. Indeed it was ſaid from the bench, on the trials of the printers, that this advertiſement blamed, and cenſured, and libelled '*all the meaſures of government*'---(relative to *America*, I ſuppoſe).---All the meaſures of government! Not the meaſures that happened *ſince* the publication of it, ſurely! and if they can find in that advertiſement, that it cenſures all the meaſures *before*, I will be content to loſe a verdict. You will not, gentlemen, for you muſt not, take it upon what that gentleman ſays, what I meant and what I thought. If you can make out that meaning from the advertiſement, then do it; but you will find no word hinting at or cenſuring any man or any meaſure but that *one* meaſure of the *Americans* being put to death by the troops. If you can find in that advertiſement any name hinted at or alluded to, or any thing of that kind, the attorney-general will be much obliged to you; for he cannot. If he could, he would have ſhewn you in which part it was. He would have ſaid, *Here* this meaſure is alluded to; *there* that great miniſter of ſtate is alluded to. He has not, nor can do that: he has a reply coming forward, and, if he can do it, he will do it then. Therefore, gentlemen, you ſee that That might be a libel, if it was written *now*, which was not a libel at the time when it was written. Gentlemen, I don't mean that my advertiſement would be a libel, if it was written now. I know the contrary well; and ſo well, that, if it is become a *doubt* in this country, that it is a ſeditious libel againſt the king and the government to charge the troops with murder, I will write it again and again. If it is not a queſtion, then I am ſatisfied; but if it is made a *queſtion* in this country, that no man ſhall charge a ſoldier with murder without being guilty of a ſeditious libel againſt the *king* and the *government*, then I will go into priſon for life: for I will regularly charge the king's troops with *murder* (if they put men to death unauthorized by the law) regularly and conſtantly: and ſo I would do, if they made the puniſhment death. Gentlemen, if the advertiſement had the aſpect of a libel, it ſhould have been proſecuted as ſoon as it was publiſhed, that ſo the miſchievous tendency of it might have been prevented, and that fair play might have been done to me, and that you might not come to try an advertiſement, forgetting that the advertiſement preceded, and did not follow the rebellion. But if the attorney-general has paſſed his time, I ought then, gentlemen, as in all other caſes by law I ſhould have, to have the benefit of the fault of my adverſary. I ought not by his neglect and fault to be put into a worſe ſituation than I ſhould have been, if he had done his duty. But the attorney-general ſaid at firſt, in excuſe for that, that it was owing to an *accident*. If true, ſo much the more fortunate for the defendant. But how appears it? How does it appear that it happened by an accident? Is that to be ſo ſlightly taken up, upon the attorney-general's juſt hinting it? What was the accident? Has he *proved* it? has he *named* it? He cannot name it. Let him account for it. I heard the late attorney-general (the preſent chief juſtice of the *Common-Pleas)* declare, that it was his duty to account for his conduct in bringing that proſecution againſt the letter of *Junius*; which was brought quick too, not in this manner. He ſaid, it was his duty to account why he took one printer before another; becauſe he looked upon himſelf in filing informations to be exerciſing a judicial, official power, and not merely an advocate at the bar; he thought himſelf bound to juſtify his conduct. Let the attorney-general tell us the *accident*. I know ſomething more of the re-commencement of the proſecution than he thinks I do; and a very ſtrange circumſtance it was that brought it to my knowledge: however, I don't think I want that. But that is not all. An accident, he ſays, prevented the proſecution at the time when, he muſt acknowledge, it ought to have been proſecuted. Aye, but there is *another* accident. What is the accident which has happened, that makes it be proſecuted now? There are *two* accidents. He has only juſt hinted one of them (he has not told you what that is); but he is totally ſilent about the other. What is the accident that makes it to be proſecuted now, at the diſtance of two years? You ſee there is *one* accident which cauſed it not to be proſecuted at firſt, in a proper time; there is *another* accident that cauſes it to be proſecuted at an improper time. He is bound to juſtify himſelf (not only to you, but to every man): he is bound to tell you *both* accidents. I believe he will explain neither. Gentlemen, I am ſorry to take up ſo much of your time. I proteſt upon my honour, it is not to gain a verdict for myſelf: I have buſineſs to do that will take me up much more time than the judges dare to confine me on this charge. I *am* already a priſoner: I have been a priſoner in my own room much longer than they will chuſe to impriſon me. They will take care. The doctrines concerning libel have now riſen to ſuch a height, that they call for ſome remedy; and they will have it. The coming neceſſity of the times will produce it: and if we ſhall not have it from juſtice and honour, we ſhall have it from neceſſity.

Gentlemen, there are many other unfair practices in this caſe, beſides this delay of proſecution. Obſerve how it comes on. The attorney-general takes the printers firſt. Why not take the author firſt? He has ſaid indeed, that though it was ſigned (and he makes that a great piece of impudence) he has ſaid, that though it is ſigned with my name, it was---'as inſcrutable and impoſſible for him to follow it, as if the 'name had not been put there.' Theſe are the very words: 'as inſcrutable and impoſſible, as if my name had not been put there.'---Now, what ſaid the evidence that he brought to you? He told you that he had never refuſed; that he had never been aſked; that they had never made the ſlighteſt enquiry after the author. Now I appeal to your own conſciences: is there a man in this court that doubts whether the attorney-general doubted or not that I wrote that advertiſement? Is there a man in this court thinks ſo baſely and ſo meanly of me, that, having ſigned my name to an act of that kind, and paid (as I will prove to you) the money to the banker; is there a man in this court that doubts that the attorney-general would have found a difficulty to come at me? There is none of you that can believe what he ſays in that reſpect: judge then of the reſt.---Gentlemen, he took the printers firſt. I will tell you why he did that: it was to gain the influence of a verdict. He meant to take me; he did not think it inſcrutable or impoſſible. After he had gained the influence of a verdict on the printers, then he comes to the author. The queſtion now comes with a prejudice before you. A jury has determined upon it, has declared it to be a crime. My God! where is his honour and his conſcience? But he ſays, that he did not know the author.---He did know it; he was in poſſeſſion of the proof before he tried one ſingle printer; and therefore the printer, who is now the evidence, was not brought on to trial. The information was filed againſt him, and he withdrew his plea, upon an *agreement* with the attorney-general; thinking perhaps (you may ſuppoſe) that I ſhould play him ſome cunning trick, and ſink the evidence. I mention this, becauſe it has been thrown out, as if I had eſcaped from the power of the houſe of commons for want of evidence. The gentlemen *(looking at the attorney and ſolicitor-general)* know the caſe better; they know better. I know the gentlemen and their underſtandings.---*They* know how I eſcaped, and I will tell you preſently.

But, gentlemen, he takes the printers firſt; and which printer?—He who printed it laſt of all the others. Now, why did he take him firſt? I will not tell you myſelf, but the printer ſhall tell you. He was a ſtranger to me, and he writes to me this letter—'The printer of the '*Whitehall Evening-Poſt* preſents his moſt reſpectful compliments to 'Mr. *Horne*, and takes the liberty of ſending Mr. *Horne* a copy of the 'information filed againſt him for publiſhing the advertiſement ſigned 'by Mr. *Horne*, on behalf of the *Conſtitutional Society*; and as the 'printer has great reaſon to believe, from his living in *Middleſex*, that 'adminiſtration will make their firſt attack upon him, as they generally 'deem themſelves ſure of a jury in that county,' &c.---Gentlemen, that was the reaſon why they took the printers firſt, and *that* printer firſt: and (which is a very ſingular thing) though they convicted that printer, they have never brought him up to judgment. But Mr. Attorney-General ſaid (and I had like to have forgot to mention it) that he did not know that I was the author. I have proved to you that he did know it before the trial of the printers. Common-ſenſe ſhews to you that he did know it, and had evidence againſt me. But then, I ſuppoſe, he will ſay, he did not ſtop the trial of the printers, becauſe that would have cauſed a delay.---It would have cauſed a delay! What, after ſtaying two years unreaſonably and unjuſtly?---It would have cauſed the delay of a term to take the author firſt, and give him fair play. Will he by-and-bye ſay, that he did not ſtop the printers trials, and bring me on firſt, merely to avoid delay? The printers would have been much obliged to him for the delay; they wiſhed and deſired it. They offered him evidence. I told this honeſt man (whoſe face I never ſaw before) when he came to me---(for the printers were not defended in the manner I wiſhed them to be defended; the little advice I gave was not followed)--amongſt the reſt I told this printer of the *Whitehall Evening-Poſt*, that I did not believe he could eſcape being tried firſt; but I told him he ſhould ſend his attorney to the attorney-general, and make excuſes, and beg and pray that he might not then be brought on to trial, but ſtay till after the *London* juries had tried the cauſe; and I adviſed---(we had a meeting; I forgot to aſk the witneſs the queſtion)---and I then adviſed that printer who was the evidence, that the *London* printers ſhould endeavour to preſs on their trials; and urge that ſuſpence was worſe to them than any thing that could follow a conviction; and that the *Middleſex* printer ſhould beg for delay.---Not that the attorney-general might be impoſed upon:---no, it would have been nothing but juſt and reaſonable:---but becauſe I would either cover a man with ſhame, if he refuſed it, or at leaſt (and ſo far kindly) prevent him, if poſſible, from expoſing himſelf, by pretending that all this is the natural courſe of accident; that it was done to avoid delay; that it was integrity, honour, purity, and conſcience.---However, I could not prevail: ſo great is the influence of that gentleman's office, and thoſe connexions which it cauſes. Though the printer was eager for it, his attorney ſaid, 'No; I can't be concerned in 'the cauſe; I would not for 500*l.* I can't ſpeak to the attorney-general; 'for God's ſake, get another attorney.'---'No, ſir, I don't mean that 'you ſhould loſe a client: I mentioned it, thinking you could have no 'objection to go to the attorney-general and pray delay, till after the 'other printers had been tried; your client's wife is near being brought 'to-bed.'---So the *Middleſex* printer was tried firſt, and a verdict gained. I did not wonder at it: I expected it. Gentlemen, though this was an accident, I muſt beg you to obſerve it is an accident which has always occurred. For in the caſe of that letter of *Junius* which was proſecuted, the firſt perſon proſecuted was *Almon* (who was not the publiſher, but had ſold it at his ſhop) who lived in *Weſtminſter*. Here too was the ſame accident; and it had the ſame conſequence; except, indeed, that in that caſe the *London* juries recollected themſelves; and though they had a verdict of a *Middleſex* jury, the *London* juries caſt it out. There was, however, a ſtruggle in their verdicts: there was ſomething---but I will not enter into that now: they would not, however, ſuffer their minds to be intirely influenced and affected by the prior verdict ſo obtained. A gentleman who was a juryman upon that occaſion in *Middleſex*, is now a baronet, and of great conſequence at the *India-Houſe*. Gentlemen, if you make yourſelves uſeful, there is a better track open to you than the honourable and juſt gains of your profeſſion. You will obſerve then that the ſame accidents always return, and they are never explained.

Gentlemen, there is one part of the treatment of me in this proſecution that I think I have a right to complain of as man to man. I gave them no trouble; I made no objections. I requeſted when the jury was ſtruck from the ſolicitor of the Treaſury (before witneſs) I told him I lived in the country, that I was always at home—I deſired he would ſave me unneceſſary trouble, and that he would do, as men ſay to the executioner, Do your office like a gentleman. He ſeemed to be well diſpoſed towards it, and treated me with great civility and complaiſance. I deſired him to preſent my compliments to the attorney-general (and that if he would not do that office for me, I would do it myſelf) and deſire he would let me know on what day he would chuſe to have the trial. The ſolicitor promiſed me he would. He kept me upwards of a fortnight, never letting me know that it would or would not be tried. He kept me till ſeven o'clock at night the day before the laſt day of the ſittings, uncertain whether I was to come here or not the next morning. What was the conſequence? I had told him the conſequence. I had a witneſs to ſend for one hundred and fifty miles. I ſent for him, and I have again brought him (I am aſhamed of the trouble I gave the gentleman, a ſtranger to me, I never ſaw him till now) I gave him the trouble to come and to go back two hundred and eighty miles. The perſon—(and it is not a common perſon, a porter, or meſſenger that can be ſent with a ſubpœna, when you do not know whether the witneſs will come or not)—I was forced to ſend him the ſame way. The ſolicitor for the Treaſury knew it; yet he never would let me know till laſt *Tueſday* night (laſt *Tueſday* afternoon I ſuppoſe my ſolicitor knew it) when the trial would come on. My witneſs was forced to go back and come again. Now, what is your verdict, (ſuppoſe it pleaſed the attorney-general to go on ſo two or three ſittings more) what is the effect of your verdict compared with that expence? Your verdict is the gentleſt part of the proſecution. When I ſay your verdict, it is becauſe then follows the judge's ſentence.

Gentlemen, if you don't know, it is proper that I ſhould inform you how the *London* verdicts were obtained. I was preſent in the court. One jury, I think, brought it in (at firſt) guilty of printing and publiſhing; a moſt ſtupid verdict! I am ſorry that honeſt men ſhould be ſo impoſed upon. Guilty of printing and publiſhing! I heard a gentleman once ſay, who has ſome ſkill in the law, that there was but one poſſible guilt that there could be in printing and publiſhing; and that was, if it was printed upon gilt paper. The pun is poor enough; but not too ſtupid for the doctrine, not a bit. There happened upon the trial of another of the printers to be ſome difference of opinion in the jury. They came into court; they deſired to be heard. A juryman deſired to know 'whether or not they were to find their verdict according to the information:' that was his queſtion (I don't know his name) which he deſired to know. It was plain enough what that honeſt man meant. It is true, he did not expreſs himſelf in the technical legal terms of the law, perhaps; but I did then ſay aloud (and I firmly believe that his lordſhip heard me; there are gentlemen in court that ſtood by and heard me) I did ſay *(a little heated)* 'his lordſhip dares not anſwer that queſtion.' I ſaid it out loud (I might well be ſuppoſed to feel a little) 'he dares not anſwer that queſtion; for he dares not deny it; it is too groſs: he dares not own it; for then he loſes the verdict.' His lordſhip did not anſwer it; his lordſhip did not. Are you to find according to the information?—Why you are to find the information *according* to the evidence. You are to find the thing, with which I am charged, proved. The juryman ſaid—according to the information—Why he was to find *according*; for according means agreeing, and means nothing elſe. The evidence agreeing with the information! Why yes, to be ſure, what is he to find elſe? He muſt find that or nothing, for that is the only thing before him. However, that queſtion was not anſwered. Then a little converſation, of a ſtrange nature, took place—(his lordſhip loves converſations with the jury)—a little converſation took place about *intention*. I hope, gentlemen, I ſhall at leaſt have this benefit by my trial, that the doctrine of intention will come out fairly and unequivocally to you; whether the jury have a *right*, whether it is their *duty* (it is the very giſt of the whole matter) to determine what was the intention. The laws have confined the jury to one ſingle word (ſo careful have they been). That word is guilt; that guilt which is charged. Guilt there can be none without intention. If guilt can be found without intention, ſo be it; but I hope that you, gentlemen of the jury, nor this court, will not be permitted to go away from hence with theſe equivocal ſayings which hitherto have been. Let it come out fairly, and let us know, in the name of God, what the doctrine is.

Gentlemen, I did object, if you remember it—(I don't now intend to go into it, for I ſhall ſtill be longer than I wiſh; but I think I ought to mention it, and I hope you will excuſe the loſs of your time)—gentlemen, we talked ſomething about the right of the attorney-general to reply—If there comes, ſaid his lordſhip, *freſh matter*.—There can come no freſh matter, unleſs there comes freſh evidence. The evidence is the matter; the pleading is a different thing. The proſecutor is bound to foreſee all that can be urged in defence by the perſon accuſed; and to anſwer it before it comes: that is, he is to make good his charge. If it is not ſo, ſee the other caſe; ſee, on the other hand, what I am to do. I am then to foreſee what he has to urge againſt me; and if I do not, what follows? Why, all that he urges in his *reply* (as he calls it) is a new part of the accuſation, which I ſhall have no opportunity of anſwering. The fact of publiſhing the advertiſement is not diſputed; I never diſputed it; the whole matter that we have to do together is, for him to prove it a crime by law or argument: therefore whatever argument he uſes in his reply, if it has any effect upon your minds, I may be convicted (if convicted upon ſuch argument) without ever having offered the leaſt defence; that is the bleſſed conſequence of his right to reply: ſo that he is not to foreſee what may be anſwered to his arguments; but the man charged is to foreſee what arguments may be urged againſt him.

Gentlemen, there lives this day a very great man in this country, whoſe doctrine and whoſe practices were diametrically oppoſite. He enjoyed the office of attorney-general. He has been a chief juſtice. He, as I am informed, never proſecuted but one libel, and that was Dr. *Shebbeare*, who is now penſioned by thoſe who made this gentleman attorney-general. What was his conduct? If ever there was an infamous libel againſt government, ſurely it was that (it is a great many years ago, but I read it). What was lord *Camden's* conduct? He left the whole to the jury; intention and all; the whole: he cut you off from nothing of your right. He did not hold the threatening language---'you *may*, if you *will*, take it upon you.'---Why that threatening? You *may* commit crimes, if you *will*: you may be as indecent as I may be ſuppoſed to be for repeating this: but, upon ſuch an occaſion as this, I reckon it not indecent. But---'you *may*, if you *will*.'---Why you not only *may*, but you are bound to do it; nor do you diſcharge your conſciences nor your oaths, if you do it not: but I hope you will have it clearly ſaid, whether you are bound or not. Lord *Camden's* remarkable words, when he finiſhed his charge againſt the defendant, was, that he did not wiſh the conviction of him, if any man whatſoever doubted of his guilt.

Gentlemen, another thing was ſaid, which I muſt warn you againſt; it was ſaid that this advertiſement (I believe I mentioned it) arraigned all the meaſures of government (at leaſt, I think, you need not ſearch into the advertiſement itſelf to be aſſured that it did not arraign the meaſures of government which have followed the publication). The printers who have been brought to judgment, have been ſentenced a hundred pounds; and they ſuffered what they were not ſentenced to, a week's impriſonment. Their fine, it was repreſented, was mitigated, for that they might have been or were impoſed upon by the author, the libel coming in the ſhape and form of an advertiſement, which diſarmed their caution; and therefore the fine was no more. Formerly our laws puniſhed men for being knaves; now I perceive they ſhall be puniſhed for being fools. If a printer, for the ſake of two ſhillings or half-a-crown, is impoſed upon by a wicked incendiary, who, under the ſhape of an advertiſement, diſarms their caution and ſlips it into their paper; the jury have, you know, nothing to do with their intention; therefore there muſt be a verdict againſt them of courſe: the judges find the printers have been impoſed upon; and therefore *only* impriſon them a week, and fine them one hundred pounds. It was a dear half-crown they gained! If the printers were impoſed upon, they ſhould have been acquitted. But by the evidence given now, you find they were not impoſed upon by me: there was no impoſition by me. What was my conduct towards the printer? This advertiſement I am now giving you will offend certain miniſters in this country: it is perfectly harmleſs and ſafe, and free from the cognizance of the law: the matter of it is juſt; it is true; but the law affords no guard or protection *now* from the power of the miniſtry in the houſe of commons, who vote men guilty! and vote things crimes! They have given out, owing to my forbearance (I did not wiſh to expoſe the nature of that defence which cauſed me to go ſafe from the houſe of commons) being ſilent, they have propagated a report, as if (like an artful tricking attorney or ſolicitor that is not uſed to honourable practice) I had made a charge upon them, and ſneaked out for want of evidence againſt me. I was determined, for the ſake of the laws of this land, that they ſhould either by forbearing to take notice of this advertiſement, or by taking notice of it, let it appear that they have no power to puniſh a man but by the laws: and therefore I furniſhed full evidence, in order to ſhew that even with the fulleſt evidence the houſe of commons have no power to try or to puniſh the ſubject. I knew I was ſafe from the courts of law, at leaſt that I muſt there be tried by a jury; and they *may* do their duty, if they pleaſe.——Gentlemen, for every minute of impriſonment that thoſe printers ſuffered, I do freely and frankly confeſs that I deſerve at leaſt a year, comparatively. If they deſerved a minute, for every minute I certainly deſerve a year; and for every farthing of that hundred pounds which they were fined, proportion only our guilt (if there is any guilt in the caſe), a million of money will not be ſufficient for my crime. If they can juſtify their ſentence on the printers, I will juſtify the court for the moſt ample puniſhment they can inflict on me. If I am guilty, no man upon earth ſo guilty. It was the moſt deliberate act of my life; it was thought of long before I did it. I made the motion; I cauſed the meeting; I ſubſcribed a great part of the money; I procured the reſt from my particular intimate friends: but I ſhall come to that by-and-bye.

Gentlemen, I have ſhewn you the method of proceeding by information *ex officio*: I muſt now deſire you to obſerve the method of puniſhment, when it comes to the court. Obſerve how that paſſes. The man is convicted this ſittings: he is called up for judgment next term: Go to priſon, ſays the judge, and then we will think of your ſentence. They ſentence him a hundred pounds; but for what was the week's impriſonment? It is put into the ſentence indeed---"and impriſoned until he pays his fine."---Well, but could the man pay his fine till he knew what it was?---Obſerve the diſtinctions which are made!---A general officer who is now in *America*, general *Burgoyne*, was proſecuted. He comes into court to receive ſentence for hiring ruffians to deſtroy the electors coming to poll; what is his puniſhment? He is fined a thouſand pounds; but he is not ſent to priſon whilſt his ſentence is deliberated upon; he is releaſed inſtantly. Now what ſays our law? Our law ſays, that 'a corporal puniſhment, however ſmall, is greater than a pecuniary puniſhment, however great.'---*Quælibet pœna corporalis, quamvis minima, major eſt quâlibet pœnâ pecuniariâ, quamvis maximâ*---or ſomething of that kind. Well then, the greateſt offenders, you ſee, have not the greateſt puniſhment. The miſerable printer who is impoſed upon by an incendiary---to priſon with him; we have not time to tell you now what we will do with him; and yet it does not ſeem to be a very difficult caſe: but in a very uncommon caſe, that of an officer of the king's troops hiring ruffians to deſtroy the electors coming to poll, and thereby gaining a ſeat in parliament; in this caſe no deliberation is neceſſary: or it is taken properly, before he is brought into court, that he might not ſuffer a moment's impriſonment. ---You ſee the difference. The delinquent was wiſhed good morning; the judge from the bench, when the general paid down his fine in court, wiſhed him good morrow. Another man was lately proſecuted, who would have taken away the eſtate of his neighbour, that neighbour not conſenting illegally to loſe it. He ſends him a challenge. He is proſecuted and convicted. No deliberation for ſentence; not a moment's impriſonment. He is fined a hundred pounds; and application is even made by the court to know if any body ever knew a precedent for a ſmaller puniſhment. Nobody indeed ever did: and yet this challenger was an elderly member of parliament, and a juſtice of peace for the county where he lived. He was ſtill better off than with a good morrow: he was told---*Idem alii fecêre, et multi, et boni!*---‘ Other men have done the ſame thing, ſir, as you; and many other men and good men!’---If he was a good man, why was he puniſhed? He ſtood not, at that time, a good man in the court; he did not appear there for his goodneſs.

Gentlemen, I ſome time ago hinted ſomething to you of the *motives* for this proſecution. I will now go no farther than only to ſhew you clearly what could *not* be the motives; and I will leave your minds to determine what is the motive: only ſo far I will ſay, that if the change in my ſituation, if I was allured to it by the lucrative emoluments of the profeſſion, and wiſhed to ſhare in the legal plunder of the people, this proſecution might then be very ſerious; but I laugh at it. I am out of the reach of the intended conſequences of this proſecution; I ſay, *intended* conſequences: for rely upon it, I am better known to thoſe who have cauſed this proſecution, than for them to have only in view the conſequences of impriſonment and fine. No, they know better: they know that no men act as I have always done who mean to be ſtopped by impriſonment and fine. But, gentlemen, I will ſhew you what is *not* the motive of this proſecution. The motive of this proſecution is not to prevent the evil tendency of this wicked libel; of this horrid charge againſt the king's troops of murder; againſt ſoldiers who never commit it, who are not likely to commit it. I am ſorry to read to you any paper: (I did indeed intend to have read many, but the time I ſee will be too long) I will only read one or two to you, juſt to ſatisfy you of ſome things which you perhaps are not aware of. Here is the *Public Advertiſer* of *May* 30th, 1775. You will find in it a very ſerious, very particular, very ſharp accuſation againſt the king's troops of *murder*; the whole circumſtances at length; and murder, murder, murder in every line; but it is ſo long that I will not read it to you now, becauſe you can all remember to look at it hereafter. The papers are *May* 30 and *May* 31. The government then, I mean the miniſter (I make an improper uſe of the word government) the miniſter deſires the public, upon this charge of murder againſt the troops, to ſuſpend their belief. What follows? This paper which I have proved ---‘ As a doubt of the authenticity of the account from *Salem*, touching an engagement between the king's troops and the provincials in *Maſſachuſet's Bay*, &c. I deſire to inform all thoſe who wiſh to ſee the original affidavits which confirm that account, that they are depoſited at the *Manſion-Houſe* with the right hon. the lord-mayor for their inſpection.

‘ *Arthur Lee.*’

Then come the copies of the affidavits; all the particulars at length: murder is not ſpared at all. Then, amongſt the reſt, comes an affidavit, which I ſhall prove to you preſently more authentically than this; though it is enough for me that it was publiſhed. But you know, gentlemen, I am not the original author of the charge. The gentleman has been talking of the *original author of the charge:* he thinks he may tell you ſo now, two years afterwards; but if he had told you ſo at the time of this advertiſement, every man in the court would have laughed at it. *Here* is the original charge, ſigned by the agent of the province where the murders were committed, and the original affidavits confirming it are here ſaid to be lodged with the lord-mayor for inſpection. It is very lucky for Mr. *Lee* that his receiving them, and cauſing them to be advertiſed, has cauſed no proſecution againſt him. We ſhall know preſently whether this affidavit be a forgery or not: the gentleman for whoſe it is given attends here by my ſubpœna to prove or to diſprove it.

‘ I *Edward Thoroton Gould*, of his majeſty's own regiment of foot, being of lawful age, do teſtify and declare, that on the evening of the 18th inſtant, under the orders of general *Gage*, I embarked with the light infantry and grenadiers of the line, commanded by colonel *Smith*, and landed on the marſhes of *Cambridge*, from whence we proceeded to *Lexington.* On our arrival at the place we ſaw a body of provincial troops armed, to the number of about ſixty or ſeventy men. On our approach they diſperſed, and ſoon after firing began; but which party fired firſt I cannot exactly ſay, as our troops ruſhed on ſhouting and huzzaing previous to the firing, which was continued by our troops ſo long as any of the provincials were to be ſeen. From thence we marched to *Concord.* On a hill near the entrance of the town we ſaw another body of the provincials aſſembled. The light infantry companies were ordered up the hill to diſperſe them. On our approach they retreated towards *Concord.* The grenadiers continued the road under the hill towards the town. Six companies of light infantry were ordered down to take poſſeſſion of the bridge, which the provincials retreated over: the company I commanded was one. Three companies of the above detachment went forward about two miles. In the mean time the provincial troops returned, to the number of about three or four hundred. We drew up on the *Concord* ſide of the bridge. The provincials came down upon us; upon which we engaged and gave the firſt fire. This was the firſt engagement after the one at *Lexington.* A continued firing from both parties laſted through the whole day. I myſelf was wounded at the attack of the bridge, and am now treated with the greateſt humanity, and taken all poſſible care of by the provincials at *Medford.*

‘ Signed *Edward Thoroton Gould.*’

When firſt I heard of this proſecution, and not before, I began to conſider with myſelf whether I had indeed made uſe of any ſuch expreſſion or word as diſtinguiſhed what I had ſaid from the caſe of many other perſons. Not a day paſſed but I found ſome news-paper with the ſame charge, containing the ſame word *murder*. I need not read any of them to you; you can all recollect. Go to the papers that are publiſhed today, to thoſe publiſhed before this charge was brought againſt me and ſince, and ſee if you don't conſtantly find in them this charge of *murder* againſt the king's troops. I took extracts from them till I was tired; and not only from the news-papers, but ſeveral other publications; from that honourable gentleman's publication and others, which are of more conſequence than fugitive pieces in a news-paper. Theſe all prove the attorney-general's nice ſenſe of honour and integrity, and regard to the public good, who proſecutes this advertiſement. Now, that men may not be miſled by it, after ſuffering them to run wild for two years, and be miſled without any controul! But, gentlemen, ſo far from that being the motive of this proſecution, the papers are all full of the ſame charge, and will continue full, I have no doubt. I proteſt upon my honour, they are none of them made by me: I have been dumb ever ſince. I meant to do good by it when I made the charge, and I have been dumb ever ſince, becauſe I could not ſee that any good was to be produced. If then you ſee what is *not* the motive for this proſecution of me, at this diſtant time, that will lead your minds to conclude what is the motive.

Gentlemen, the language of the attorney-general forces me to ſay a few words upon a ſubject which is the moſt diſagreeable for a man to ſpeak of; unleſs indeed it is when he appears as I do, a defendant. I thought when the attorney-general opened his charge upon this proſecution, that he would have taken a different line from that which he repeatedly purſued in the trials of the printers. He knew that I had heard him talk againſt ‘ indecency, a flood of obſcenity, and ſcandalous publications.’ I had already heard him charge that advertiſement to be full of ‘ ribaldry, *Billingſgate*, ſcurrility, balderdaſh, and impudence.’ I have not uſed a word that he did not uſe. All theſe I knew he had charged upon that poor advertiſement. I thought that upon this proſecution he would not give me ſuch an advantage as to ſay the ſame things, or take the ſame line that he took before. It is true, he gained a verdict by that line before, and therefore perhaps thought he might this time. I own I did think that he would have paid me the compliment of ſomething a little new; but he ſays he never knew ſo much of my talents and learning as at this time. The gentleman's memory is ſhort: I would have forgot it, if he had not. He repreſents me to you in the light of a ſcurrilous, ribald, balderdaſh, *Billingſgate*, impudent fellow. That boldneſs with which I defend the right of the ſubject, will not, with any man who has a regard for the right of the ſubject, paſs for impudence: thoſe who know any thing of me muſt judge whether I am impudent upon other occaſions.

Gentlemen, he has followed in this deſcription of me which he has given, and in that character with which he has been pleaſed to cloath me—he has followed the old practice of ſome ingenious tyrants, who uſed to dreſs up men in the ſkins of beaſts in order to encourage the dogs to worry them. Juſt ſo this gentleman dreſſes up his victims in the characters of beaſts, in order to expoſe them to your indignation. He had no pretence whatever for repreſenting me in that light. I do the more wonder at this language from him, becauſe he knew better. He has ſaid indeed, that he did not know the gentleman. The word *know* has many different meanings. He did not know me as a friend, or as an acquaintance; I never had that honour: but that he did know me ſo far as to know much more of the talents and learning (if there were any in the caſe) than what he can poſſibly have picked out from this day's hearing, is a notorious fact. However, gentlemen, if I am that *Billingſgate* fellow, unfortunate is it for the attorney-general that a fit of *Billingſgate* then once took him: and whilſt the fit was on him, he applied to a gentleman to introduce him to my company, abſolute ſtranger to him as I was. I did not requeſt it; the attorney-general requeſted it. Perhaps the gentleman who introduced him is in court. The fit was not a ſhort one: my conduct and my character was not, in his declared opinion, ſuch as he now repreſents it. I believe we ſat in a public coffee-houſe together, though in a private party, I ſuppoſe from eight or half after eight in the evening till paſt midnight conſiderably. I don't mention it to plume myſelf upon his diſtinction; I claim no honour from it: the gentleman might be deſirous of ſeeing me as you go to ſee a raree-ſhew, or as you would any ſtrange creature; it might be from ſome curioſity. I never was vain enough, gentlemen, to impute it to myſelf as a merit; I did not ſee any reaſon to grow proud upon it; but I mention it particularly for this reaſon, that not only it ought to have ſaved me from ſuch a repreſentation of character, but it ought to have ſaved the attorney-general from pinning ſuch motives upon me as he mentioned in another trial; ſuch as the gaining of half a crown, or the flying in the face of government. When he was in poſſeſſion of my motive, he knew it perhaps better than moſt men in *England*; and though I don't think I have a right to repeat what paſſed from that gentleman (though there was nothing in it diſhonourable to him), yet I may be permitted to ſay what came from myſelf to him. A queſtion was aſked me to account for a part which I played; and why I, who did not then ſeem to him to be a deſperate man driven by neceſſity to it, or that ill-behaved man, or that fool (for great numbers of patriots and miniſterial men go from folly on both ſides) he ſeemed to think I might have ſome more honourable motives about me, and wiſhed to know what they were. I told him my motives; and it is a ſtrange circumſtance that I ſhould then tell him that motive which is the very motive of this action of mine which he now proſecutes. I told the gentleman, in the year 1768, that there was a certain ſect of religion (which I named) which of all others was moſt abhorrent from my principles and way of thinking; but I added—‘ Perſecute them to-morrow, and I will declare myſelf of that ſect the next day.’ I appeal to himſelf; he will remember it; it is rather too remarkable. I will mention the ſect, if it is neceſſary. Shall I repeat the name of the perſon, the introducer, and the place? If there is any doubt, and he deſires it, I will mention the particulars; becauſe I ſhould be ſorry to be laughed at as if advancing a falſhood of this kind, and pluming myſelf for paſſing a few hours with the gentleman who happens now to be attorney-general. This paſſed long before this wicked advertiſement; long before I could foreſee that the *Americans* were to be treated as they have been. I think it ſhould have ſaved me from ſuch a repreſentation of character, and from ſuch motives as have been imputed to me; from that gentleman at leaſt, if he acts (as he pretends) without direction from others; for he has ſeen me ſteadily purſuing that ſame motive. Every action in which I have been known to be concerned, has ſteadily been upon one and the ſame principle. I have never had occaſion to ſupport a friend or an acquaintance to promote an election, or to vote, or to do any thing for my particular connections; they have alway been abſolute ſtrangers to me, and men taken up upon the footing of oppreſſion. Friends!——Yes, if friendſhip received from me could make them my friends. But friends!——No, if any friendſhip received from them was neceſſary to make them ſo. My motive has been conſtantly the ſame: I know no *American*.

Gentlemen, I have been more concerned in my room than I have with the commerce of men in the world; and I read there, when I was very young, that when *Solon* was aſked which was the beſt government, he anſwered—‘ where thoſe who are not perſonally injured, reſent and purſue the injury or violence done to another, as he would do if done to himſelf.’—That, he ſaid, was the beſt kind of government; and he made a law impowering men to do ſo. Now, gentlemen, we are happier, we are under a better government; for our laws enjoin us to do what he only impowered men to do. By our laws the whole neighbourhood is anſwerable for the conduct of each: our laws make it each man's duty and intereſt to watch over the conduct of all. This principle and motive has been repreſented in me as malice. It is the only malice they will ever find about me. They have in no part of my life found me in any court of juſtice, upon any perſonal conteſt or motive whatever, either for intereſt, or profit, or injury.

I have kept you too long to ſay a tenth part of what I intended to ſay, and I believe it is not neceſſary: I ſhall therefore paſs over many things that would give to ſome pleaſure, and to ſome pain. But as they are of that nature that I ſhall give myſelf the liberty of uſing, upon other occaſions, as I pleaſe (doing no wrong), I can the more readily forbear them here. But, gentlemen, in this matter of charging the king's troops with murder, there is a very ſtriking circumſtance; and that too, I ſuppoſe, the attorney-general will have forgotten. It is well known that, amongſt other oppreſſions and enormities which gave me pain, murders (without any conteſt and diſpute) committed and pardoned gave me much. I cauſed the ſoldiers in *St. George's Fields* to be proſecuted—*the king's troops*—for murder. I took them up. It was called no libel by the then attorney-general; no libel againſt the government. They were tried for murder. I did intend to have told you how they eſcaped; but it matters not. They were tried; they were charged with murder; and that not only in a court of juſtice; I advertiſed it, I ſigned it with my name: the ſame printer (I forgot to aſk him as an evidence: indeed I had before aſked him for a news-paper that contained the advertiſement, but he could not ſend me one) he could have proved it; but it is notoriouſly known, I charged that murder upon the king's troops with my name. It was not thought a libel then. It was thought a very great affront: for thoſe troops had been thanked, in the king's name, for their alacrity upon the occaſion. What then, if the king's name had been abuſed to thank men for their alacrity, what then? (I did not mention that, but I mentioned the murder committed.) There was murder committed. I ſaw it with my eyes; I ſaw many barbarities committed. I might have been amongſt the ſlain. And ſhall I not mention what I ſaw with my own eyes? Shall I have no tongue nor underſtanding, but in a court of juſtice? I certainly will.—What followed? Soon after that, Mr. *Stanley*, a conſiderable officer in the ſtate, moved in the houſe of commons for an act of parliament to take away from the ſubject the right of appeal in the caſe of murder; becauſe I had cauſed appeals to be brought; that is, I aſſiſted the parties who brought them. This motion was ſupported by Mr. *Selwyn*. Mr. *Dyſon*, a lord of the Treaſury, declared himſelf to be entirely of their opinion;—‘ becauſe the right of appeal for murder was (he ſaid) a ſhackle upon the king's mercy: but he begged a delay till the next winter, when he promiſed it ſhould have his aſſiſtance; that ſo the motion might not appear in the journals of the houſe all the ſummer, to *alarm* and *terrify* the minds of the people *before* that bill could be paſſed into a law, for which at preſent, he ſaid, there was not time.’—To avoid its alarming the people *before* it could be paſſed into a law!—Well, it did not ſtop there: ſome notice was taken of this, but not much, as it was for that time dropped. But this motion was revived ſome time after. Mr. *Roſe Fuller* (a better man to come forwards upon ſuch an occaſion) gave notice of a renewal of that motion in the houſe of commons: he was ſupported by Mr. Attorney-General. I was alarmed at that (and I will prove it; I am not now aſſerting what I will not prove). I inſtantly publiſhed what they might have called a libel, if it had not been upon ſuch tender ground. I ſent it to the public papers, with the initials of my name: I inſerted in it ſuch matter as could not fail to make it be known to come from me. That did not content me. I requeſted an honourable member of that houſe, who is now in court, Mr. Alderman *Oliver*, to preſent my compliments to Mr. *Roſe Fuller* and the attorney-general, and to inform them that, upon that ground, I was ready to go even to death; that I would ſtick at nothing; that, on ſuch an occaſion, I feared no proſecution for libel. I intreated them to tell me when they would bring the motion on, that I might be preſent to hear what paſſed, which I would faithfully report and freely comment upon. The attorney-general, in his ſupport of that motion, had reviled the right of appeal in the ſubject for murder, as a *Gothic* cuſtom. *Gothic* was the invidious charge he brought againſt it: it was a *Gothic* cuſtom! Why, gentlemen, ſo are all the rights, and liberties, and valuable laws which we have; they are all *Gothic*. But this was to be plucked out from amongſt the reſt; and becauſe it is *Gothic* that men ſhould be puniſhed for murder, becauſe it is a ſhackle upon the king's mercy, murderers are not to be puniſhed. Gentlemen, this attempt has a near affinity with this proſecution of me, for a libel againſt the *government*, for charging the king's troops with murder. Gentlemen, I beg your attention to this matter: for, you ſee, they have got farther now in their ſyſtem and their doctrines; and the mere charging of the king's troops with murder is to be conſidered as a ſeditious libel againſt the king and the government! But what thought the houſe of lords at the time of the Revolution upon this *Gothic* cuſtom?—King *James* the ſecond had cut off and murdered many of the peers, under a ſham trial of a commiſſion of peers whom he picked out. At the Revolution they took care to ſecure themſelves from ſuch trials in future; and therefore, on the 14th of *January* 1689, they entered this among their ſtanding orders:——‘ Whereas this day was appointed for taking into conſideration the report made the 8th day of this inſtant *January*, from the lords committees of privileges concerning the trials of peers: after due conſideration had thereof, it is reſolved by the lords ſpiritual and temporal in parliament aſſembled, that it is the antient right of the peers of *England* to be tried only in full parliament for any capital offences. And it is ordered that this reſolution be added to the roll of ſtanding orders of this houſe.’—This was to ſecure themſelves. But when they had done this, ſome noble ſpirits amongſt them being alarmed and apprehenſive, leſt, under this pretence, in future times the ſubject might be deprived of his right to proſecute thoſe who had committed murder, they (three days afterwards) on the 17th of *January*, entered the following declaration: ‘ It is declared by the lords ſpiritual and temporal in parliament aſſembled, that the order made the 14th day of this inſtant *January*, concerning the trials of peers in parliament, ſhall not be underſtood or conſtrued to extend to any *appeal of murder* or other felony to be brought againſt any peer or peers: and it is ordered that this declaration be entered on the roll of ſtanding orders of this houſe.’—The peers at the Revolution (all *Gothic* as it was) took this right of the ſubject, and hugged it to their boſoms; and this too in their own caſe againſt themſelves. They would not themſelves be exempted from a poſſibility of being proſecuted to judgment, that juſtice might be done for the lives of the king's ſubjects, even if ſlain by themſelves. However, gentlemen, this *Gothic* right of appeal is not *as yet* taken from us: and I do firmly believe, that by the reſolution which I ſhewed, and by the meſſage which I ſent, and by the libel which I publiſhed (if ſuch things be libels), I do believe I have the merit of putting off (at leaſt for that time) ſo infamous an attempt. Infamous four-fold, if you conſider the doctrine now brought forwards.---The king's troops ſhall not even be charged with murder! Obſerve then what follows: the king perhaps will not purſue; the ſubject ſhall loſe his right of appeal; and you ſhall not even dare to ſay that the king's troops have committed murder.

I have already taken up much of your time; but I hope that the importance of the doctrine brought forward in this caſe, as it is the firſt (there is no precedent of ſuch a one), I hope that ſhall be my juſtification.

Gentlemen, I will now come to the advertiſement itſelf. The attorney-general ſays it is a ſcandalous publication; and he has repeated all thoſe terms which I have before mentioned to you.

Now, gentlemen, pray conſider with yourſelves, to what purpoſe has he done this? Look at the information (you have a right to carry it out of court with you); ſee if you can find any ſuch charge in the information; ſee if you can find any thing tantamount to ribaldry, or ſcurrility, or *Billingſgate*, or balderdaſh. Theſe make no part of the information at all. He has done it merely to miſlead and inflame. But he complains of ſcandalous publications! Who has moſt cauſe to complain of ſcandalous publications (taking the nation as divided in opinion between the Tory and the Whig doctrines)? who has moſt reaſon to complain of ſcandalous publications? Read Dr. *Shebbeare* and the archbiſhop of *York!* a penſioner of the crown, and an archbiſhop juſt created ſo by the crown! See how they have treated the Preſbyterians! And yet, I preſume, they are as reſpectable a part of the king's ſubjects as the king's ſoldiers! I think that to alienate the minds of the Preſbyterians, or of others from them, is doing no great ſervice to this country! Why not proſecute for that? No; penſions and mitres ſhall reward them! But, not to talk of theſe general matters, the attorney-general, in a proſecution of me for a particular advertiſement, thinks it his place to talk of ſcandalous publications. Pray, take the two individuals, the attorney-general and myſelf; which of us two has moſt cauſe to complain of ſcandalous publications? Judge fairly between us. He a gentleman in great office; a gentleman neceſſarily expoſed to the difference of opinions about his conduct: myſelf an obſcure man, who never did enjoy any office of truſt or of conſequence; who never was a candidate either for honour or for profit; who have no claim to the notice of the public. Compare this with the ſituation of that gentleman; then compare the ribaldry and the ſcandal that has been publiſhed about us both; and judge which ought moſt to have talked of ſcandal in this proſecution! Gentlemen, I have had the honour to be burnt in effigy, and I ſaw myſelf committed to the flames. I have been ſung about the ſtreets in ballads, and I ſaw a little pert parſon cocked up upon a ſtick in the ſinger's hands. The news-papers for ſome years were even ſick of my name. Even my cloaths afforded an entertainment for the wit of the theatre. As for caricatures, I have myſelf bought enough of them to furniſh a room:—my rooms are but ſmall, as you may eaſily ſuppoſe.---My life has been written, with my name at length, and the atheiſt and macaroni parſon printed at the bottom of a print in the frontiſpiece. Atheiſt! and with my name at length!---Scandalous publications, to be ſure, ſhould be urged by that gentleman againſt me!---Gentlemen, I have never complained of thoſe imputations. I proteſt (except with very ignorant, very poor creatures, and it does not ſignify what they think) I don't think thoſe imputations ever hurt my character; and if they have, I will take the chance of time to refute them. There was indeed one imputation that I believe did get ſome ground; and I thank the attorney-general for now relieving me from it: it was the worſt of all the other --a corrupt penſioner of the crown.---That was an imputation which I believe did ſtick by me; but there is no wonder at that at all. I did not even for that ſo much as accuſe the publications and the writers: it is the practice of the times, and the corruption of the miniſter, that libelled me! Every man may, without being abſurd, ſuſpect his neighbour of corruption, without any ſpecific charge brought againſt him. Good God! in a nation of lepers like this, who can expect to be thought clean! However, I agree with the attorney-general in all that he has ſaid generally againſt ſcandalous publications: they ought to be, and the laws (without ſtraining them) are now ſufficient to cauſe them to be ſuppreſſed. But, gentlemen, I ſhall never be found in the liſt of thoſe dealers in ſcandal. Well, but in the advertiſement he tells you, there is ſcurrility, *Billingſgate*, ribaldry, and balderdaſh.---The gentlemen of the law love to go by precedents. The attorney-general found a precedent for it; and therefore (without conſidering whether it would apply or not in this caſe) he made uſe of it to eke out the time. Mr. *Noy*, the attorney-general, in the Star-chamber, proſecuted a man for ſpeaking diſreſpectfully of ſtage plays; and he ſaid, that---'it may be fit enough and lawful to write againſt plays, by men 'that have a *miſſion:* and they muſt do their errand in mannerly terms, 'and in the ſame terms as other men expect to bear with them. Mr. '*Prynne* had no *miſſion* to meddle with thoſe things, to ſee whether 'men ſhould not return to gentiliſm. The terms which he uſeth are 'ſuch as he finds among the oyſter-women at *Billingſgate*, or at the 'common conduit.'——Mr. *Prynne* had no *miſſion*, it ſeems, to prevent men from turning heathens; and therefore he ought not to endeavour to prevent them from turning heathens! But however, gentlemen, if I have uſed *Billingſgate*, and thoſe bad terms with which he charges me, I ſhall not be angry with the attorney-general, but very much obliged to him, if he will help me to correct my language. I am ſorry, however, to find that he does not intend I ſhall have much benefit by the example of his own. He has charged the advertiſement with impudence too: and it ſeems, gentlemen, by what I heard from him in the other trials, and in this, to be a very lucky impudence for me: for he did ſay, that '*wicked* is a term too high for this advertiſement.'---Theſe are the very words; I took them down: 'wicked is a term too 'high for this advertiſement.' Upon what, then, does he expect to gain a verdict? He ſaid too, that 'its impudence diſarmed its wicked-'neſs."---I believe that is a new figure, not to be found in poetry or painting! Impudence diſarming wickedneſs! Why, gentlemen, that was in plain words telling the jury (if they had at all adverted to what he ſaid) that they had nothing to do with that advertiſement: for if it is not high enough to be wicked, it is too low for the verdict of a jury. You have nothing to do but with legal wickedneſs: a man cannot be proſecuted for ſcurrility and impudence.---But where, in which words of that advertiſement, is this ſcurrility and *Billingſgate?* In which ſentence is the unmeaning ribaldry and balderdaſh? *Balderdaſh*, I believe, is a term taken from the drunkard's table. Balderdaſh (if it means any thing) means---a rude mixture, a confuſed diſcourſe. Does he proſecute a rude mixture and a confuſed diſcourſe? If its aim and its object are difficult to be found out, is that an object of proſecution? In that caſe, it might as well have been written in *Hebrew*. But, gentlemen, all this was merely to inflame and miſlead you; and therefore I ſhall not dwell upon it. But, gentlemen, whilſt he has been miſ-ſpending the time of the court in that which makes no part of the information, he has not ſaid one ſingle word about that which does make a part of the information; I mean its falſhood. Falſhood is a part of the charge, and it is a criminal and an odious part of the charge; and if you don't find it in the advertiſement, you cannot give a compleat verdict. Falſhood is a part of the monſter which he has exhibited: and if one limb of it is wanting, you cannot give him a verdict. Gentlemen, I ſhall prove the aſſertions of the advertiſement to be true by my evidence; and I will not now delay you with them. And, gentlemen, I ſhall prove to you a thing which may now perhaps be a little uſeful to my character (if it ſuffers under that ſtigma of *Billingſgate* and balderdaſh, and incendiary intentions, with which I am charged); for I ſhall not only prove that the motion was made, the money collected, and paid, but I ſhall prove to you, that the advertiſement of the firſt ſum did produce the ſecond. The attorney-general ſays, it was only a fetch to fly in the face of the law. It was a *fetch.* It *fetched* 50l. more: and I will prove to you that it did ſo. I will tell you the perſon who ſent it, and the perſon who conveyed it to me; becauſe the purpoſe for which the money was given, the gentleman who ſubſcribed it, and the gentleman who conveyed it, are all worthy of each other. The money came from ſir *Stephen Theodore Janſſen*, who is now out of the reach of envy; it was conveyed to me by Mr. Alderman *Oliver*, who, though living, is equally out of the reach of cenſure; and it was paid for the purpoſe for which it is declared. And, gentlemen, I am the rather inclined to prove theſe circumſtances to you, becauſe his lordſhip in his charge to the jury on one of the latter trials, finding that no evidence had been brought of the truth of the aſſertions in the advertiſement, was pleaſed to forget a doctrine I have ſometimes heard about truth, and threw in, as a make-weight into the ſcale, an inſinuation of the poſſible falſhood of the advertiſement. His lordſhip ſaid, he 'did 'not believe ſuch a propoſal had ever been made, or ſuch money con-'tributed, or paid, or even ſuch a ſociety named exiſting. He hoped 'there were no perſons capable of ſuch an act: he hoped, and *there-'fore* he believed!' It is a tolerable inſinuation to a jury! He hopes there are no men capable of ſuch an act! What diſmal act muſt this be? It muſt ſurely be ſome act that excludes a man ever after, ſurely, from being admitted to ſit cheek by cheek, and laugh and joke together with his lordſhip. It muſt ſurely be an act of that kind that a man muſt be held in abhorrence. No honeſt man could keep one company after it. 'He hoped there were no men capable of ſuch an act, and there-'fore he believed it.' After this the attorney-general, from his lordſhip, took the ſame cue: and therefore, in a ſucceeding trial, he too inſinuated, that the ſubſcription was a mere pretence (a *fetch* he called it) to colour the advertiſement. I own when his lordſhip hoped, and *therefore* believed, I was in ſome pain for my own exiſtence: and though I ſtood cloſe at his elbow, I did not know but he might believe next, that there was no ſuch perſon as myſelf exiſting in the world. And yet I have heard his lordſhip ſay, on other trials (and if I miſrepreſent him, he will do juſtice to himſelf) I have heard him ſay---'What! ſhall not a judge and a jury know and believe what every one 'elſe knows and believes?'---(and it was upon a trial for a libel)---'Shall they alone be ſuppoſed ignorant of thoſe known and notorious 'facts which no one elſe in the court doubts?'---As I do not therefore know which of theſe two doctrines his lordſhip may adopt on this occaſion, and cannot tell what he may believe (becauſe I do not know upon *all* ſubjects what he may hope), I ſhall therefore prove the truth of my advertiſement. And when I have done that, perhaps, gentlemen, you will be told (as I have heard it ſaid) that *falſe* in the information ſtands for nothing, and is not a part of the charge! though obſerve, if I omit proving the truth, they will not fail to aggravate the charge, by inſinuating the falſhood.

Now then, gentlemen, I come to the very great offence of all; to that which does indeed make a part of the information, but has made no part (except in aſſertion) of the attorney-general's harangue:—I mean, charging the king's troops with *murder.* I am told, that it is not for any of thoſe aſſertions about ſubſcription, and payment, and collection, that I am proſecuted; but it is for charging the king's troops with *murder. There* the attorney-general ſaid, he 'put his finger.'—I have not charged the king's troops with murder: there is not any ſuch aſſertion in the advertiſement. There can be no charge, no truth or falſhood, but in an aſſertion. Gentlemen, I have no more aſſerted, that there were any perſons murdered, than I have aſſerted that they have left behind them widows, orphans, or aged parents. Perhaps no perſons were murdered, perhaps no perſons were even killed at *Lexington* and *Concord* on the 19th of *April* 1775. Perhaps, if there were any killed, they were ſuch as have left behind them neither widows, orphans, nor aged parents. The advertiſement does not aſſert any of thoſe things. There is indeed a deſcription in the advertiſement of certain perſons for whoſe uſe the collection was made: if there are no ſuch perſons, the intended charity will not take place. I indeed ſuppoſe the charge to be true: others had charged the king's troops with this murder nine days and more before my advertiſement. I have ſhewn you where; in the ſame news-paper of *May* the 30th and 31ſt, 1775, ſigned by the agent of the province. I ſuppoſed that charge true; but I did not make it. I took it as I found it. The charge was in all the news-papers of *May* 30th and 31ſt, 1775. Why not proſecute thoſe that brought the charge? The charge was authenticated in the moſt formal manner: original affidavits, taken on the ſpot, were lodged with the lord-mayor of *London.* The charge was not anonymous; it was ſigned by the agent of the province where the murders were committed; it was ſigned by Mr. *Arthur Lee.* He publickly avowed it every where. He ſat daily in this court, with the chief juſtice and the attorney-general, publickly as an advocate: he was retained on one of the trials: he ſtood up to avow it: his lordſhip knew what he was going to ſay, and would not permit him to ſpeak: it was in the firſt trial at *Weſtminſter.* You ſee then (nay, you know it from a thouſand publications) that this was not a wanton ſuggeſtion of my own; nor yet lightly taken up upon a ſlight rumour: but it was ſo given to the public, that no man could reaſonably doubt of it. The *Gazette*, publiſhed by authority, deſired every man to ſuſpend his belief; in declared anſwer to which theſe affidavits came. It has never ſince been contradicted, even by that very authority that deſired us to ſuſpend our belief. But, gentlemen, though I did not make the charge in this advertiſement, to ſave trouble I am willing to have it underſtood, that I did make the charge in the advertiſement: I do again make it now. I did not word that part of my advertiſement in the deſcriptive manner in which it ſtands through caution, and as a ſubterfuge to inſinuate a charge which I was afraid to make: ſo far from it, that I do tell you again I allow the charge. I believe, gentlemen, theſe murders will never be forgotten as long as the hiſtory of this country ſhall remain: for the murders of that day, the 19th of *April*, have been productive of all that ſlaughter which has happened ſince, and of all that which is ſtill to come. Suppoſe then, gentlemen, if you pleaſe, that I had charged the king's troops with murder. Well! what then? How follows the libel againſt the king and the government? for you muſt take notice that the accuſation in the information is not that I have charged the king's troops with murder. That would not have ſupported an information: an information could not be ſupported upon that charge. The charge againſt me is, that I have charged the king and the government with murder And to-day the gentleman has ſpoken a little more plainly than he did before. To-day he ſays, that 'I have charged the perſons employed by government with 'being guilty of murder; and *conſequently* thoſe who employed them are 'involved in the ſame guilt.' This is the charge againſt me. But how does he draw the conſequence? Is that to be found in the advertiſement? Does every man that ſays a ſoldier has committed murder, involve the king and the government in the commiſſion of that murder?

Gentlemen, I have not, in my advertiſement, even charged the miniſters. But if I had, I hope the miniſters or the troops are no part of that government which you acknowledge: at leaſt I am ſure the troops do not make a part of that government under which I was born; they do not make a part of that government to which I have repeatedly ſworn, and always held the moſt faithful and firm allegiance: and I will ſay more, they do not make a part of that government under which I will ever ſilently live. Indeed, gentlemen, Mr. Attorney-General ſeems to think the troops ſomething more ſacred even than the government: for he ſaid, in aggravation of the charge, that it was 'not only a libel 'againſt government, but *even* againſt the ſoldiers in our ſervice.'—If he ſhould happen to forget this alſo, the counſel who anſwered him at the time, and took notice of it, I hope will remember it—'Not only a

‘ libel againſt the government, but *even* againſt the ſoldiers in our ſer‘ vice:’ ſo that the troops are ſomething more than the government! I believe they are intended to be made ſo; for ours is a government of laws, not a government at will, either by troops, commanders in chief, miniſters, or king. Conſider, gentlemen, that the king's troops are only tolerated in this country for the purpoſe of foreign defence. They have been but of late years tolerated in time of peace. They have only an annual exiſtence; which exiſtence expires yearly, unleſs regenerated by a yearly vote. Now, gentlemen, conſider! *Hanoverians*, *Heſſians*, *Brunſwickers*, *Waldeckers*, the very *Indian* ſavages (for of theſe are the king's troops now compoſed) all theſe, by Mr. Attorney's doctrine, make a part of the bleſſed government of this country! and to charge any of thoſe king's troops with murder is to be guilty of a ſeditious libel againſt the king and againſt the government! Gentlemen, reflect. Have not the king's troops often been charged with murder? Does there paſs a year when ſome of them are not convicted for murder? and, in the laſt good old king's reign, were they not executed too for murder, when they were convicted? It is too notorious.---A libel to charge the king's troops with murder! I believe nobody ever dreamt that it was a libel againſt the government, or even againſt the miniſtry, to ſay that ſome of the king's troops have committed murder. If ſuch a charge is falſe and malicious (and a falſe and malicious charge may be made againſt the troops, as well as againſt any other perſon) it may be a libel againſt them, juſt as it would be againſt any other of the king's ſubjects; and they muſt ſeek the ſame remedy. They are not nearer, nor, I hope, dearer than we are; than any other of the king's ſubjects. How long have the troops been theſe privileged characters? What is there peculiar in their character, that to charge them with a murder ſhall be a libel againſt the king and the government? Suppoſe I had ſaid (as I believe I might truly), and as I know it has often been ſaid, that many murders have been committed by the king's patents, does any man think that the attorney-general would have proſecuted that as a ſeditious libel againſt the king and the government? And yet the king's patents are juſt ſuch as he pleaſes to make them: they are of his own begetting, and much more as he pleaſes to make them than even his children. But the troops? what are they? what are they, whoſe origin we know? what are thoſe who are of our own country?---Many of them, felons taken from gaols, and reſcued from the gallows. Of theſe are the king's troops compoſed. And is it wonderful to charge the king's troops with murder? But it is too ridiculous. I am ſure the attorney-general does not, he will not, pretend to ſay, that every particular charge againſt ſome ſoldier or ſoldiers for murder is a ſeditious libel againſt the king and the government! He will not ſay ſo! Suppoſe, gentlemen, ſome of the king's peace-officers had been charged with murder. It has often happened. Conſtables and peace-officers may exerciſe their authority in an illegal manner: they may kill men inſtead of arreſting them. They have done it; they have been ſometimes tried for it. Are not they as much the king's officers as the troops? Something more ſo, I ſuppoſe; for they are the officers of the *real* government of the country; the officers of the laws. And yet was ever any man proſecuted, or would any man now be proſecuted, if he charged a pack of conſtables with having committed murder? Would that be a libel againſt the king and the government? It could not be. Gentlemen, ſuppoſe ſome of the ſoldiers as brutal as *Kirk*'s lambs (ſoldiers, for their cruelty, known by that name) ſhould renew again the horrid barbarities which they committed in the Weſt; would it then be a ſeditious libel to ſay that they had committed murder? I do not ſay, nor know, that the king has at preſent among his troops any lambs of *Kirk*'s breed; but I am ſure he had in 1768; becauſe I then ſaw them not only commit murders, but other barbarities which not a ſavage hardly would commit. I ſaw one of the king's troops run his fixed bayonet under the ſhoulder-blade of a poor man, becauſe he could not get under a rail time enough out of his way: I ſaw a woman with child wounded: a ginger-bread woman murdered as ſhe ſat at near a quarter of a mile diſtance. Were not they murdered? Were not thoſe murders committed by the king's troops? by as numerous a body of the king's troops as thoſe who committed the murders at *Lexington*? Gentlemen, there was a perſon preſent; I don't know that I have a right to mention his name; but he ſaid he had ſerved as a ſurgeon under *Braddock* in *America*, and he told the juſtices of the peace, that, even in that country, he had never ſeen murder ſo wickedly, ſo wantonly committed. But perhaps the attorney-general does mean ſtill to proſecute me for calling them murderers. Why ſhould he not? It is but nine years ago! I don't know but that, as ſoon as this proſecution is over (if you ſhould eſtabliſh this doctrine), he may follow it with another proſecution for that libel too. The ſame printer can prove it; and I ſhall not deny it. —But the attorney-general will, I know, from neceſſity, be obliged to ſay, that this is a very different caſe from charging ſome individual ſoldiers with murder. The king's troops *here*, he will ſay, acted in that capacity, as the king's troops, in a body, under their officers, and in a military manner, as part of the king's army.---Well, it may be ſo; but, however, that is more than he has proved to you. If you believe that, you muſt take his word for it, or you muſt have it from the evidence which I ſhall produce. But if Mr. Attorney-General makes or attempts to make this diſtinction to you, gentlemen, between individual ſoldiers and thoſe acting as part of an army, I muſt then intreat him to draw the line. None has yet been drawn; but he muſt do it before you can give him a verdict. If he will give up, as I am ſure he will, that to charge any individual ſoldier with a murder is not a ſeditious libel againſt the king and his government; but ſhall inſiſt, that to charge a *body* of the king's ſoldiers, acting under their officers, is a libel againſt the king and the government; he muſt then draw ſome line. He will tell you, I ſuppoſe, whether it is a regiment, or a company, or a ſerjeant's guard, or a corporal's guard; what number, and how commanded is it; that draws the line; that makes it an offence againſt the king and the government, and makes it a ſeditious libel to charge them with murder. Look after him---ſee if he draws you that line.---He muſt likewiſe, gentlemen, when he has drawn it, ſhew you his law for it; and then he muſt prove that the troops I have charged fall within that line: and if he does all this, if he draws that line, and eſtabliſhes it by law, and proves that the troops I have charged are within that line which he eſtabliſhes by law, then you are bound to give a verdict againſt me. And if he would do that, I would at once ſave him the trouble of a trial. If he can draw that line, I will not keep the court a moment.

Gentlemen, I will be bold to ſay, that the whole army together, foreigners and natives, with all their officers, and the commander in chief, —aye, and the king himſelf at their head,—is no part of the government of this country; nor can they lawfully put any man to death. I ſaid, gentlemen, ſome time ago that there never had before been brought a proſecution upon ſuch a charge as this. Now, it is true, that a part indeed of the charge againſt honeſt *John Lillburne*, upon one of his trials, was, that he had accuſed the ſoldiery of having committed murder; and his words were (beſides the word *murder*, which he expreſſed at length) that they had committed murder by ‘ ſhedding the blood of war, in the ‘ time of peace:’ and he had likewiſe called their general, by name, a *murderer*. But, gentlemen, it muſt be remembered, that this proſecution was brought when the army were indeed, *de facto*, the government; when there was neither king nor parliament, but the army governed alone. Then indeed it was natural enough to call the troops the government, and to reckon it a ſeditious libel againſt the government to charge them with murder. Since that time, the attorney-general will find no ſuch proſecution. However, gentlemen, even then a *London* jury, faithful to their duty, in ſpite of the judges and the attorney-general (who then held the very ſame language which the attorney-general holds now), in ſpite of all their arts, at that perilous time, a *London* jury in this very court, ſitting in thoſe very places where you now ſit, did juſtice to their own conſciences, and they acquitted him, as you muſt me, unleſs you chuſe to exchange the laws of the land, and have military execution take place in this country. A ſtanding army, in the time of peace, is a monſter to the free conſtitution of this country: it has but very lately been ſuffered; and one of the great arguments that has been urged by thoſe who have from age to age oppoſed a ſtanding army, was, that they would be thenceforwards uſed as they now are. The penſioners of the crown and the friends of arbitrary government ridiculed ſuch a ſuppoſition. They ſaid, it was impoſſible that ſuch a time could ever arrive. I have read their arguments; I am ſure the gentleman who now proſecutes me has read their arguments. They were then afraid of this uſe of troops; and therefore thoſe who oppoſed the eſtabliſhment of the army gave it as their reaſon. Gentlemen, the courtiers ridiculed the thought that ſuch a time could ever arrive, or that the ſoldiers in this country could ever be ſo employed. Now, what would our fathers have ſaid, if any chief juſtice or attorney-general had at that time hinted that the ſoldiers ſhould not only be ſo employed, inſtead of the civil officers of juſtice, to inforce the law upon the ſubject; but that they ſhould alſo have a privilege, when they were employed, which the officers of juſtice never pretended to? Any man who had broached ſuch a doctrine (before the crown had got a firm poſſeſſion of a perpetual ſtanding army) ſuch a man would have been hooted at by both parties: by the court (not that they would have diſliked the doctrine, but) becauſe the ſecret would have been let out too ſoon. But now this ſame doctrine has made the chief juſtice an earl, and ſhall make the attorney-general a chief juſtice.

Gentlemen, I muſt entreat you to recal to your memory in what light military execution has always hitherto been conſidered in this country; and I ſhall give you (for it is worth the while) the circumſtances of the military execution at *Glenco*. (I publiſhed the pamphlet, that all the world might ſee it.) I mention it, becauſe it happened about the time of the firſt eſtabliſhment of a ſtanding army (in its preſent form) in this land. It is but about eighty years ſince. It happened immediately after the Revolution. Now, gentlemen, who were the *Glenco* men? ‘ It is certain and acknowledged by all, that they had been in ‘ the rebellions under *Dundee*, and under *Buchan*.’ The time of this ſlaughter was in very troubleſome unquiet times, at the moment of the Revolution: it was after repeated proclamations of indemnity and pardon. The laſt proclamation allowed them five months (from *Auguſt* to *January*) for them to come in and take the benefit of that proclamation. About ſix weeks after the expiration of that term, the ſlaughter happened; and about twenty-five or thirty of them were killed. Now, gentlemen, let us look for the reaſons which were given for that ſlaughter. The ſecretary of ſtate, *Stair*, gives theſe reaſons for that ſlaughter: theſe are his words:---‘ Since the government cannot oblige them, it is ‘ *obliged* to ruin ſome of them, to weaken and frighten the reſt.’ He goes much farther:---‘ It is a great *work of charity* to be exact in root‘ ing out that damnable ſect.’---They were not only obliged to do it, but it was charitable. He goes farther:---‘ for a *juſt example* of venge‘ ance, I entreat the thieving tribe of *Glenco* may be rooted out to ‘ purpoſe.’---He ſays it was ‘ a great *advantage to the nation*, that that ‘ thieving tribe were rooted out and cut off.’---‘ When you do your *duty* ‘ in a thing ſo *neceſſary*,’ (there was a neceſſity, you ſee)---‘ to rid the ‘ country of thieving, you need not trouble yourſelf to take the pains ‘ to vindicate yourſelf by ſhewing all your orders.’---‘ When you do ‘ *right*, you need not fear any body.’ He adds farther, gentlemen,--- ‘ Here is a fair occaſion for you to ſhew that your garriſon *ſerves for* ‘ *ſome uſe*.’---Theſe are his inſtructions; the ſecretary of ſtate's inſtructions to the troops:---it was a *fair occaſion* to ſhew that their garriſon *ſerved for ſome uſe*.---‘ The *king's juſtice* in this, will be as conſpicuous ‘ and *uſeful* as his clemency to others.’---Can any murder be dreſſed up in fairer terms? I defy the attorney-general, with all his abilities and force of language, to ſay any thing in behalf of this murder at *Lexington*, in more ſpecious terms than ſecretary *Stair* has done. ‘ It was ‘ *charity* to be exact---for a *juſt example* of vengeance---I entreat the ‘ thieving tribe of *Glenco* may be rooted out to purpoſe.---It is a great *ad‘ vantage to the nation* that the thieving tribe were rooted out, and cut off. ‘ ---When you do your *duty*, in a thing ſo *neceſſary*, you need not *trouble*

‘ yourſelf to take the *pains* to vindicate yourſelf by ſhewing all your ‘ orders. When you do *right*, you need not fear any body.---Here is ‘ a *fair* opportunity for you to ſhew that your garriſon *ſerves for ſome* ‘ *uſe*.'--- And after it was done, he ſays, ‘ All that I regret is, that any ‘ of the fort got away, and there is a *neceſſity* to proſecute them to the ‘ utmoſt.'---Theſe are the ſpecious reaſons given for this ſlaughter at *Glenco* by the *then* ſecretary of ſtate. But, notwithſtanding all theſe fine reaſons of the ſecretary (who would have been very glad to have had it conſidered as a ſeditious libel againſt government, for any man to ſay that that murder which he had authorized was a murder: he would have been very glad of this doctrine; it would have ſaved him) he himſelf acknowledges in a letter, that there was ‘ *much talk* at *London*, that the ‘ *Glenco* men were *murdered*.' There was *much*, obſerve, not a little; there was *much talk* at *London* that the *Glenco* men were *murdered*. And the parliament of *Scotland*, who took up the matter, ſaid, it had made ‘ much noiſe both in *Scotland* and the reſt of the king's dominions.'--- And, gentlemen, it was a very uſeful *talk* and *noiſe*. You will find what it produced. Now, what did the king? reluctantly indeed; but it produced good. What did the ſecretary of ſtate? What did the attorney-general? File an information for charging the king's troops with murder? (words and writing have the ſame effect; raſh words, indeed, ſhall have an excuſe where a deliberate writing ſhall not.) No! there was no information for a libel; but the king granted a commiſſion for an enquiry by what pretended authority that ſlaughter was committed. The officers of ſtate at that time knew what they were about, as well as they do at this time. There was a *defect* in the commiſſion. Gentlemen, in this firſt commiſſion which was granted, the officers who had the drawing it up, no doubt, took care that there ſhould be a defect. A defect there was, and the enquiry did not take place. But the *much noiſe* and the *much talk* continued; and two years afterwards the king was forced to grant another commiſſion of enquiry; and then care was taken that there ſhould be no defect. And that commiſſion of enquiry was put in force. It was a commiſſion of enquiry to ſome of the nobleſt and the greateſt in that country, *Scotland*, where the murders were committed. Gentlemen, what did thoſe lords commiſſioners? They reported, that the ſlaughter of the men at *Glenco* was---‘ a Barbarous Murder;' the very *Billingſgate* language complained of in me. Theſe noble *Scotchmen* voted and uſed that very expreſſion, that very ribaldry. The attorney-general has taken hold of a whole nation by calling it *Billingſgate* and ribaldry. Here is that very word, *murder*, *barbarous murder*, applied to the king's troops, which offends that gentleman ſo much in my advertiſement. He may now ſee, that I too had a precedent for it.---After the commiſſioners had diſcharged their duty, and made their report, that it was a *barbarous murder*; the parliament of *Scotland* took it up, and they voted the ſame *Billingſgate*---they voted that it was a ‘ Barbarous Murder.' And they addreſſed the king; and in that addreſs they call it a ‘ Barbarous ‘ Murder.' But that is not all. They juſtify the king. They find upon their enquiry, that the king's inſtructions had been contradicted: for *his* inſtructions were, that the *Glenco* men ſhould be proſecuted ‘ in ‘ the way of public juſtice, and *no other way*:' that is what they find for the king. And yet they were no friends of thoſe men who were murdered. They did not juſtify them, nor arraign *all* the meaſures which had been taken againſt them, by finding it a *barbarous murder*. But they juſtify the king; and they acknowledge themſelves ſo well perſwaded of their guilt, that they ſay, if the king had proceeded againſt them according to LAW, and had taken their lives, ‘ they would have met with no ‘ more than they deſerved.' However, gentlemen, I ſuppoſe that in that declaration they were rather haſty: for there were women and children, and old men of 80, killed: and I do ſuppoſe, that if they had been proceeded againſt according to law, the infants at leaſt would have been ſpared, if the old men and the women had not eſcaped. They go farther. They accuſe the ſecretary of ſtate, *Stair*, as ‘ the only warrant and ‘ cauſe' of the ſlaughter by his *orders*. They find that he ‘ did, in ‘ place of preſcribing a vindication of public juſtice, order them to be ‘ cut off and rooted out in earneſt, and to purpoſe; and that ſuddenly, ‘ and ſecretly, and quietly, and all on a ſudden.' It keeps pace very much with the murders at *Lexington* and *Concord*. That expedition was ſecretly, quietly, and all on a ſudden; an expedition at the dead of night.---They find that he directed the ſoldiers, that they ‘ ſhould not ‘ trouble the government with priſoners.'---Now the government cannot be *troubled* with priſoners; the miniſters might: government is not troubled with offenders.---He promiſes them, that ‘ their power ſhould ‘ be full enough:' and he orders them, that they ſhould ‘ begin with ‘ *Glenco*:' and his words are, that they ſhould ‘ *ſpare nothing* which be‘ longed to him.'--- Military execution differs a little from the laws of the land!---They accuſed the king's troops with *murder*, for executing the orders which they had received: they addreſſed the king ‘ to order ‘ his advocate to proſecute them:' and they deſire him, that he would ‘ ſend the troops home to be proſecuted:' ‘ there remaining---' (theſe are their very words) ‘ ſend them home to be proſecuted: there re‘ maining *nothing elſe* to be done for the full vindication of his Majeſty's ‘ government from ſo foul and ſcandalous an aſperſion.'---There remaining nothing elſe to be done! Not an information for a libel, but an enquiry into the matter, and a proſecution of the offenders! Now, gentlemen, then I muſt entreat you to obſerve what the troops are capable of doing: and I did intend to have read to you the cruel particulars of that narrative; but it is well enough, you will read it another time at your leiſure; and it is your conviction, more than your verdict, I ſeek. You will know where to find it. You will ſee in how barbarous, how wanton, how treacherous, and how cruel a manner they ſlaughtered men, women, and children. And this they were told was their duty; and this they thought a proper way (as *Stair*, the ſecretary of ſtate, who was a military man; they thought it, as he told them) a proper way to ſhew that they *ſerved for ſome uſe*. Gentlemen, you find then, by this report and vote, that murder may be committed by the king's troops *without* and even *againſt* the king's orders and inſtructions; therefore I conclude, that it is not neceſſarily a libel againſt the king and the government to accuſe his troops with murder. Indeed I go farther: I ſay, the king *cannot* give orders for ſuch a murder. It is an impoſſibility: nor, if it were poſſible, would ſuch orders juſtify the act. It exceeds the king's power; and would ſtill, by whomſoever authorized and committed, continue to be a *murder*. Gentlemen, you find too, that a ſecretary of ſtate may be guilty of exceeding the king's inſtructions (as in this caſe of *Glenco* he was upon enquiry found to have done). And as a ſecretary of ſtate may exceed the king's inſtructions, ſo may all thoſe other perſons through whoſe hands the orders paſs from the ſecretary of ſtate to the ſoldiers who execute them; conſequently, it is no charge againſt the king or the government to charge the troops with murder. But, whether the troops have orders or not, you ſee, that the king's troops who commit the fact are nevertheleſs guilty of murder, as it has been here voted, tho' acting under orders. Now then, gentlemen, I muſt beg you to compare that doctrine concerning *Glenco* (which has never been arraigned) compare it with this doctrine of the attorney-general concerning the ſoldiers at *Lexington*. In the trials of the printers he ſaid, and he ſays now, that the advertiſement is a ſeditious libel againſt the government, becauſe it arraigned the employment of the king's troops, and called the victory they had obtained a *murder*. *There*, he ſaid, he put his finger; ‘ for this (ſays he) arraigns *all* the meaſures of govern‘ ment; quelling rebels armed, to call that murder.' Now I beg of you to conſider what a number of things are left out in this manner of reaſoning, and what a number of things are taken for granted. In the firſt place, it does not appear, nor has he offered to prove any ſuch thing, that the ſlaughter at *Lexington* and *Concord* was a meaſure of government.—— Arraigning all the meaſures of government! and yet it does not appear that this was a meaſure of government; I mean, even according to the abuſed uſe of the word *government*; I mean, not a meaſure even of the ſecretary of ſtate. But if it had been, how does it follow that, by abuſing the meaſures of the miniſters of ſtate, I condemn *all* the meaſures of government? Suppoſe I condemn *one* meaſure of government, how does it follow that I condemn all? May not a man condemn *that* meaſure, and yet approve all the foregoing? I do not mean to be underſtood that I approve the foregoing meaſures: I abhor them. But there is nothing in the advertiſement before you which condemns the meaſures of government directly or indirectly: it relates to no other meaſure but merely to *that one*; and you are not to trouble yourſelves with what I may like, or what I may not like, but what I have *expreſſed* in that advertiſement which is before you. For in this caſe of *Glenco*, it is evident that the noble commiſſioners who voted it a *barbarous murder*, did not condemn *all* the meaſures of government: for they ſaid, ‘ If the king had proſecuted them by ‘ law, and taken their lives, he had done no more than juſtice:' it is plain therefore they did not condemn all the other meaſures of government, but only the ſlaughter by the troops; for they ſupported the other meaſures of government, and that at the riſk of their lives and fortunes. And, gentlemen, I know of my own knowledge, and I dare ſay you do, many perſons who have not diſapproved of all thoſe preceding meaſures relative to *America*, who yet did diſapprove of that raſh and wanton tranſaction. Then, gentlemen, as for the ‘ victory,' I think it will not appear to be quite ſo compleat a victory as that at *Glenco*! and therefore you ſtill ſee, that ſuch a victory as that may be called a *murder*. Gentlemen, for my own part, I do not heſitate to declare, that I abhor ſuch victories; victories by ſubject upon ſubject! And as for ſuch a victory as this, I do declare I think that the brows of ſuch conquerors inſtead of laurel ſhould be crowned with wreaths of hemlock. And as for his— ‘ quelling of armed rebels!' every word is falſhood.—They were not *rebels*, nor *armed*, nor *quelled*. They had committed no act of hoſtility; they had made no attack; they were ſleeping quietly in their beds, unapprehenſive of any attack upon themſelves, at the time that this expedition took place: and that I ſhall prove, gentlemen. What reaſon have you to believe that they were in rebellion, unleſs the attorney-general's ſaying ſo proves them to be in rebellion? for he has offered no proof to you of it. It is now—(and pray conſider this matter about rebels; though I think it does not matter; for a rebel may be murdered) but conſider, it is now two years and a quarter ſince this ſlaughter was committed; and yet, to this day, no perſon whatever has been proſecuted as a rebel. No legal proceedings of any kind have taken place. It is two years and a quarter ſince that execution upon the rebels, as they are called, and yet no proof of rebellion: and yet you are to believe, that they are rebels! The attorney-general, if they are rebels, ſhould do his duty: he ſhould proſecute.

Now, gentlemen, obſerve only another contradiction in the doctrines which are brought before you. You will be told, that if they were murdered, the murderers ſhould be proſecuted. You have been told ſo. Men are not to be charged with crimes; they are to be proſecuted by law. So then we are not to know, we are not to judge of murder when it is committed, till the law helps our judgment. And yet, obſerve, we are to judge of rebellion; which is a crime ſurely more difficult to be aſcertained, and about which there have been more doubts and diſputes than about murder. If a man, out of the court, exerciſes his judgment about a murder, he ſhall be puniſhed; but he is at the ſame time bound at his peril to exerciſe his judgment about rebellion; to know what is rebellion, and who have committed it. And yet, gentlemen, I muſt beg you to obſerve, that if theſe very men, executed by military force at *Lexington*, had been rebels; had been taken in rebellion; had been proſecuted, convicted, ſentenced, and had been leading to the gallows by the ſheriff; if theſe ſame king's troops had come and ſhot them, or run their bayonets into them, they would have committed *murder*. It is not their being rebels; it is not their being ſentenced—when they are even leading to execution, a man may commit a murder upon the convicts: and theſe troops would have committed murder, had they executed the men even in that condition.

Gentlemen, the ſame way of thinking of military execution has prevailed ever ſince that time. I ſhall not trouble you to repeat the particulars of the affair of Captain *Porteous* at *Edinburgh*. Theſe gentlemen are ſo little pleaſed with military execution upon themſelves, that *Porteous* was charged by them with murder. He was proſecuted, convicted, and when he was reprieved after ſentence, the people of the town executed that man themſelves, ſo little did they approve of military execution. Now, gentlemen, there are at this moment people of reputation, living in credit, making fortunes under the crown, who were concerned in that very fact, who were concerned in the execution of *Porteous*. I do not ſpeak it to cenſure them; for, however irregular the act, my mind approves it. I beg you likewiſe, gentlemen, to recollect that moſt wanton and moſt wicked rebellion of the year 1745. In what a manner was the victory over them ſpoken of in *Smollet*'s—'Mourn, hapleſs *Caledonia*'!— It is known, I ſuppoſe, to every body who ever reads poetry. He calls it *murder*:

> "The naked and forlorn muſt feel
> "Devouring flames and *murdering* ſteel," *&c.*

I condemn his act; I do not juſtify it; but he was not proſecuted for it in that mild reign.

Gentlemen, it has always been judged a meritorious jealouſy in our civil officers; it was in *Janſſen*; it was in ſome other ſheriffs, who are ſtill living, when they refuſed the aſſiſtance of the military to execute criminals. So little proper are the military, with or without orders, for civil purpoſes, that it has always been thought a praiſe-worthy jealouſy in them to refuſe to ſuffer the military to aſſiſt at the execution of criminals: how much leſs then are they proper to execute them themſelves. In that proſecution of the king's troops for committing murders in *St. George*'s *Fields*, I was particularly fortunate for this occaſion; and I ſhould have reaſon to rejoice for myſelf (if I alone was concerned), that I did by that proſecution bring out a doctrine (which I know to be falſe, and which if not diſcountenanced will be fatal) but I did draw out a doctrine from the bench which muſt prevent your verdict againſt me now. To juſtify the executions committed in *St. George*'s *Fields*, or to ſave the delinquents from puniſhment, the judge declared from the bench that they were to be conſidered as any other men in the country; that it was a matter of no conſequence whether they wore a white coat or a red one; that they were on the *ſame* footing, and might be employed like any other ſubject. I know that to be falſe: they are diſtinguiſhed from other men, not ſo as to make them *more* qualified for execution, but leſs. However, this doctrine anſwered the purpoſe at that time: but this doctrine, if I am to be convicted, muſt now be laid aſide. The king's troops muſt no longer be conſidered as on a level and on the ſame footing with the king's other ſubjects. They muſt now, by the 'king's troops,' mean ſome perſons more ſacred, dearer, and nearer to his majeſty than any other of his ſubjects; and to arraign any action of theirs is to be guilty of a ſeditious libel againſt the government. Now, gentlemen, obſerve how rapid is their progreſſion; from toleration to equality, and from equality to domination; and from thence you may learn how dangerous is this doctrine. Obſerve, that firſt, and for many years, they beg hard to have troops tolerated, merely to prevent ſurprize, and to be ready againſt foreign enemies: that is the pretence. The judges next connive at their employment againſt the ſubject at home, under pretence of *equality*, and as being merely on the *ſame* footing with the king's other ſubjects, and with no other difference but the colour of their coats. From this laſt doctrine (though it includes a contradiction to what follows) the tranſition has been very ſhort indeed. They are now to be taken *out* of that equality with other ſubjects; and it is made a crime againſt the king and the government to condemn any ſlaughter which they may commit: and this too without any enquiry, without any proof concerning the nature of the execution or the manner of the ſlaughter; or whether it was directed, or was not directed; or by whom directed. And yet, gentlemen, I have learned from Mr. Juſtice *Atkins* (ſtill going to my only ſource of law, a ſtate trial) I have learned from him, that 'ſome judges are of an opinion that before a trial, or preſentment, or acquittal, *modo legitimo*, no action upon the caſe for ſlander will lie; it not being, he ſays, ripe for it till an acquittal. By the ſame reaſon, he ſays, it is not ready for an information, which is but the king's ſuit, the reaſon being the ſame in both.' So that, gentlemen, if that be true, this proſecution is too ſoon as well as too late: too ſoon, becauſe it precedes the enquiry into the fact, whether murder or not; and too late, for the reaſons I have already given. And I have no doubt, gentlemen, but that you yourſelves will think that the firſt ſtep to be taken to remove (if there be any) aſperſion on government, is to ſet on foot an enquiry into the murder; and then, if it ſhall be found a groundleſs charge, proſecute and puniſh thoſe who charged them. They ſay, why do I not proſecute them? or at leaſt, that I ſhould have proſecuted the murderers, or not charged them with the murder. It is well known, I have always done ſo when I could; and I would do ſo now if I could. I would proſecute thoſe troops guilty of thoſe murders. But how is that to be done? An act of parliament was made juſt before the commiſſion of theſe murders, to exempt the murderers from trial in *America*; and you will pleaſe to remember, that it is not long ſince an act of parliament was made in *England* for the *more ſpeedy* execution of murderers here. An act was made a few years ago for the more ſpeedy execution of murderers in *England*; and that becauſe it was thought a means of deterring men more effectually from murder. Now then what are you to conclude? What are you to conclude even from the circumſtance of delay alone? but either that what deters men from committing murder here, will not deter them from committing murder there; or elſe, that it was not intended to deter men from committing murder in *America*. Now what would any diſpaſſionate *American* think even of this ſingle difference between us? This act was made at a time too when checks for their ſecurity were more neceſſary than at any other time; for it was when troops were pouring in upon them. Obſerve, when *Engliſhmen* are murdered, as ſmall delay as poſſible ſhall be ſuffered between the fact and the puniſhment; in *America*, every delay and every poſſible difficulty! What was this likely to produce but mutual ſlaughter on both ſides? The ſoldiery were encouraged to murder by a proſpect of impunity; and the *Americans*, by that impunity of their murderers, were taught to defend and revenge themſelves. I beg you to recollect what happened in *London* only three or four years ago. A foreigner ſtabbed a coachman in *Palace-Yard*, *Weſtminſter*. The poor man in the agonies of death called out for a knife, that he might do himſelf juſtice (the fact is notorious; I believe it came out upon the trial) that he might do himſelf juſtice; as, he ſaid, he knew that his murderer would be pardoned! Gentlemen, he was miſtaken; his murderer was hanged: but it was a very natural thought for him, after the pardons for murder which had then been recently granted. For take away from men a reliance in the protection of the law, and they will wiſely, and juſtly, and properly, do juſtice for themſelves. The juſtice of this principle is acknowledged every where; in all countries. There is a ſignal inſtance of it. Even a *French* deſpot found it; and when the king of *France* pardoned one of his own blood for a murder which he had committed, he publickly bade him obſerve, that he would likewiſe pardon any one that ſhould murder him. Now, gentlemen, picture to yourſelves the *Americans* of *Lexington* and *Concord* ſleeping quietly in their beds, their wives and their infants by their ſides, rouſed at the dead of night, with an alarm that a numerous body of the king's troops (their numbers, perhaps, augmented by fear and report) were marching towards them by ſurprize in an hoſtile manner—theſe troops who were not to be brought to juſtice by them for any murders which they might commit! What ſhall they do? Shall they attempt to fly, and leave the helpleſs part of their family behind them? Shall they ſtay, and ſubmit themſelves and their families to the licentiouſneſs of theſe ruffians? I ſuppoſe there might be amongſt them (as amongſt us) ſome of both theſe ſorts: but however, for the honour of human nature, there were alſo ſome of another temper. *They* haſtily armed themſelves as well as they could; they collected together as they might; and they ſtaid waiting the event, determined not to attack, but to defend themſelves from lawleſs inſult, or to ſell their lives as dearly as they could. There is nothing ſurely in this that will juſtify the ſlaughter of them which enſued. And you will pleaſe to obſerve the time when this happened; for it is a very ſtriking fact. As ſoon as the act of parliament exempting them from trial for murder in *America*---as ſoon as that act got to *America*, and the weather would permit them, the troops did inſtantly and without delay commit thoſe murders with which I now charge them. That act of parliament was propoſed by the confidential friend of my judge; it was propoſed by lord *George Germaine*; and though the attorney and ſolicitor general, according to cuſtom, were inſtructed to bring in the bill, he propoſed it in the committee. He mentioned the word *ſoldiers—troops*:---but the attorney and ſolicitor general, or the other gentlemen who are in office (for I believe their names are mentioned for form, I do not mean to accuſe them) thoſe who drew up the bill, knew what was the ſecret intention of the propoſer (not the intention of the government), and therefore no ſoldier is to be found in the bill; but it is left at large---thoſe aſſiſting in the execution of the orders of the officers of juſtice; and the *general of the army* was at that time the *civil governor* of the town. Lord *George Germaine*, whom I have ſubpœna'd to appear, and who I underſtand does not mean to attend, was not then, it is true, in office; but he was very ſhortly after made ſecretary of ſtate for the *American* department. You ſee then that ſecretary *Germaine* was more ſubtle and cautious than ſecretary *Stair*. Now, if we would proſecute thoſe murderers, how is it to be done? How ſhall we find the ſurviving witneſſes? Having found them, how ſhall we get them to *England*? How ſhall we find the individual murderers? and if found, how ſhall we bring them hither?

Gentlemen, do you not plainly ſee? The act paſſes that they ſhall not be tried for murder in *America*.---The murders immediately follow.--- They cannot be tried by the *Americans*;---and (if the doctrine now attempted by this proſecution is eſtabliſhed by you) our miſerable fellow-ſubjects in *America* ſhall not have even the poor conſolation of being even pitied here. The murderers ſhall not be tried *there*: they ſhall not be charged *here*. But, gentlemen, I ſhall be told (as I have been) that the *Americans* were rebels. I anſwer, that it has not been proved. Times of diſcontent and ſuſpicion are not times of rebellion: ſuſpicion may be groundleſs, as well as diſcontent.

But, gentlemen, you will be told that it was no murder, becauſe there was a neceſſity for it.---Lord *Stair* ſaid the ſame for *Glenco*.--- Well, gentlemen, if upon the trial of the murderers it ſhould ſo appear, that would ſave them from a verdict of murder. But till that neceſſity appears, and is proved, every man is juſtified in calling it a murder. Neceſſity ſhall ſave the accuſed from a ſentence of death; but it ſhall not turn the accuſation into a libel, becauſe it had a reaſonable foundation. Men were killed without the ſanction of the law. However, I have never yet heard any neceſſity, any real neceſſity ſhewn for this ſlaughter; and I take it that my evidence will be ſufficient to make it appear that it was a voluntary act, not unexpected or waited for, but ſought for by the troops. Indeed, the attorney-general has excluded any ſuch notion; for he has called it a victory!---Neceſſary ſelf-defence (and no further than that reaches is any man juſtified in putting men to death) neceſſary ſelf-defence has, I believe, never yet been called a *victory*. The utmoſt which that could ever be called, would be a lucky or a happy eſcape. But neceſſity did never yet excuſe him who attacks; it will only excuſe in ſelf-defence. The law tells you, you muſt go back to the wall. If you go and attack, and ſo invite what follows, neceſſity will not afterwards acquit you. But, gentlemen, let it be neceſſity. If it is neceſſity, I am ſure, I am ſtill juſtified in calling it murder by the greateſt and (upon this occaſion) the *beſt* authority for me in this country. For if, when at a critical moment, to ſave this nation from an univerſal famine, it was neceſſary for the miniſters of ſtate to act contrary to law---if all men with one conſenting voice approved this ſalutary meaſure to ſave the lives of men, and both houſes of parliament returned his majeſty their thanks for concurring with it---I ſay, if, notwithſtanding this, it was neceſſary, in order to heal the wound which the conſtitution was ſuppoſed to have received (by the ſubjects lives being thus *ſaved* contrary to law) if it was neceſſary to have an act of parliament to indemnify thoſe innocently-guilty miniſters of ſtate, thoſe meritorious offenders; what, ſhall it not be equally neceſſary to have an act of parliament to indemnify thoſe who have put our fellow-ſubjects *to death* contrary to law! I know indeed there was a very ſevere judge once, who did go ſo far in the inſolence of his delegated authority, as to affirm that,

——— ——— ——— ‘ ’Twere all as good,
‘ To pardon him that hath from nature ſtol’n
‘ A man already made, as to remit
‘ Their ſawcy lewdneſs that do coin heav’n’s image
‘ In ſtamps that are forbid.---’Tis all as juſt
‘ Falſely to take away a life true made,
‘ As to put mettle to reſtrained means
‘ To make a falſe one.’———

But the doctrine now held out to us goes as much farther; as revenge and tyranny are more odious, more pernicious, and more deteſtable than luſt. Luſt, for its purpoſe, argued only that it was an *equal* crime to give life contrary to law, as to take away life contrary to law. But revenge and deſpotiſm only make it a crime to preſerve lives (which is a better kind of giving life than generation) contrary to law;---and deny it to be any crime to take away lives contrary to law, unleſs it be alſo at the ſame time contrary to the inclination of the tyrant.---Admit then, gentlemen, if you pleaſe, admit the motive for killing thoſe our fellow-ſubjects at *Lexington* and *Concord* to be as *neceſſary* as you pleaſe: go farther, admit it to be uſeful, admit it to be highly meritorious:---yet I hope the warmeſt admirer of ſuch kind of executions, the moſt thirſty after *American* blood and confiſcation, I hope he will not inſult our underſtandings by contending that it could be *more* meritorious, that it could be *more* uſeful, that it could be *more* neceſſary to *kill* men in ſupport of the meaſures of ſome particular miniſters, than to ſave this whole country from famine. Our law, gentlemen, has not called ſuch an action as that illegal *embargo on corn* by any *ſpecific* name, as it has called the illegal putting of men to death by the name of *murder*. Suppoſe then (what indeed was freely done) that any one, for want of a *ſpecific* name, had called that neceſſary embargo on corn, an *illegal* action: as when we ſay *murder*, we mean *illegal* ſlaying. Now then, I aſk (and I hope the attorney-general will tell us), would it have been a ſeditious libel againſt the king and the government to have called that meaſure *illegal* (for want of a ſpecific name) which the *real* government itſelf, the legiſlature, by the indemnifying act declared to be illegal? Whether the attorney-general may pretend this or not, I cannot tell: but I am ſure my judge muſt direct you otherwiſe.---He CANNOT for ſhame pretend, becauſe he forced an act of indemnity upon theſe men, who themſelves thought the act a ſufficient juſtification of itſelf; he *forced* them to be pardoned, to be indemnified by an act of parliament; and therefore I am ſure that he *cannot* pretend that *utility* and *neceſſity* ſhall juſtify the *deaths* of men, when he would not permit *utility* and *neceſſity* to be ſufficient, without an act of indemnity, to juſtify thoſe who had illegally ſaved this whole country from famine.

But, gentlemen, I am aſhamed to have ſaid ſo much upon a point ſo clear. It is not becauſe I am tired; or becauſe I am failing in many more arguments equally ſtrong. But I diſdain to take up more of your time, or to ſay a word more upon this ſubject. I will leave it juſt where it is. I leave it to the reply of the attorney-general, and the direction of the judge.

Mr. *Horne* having concluded, the attorney-general began to addreſs the jury by way of reply; upon which Mr. *Horne* roſe, and ſpoke to lord *Mansfield* as follows:

Mr. *Horne*. My lord, I don’t mean to interrupt the attorney-general: but, my lord, my haſte, and the ſhame I feel for having made any defence to ſuch a kind of charge, made me forget to examine my witneſſes. The attorney-general has not proceeded far in his reply, and I hope I ſhall be at liberty to call them now.

Mr. *Attorney-General*. You will not examine witneſſes to juſtify a libel?---My lord, I object to his calling witneſſes, except he had opened to what points he meant to call them.

Lord *Mansfield*. You had better not object, Mr. Attorney-General; you had better hear his witneſſes.

Mr. *Horne*. My lord, if Mr. Attorney-General make an objection, I will endeavour to obviate his objection.

Lord *Mansfield*. Call your witneſſes.

Mr. *Horne*. I call the attorney-general.

Lord *Mansfield*. Oh! you can’t examine the attorney-general.

Mr. *Horne*. Does your lordſhip deliver that as the law?---My lord, I call the attorney-general, and deſire that the book may be given to him.

Lord *Mansfield*. You muſt ſtate then what queſtions you mean to aſk him; for he has a right to demur to the queſtions, and take the opinion of the court.

Mr. *Horne*. If I do that, it will be more than he was directed by your lordſhip to do with any of the witneſſes he examined.

Lord *Mansfield*. They were called of common courſe; the attorney-general may demur to it.

Mr. *Horne*. If I aſk him an improper queſtion, he may then object to it, if he can.

Lord *Mansfield*. If you call the attorney-general in any cauſe, if you don’t ſtate the queſtion, he may demur.

Mr. *Horne*. Can he before he is ſworn?

Lord *Mansfield*. He may demur to being examined at all.

Mr. *Horne*. Yes, and I dare ſay he will.

Lord *Mansfield*. You might as well call a common attorney or an advocate employed againſt you in a cauſe.

Mr. *Horne*. But this, my lord, differs widely. In what I ſhall call Mr. Attorney-General to, he acts neither as attorney nor as advocate.

Lord *Mansfield*. State the queſtion.

Mr. *Horne*. My lord, I have many queſtions to aſk him. He has paraded upon his honour, his conſcience, and his duty. He is not acting as an attorney or an advocate in the cauſe. When he files an information, he is then acting as a judge or a jury; and if he has not acted in it with that integrity with which he would have done upon oath, ſo much the worſe for him. One chief reaſon why I deſire to examine him is, to obtain this: that I may point out a means by which an accuſation in future ſhall not be brought againſt a man without an oath, at leaſt from ſomebody. My lord, one queſtion I mean to aſk him is concerning that accuſation which he has now brought: how it came to be brought? how it came to be dropped? and ſome other circumſtances attending it. He has talked ſo much of the fairneſs, and the conſcience, and the integrity of his motives in doing it, that I am ſure it will look very comical if he refuſes to ſwear to thoſe declarations. If he will not ſwear to theſe motives, without his oath I cannot believe it: and if, contrary to my expectations, he does ſwear to it, after his oath I ſhall be left to exerciſe my own judgment.

Mr. *Attorney-General*. To any matter ſo impertinent as that! If that gentleman had had any queſtion of fact to have aſked me relative to his defence, I would not have objected to have ſworn to it; although I ſtand in the place of proſecutor in this cauſe, where in point of form I might: but I put myſelf upon this, that I will not be examined to queſtions ſo impertinent as thoſe that have been now propoſed.

Mr. *Horne*. My lord, the gentlemen of the jury will pleaſe to obſerve then, that here is an accuſation without an accuſer. Your lordſhip ſmiles! Upon my word, my lord, I do not think it a thing to be laughed at. If I had the honour to be talking with your lordſhip over a table, I ſhould ſpeak of it with the ſame ſeriouſneſs, and not as a quibble. I hope the gentleman will upon oath juſtify that information, for the integrity of which he has been haranguing.——He will not!—Well, then I muſt do without the evidence of the attorney-general.

Lord *Mansfield*. I cannot force him to be examined.

Mr. *Horne*. No, my lord, nor do I believe any body elſe could.——Pleaſe to call lord *George Germaine*.

[*Lord* George Germaine *was called by the cryer, but did not appear.*]

Mr. *Horne*. He is gone to *Germany* too, I ſuppoſe, with general *Gage*.

Mr. Alderman OLIVER *ſworn.*

Examined by Mr. Horne.

Mr. *Horne*. My lord, I call this witneſs to prove the *truth* of the aſſertions contained in the advertiſement.

Q. Sir, I muſt deſire you firſt to ſpeak to the particulars of a meeting called, during an adjournment of the *Conſtitutional Society*, in the year 1775. Was there a meeting called by you in *June* 1775?

A. I believe there was; upon your application.

Q. Are you ſure of it?---*A.* I am.

Q. Did you know the purpoſe for which it was called before it met?

A. Yes; I did.

Q. Did you approve of that purpoſe?---*A.* I did.

Q. Was a propoſal made to ſubſcribe any money, and for the purpoſes mentioned?

A. Yes, it was; and by you.

Q. A ſum of money was ſubſcribed?---*A.* There was.

Q. Did you contribute part of it?

A. I did.

Q. Was ſuch a direction, as in the advertiſement, given to me?

A. There was.

Q. There is another advertiſement of 50*l.*---I believe I need not read it; it is well underſtood. Did I receive that 50*l.* from you in the name of an unknown contributor?

A. Through me.

Q. Was that 50*l.* given for the purpoſes mentioned?

A. It was.

Q. By whom?

A. Sir *Stephen Theodore Janſſen.* I was alſo a ſubſcriber to the ſame purpoſe.

Q. I mentioned in the courſe of my defence what may otherwiſe perhaps be repreſented as not true: Did I ſend by you, upon a relation from you of a motion made for an act of parliament to take away the right of appeal from the ſubjects in caſes of murder, did I, or not, ſend that meſſage which you heard me repreſent in my defence?

A. You ſent a meſſage by me; and I dare ſay, from your accuracy of memory and your truth, you did deliver a meſſage from the attorney-general. Whether I thought that it would be of the ſame effect,---I did mention to Mr. *Roſe Fuller* the determination of Mr. *Horne* to go all lengths in oppoſition to that act which was to deſtroy the right of appeal in caſes of murder; and I do believe in my conſcience his application prevented any further ſteps being taken upon it.

Q. The fact, as I repreſented it, the witneſs ſays is true.

A. Certainly ſo.

William Lacey *ſworn.*

Examined by Mr. Horne.

[*A receipt for* 100*l. ſhewn to the witneſs.*]

Q. Is that your hand-writing?---*A.* It is.

Q. Do you recollect that 100*l.* for which that is your receipt, being paid in at your houſe?---*A.* I do.

Q. In the name of Dr. *Franklin?*

A. On his account.

Q. Do you know by whom that was paid?

A. I have it in my book in the name of Mr. *Horne.*

Q. Do you recollect me to have paid it myſelf?

A. I do not: but it was paid.

Q. Do you know of any other ſum paid?

A. No: I have got a copy as it ſtands in my book here.

Q. Is there any thing beſides the 100*l.* put in?---*A.* No.

Q. No 50*l.*---*A.* No.

Q. Where is Mr. *Chetham?*

A. He is in *Ireland.*

Q. He is a clerk in your houſe?---*A.* He was.

Q. And uſed to receive money occaſionally?---*A.* Yes.

Q. Do you know his hand-writing?

A. I believe I ſhould.

Q. Look at that receipt.

[*A receipt for* 50*l. was ſhewn to the witneſs.*]

A. I believe that to be his writing.

Mr. *Horne.* Call Mr. *Gould.*

Mr. Edward Thoroton Gould *ſworn.*

Examined by Mr. Horne.

Q. Did you in the year 1775 ſerve in a regiment of foot belonging to his majeſty?---*A.* I did.

Q. Was you preſent at *Lexington* and *Concord* on the 19th of *April* 1775?

A. I was.

Q. How came you to be there?

A. As a ſubaltern officer, ordered there.

Q. Ordered by whom?

A. General *Gage.*

Q. At what time did you receive thoſe orders?

A. I don't recollect immediately the time.

Q. Was it on the 19th, 18th, or 17th of *April?*

A. I believe it was on the 18th in the evening.

Q. Did you receive them perſonally from general *Gage?*

A. No ſuch thing.

Q. Whom then?

A. From the adjutant of the regiment.

Q. When did you ſet out from *Boſton* for *Lexington?*

A. I cannot exactly ſay the time in the morning, but it was very early, two or three o'clock.

Q. That is in the night in *April*, was it dark?---*A.* It was.

Q. Did you march with drums beating?

A. No, we did not.

Q. Did you march as ſilently as you could?

A. There were not any particular orders given for ſilence.

Q. Was it obſerved?

A. Nor it was not obſerved, not particularly by me.

Q. Were you taken priſoner at *Lexington* or *Concord*, or either of them?

A. At the place called *Monottama*, in my return from *Lexington.*

Q. I ſhall aſk you no queſtions that you diſlike; give me a hint if there is any one you wiſh to decline---Did you make any affidavit?

A. Yes, I did.

Q. Will you pleaſe to read that?

[*Giving the witneſs the* Public Advertiſer, May 31, 1775.]

A. I believe that to be the exact ſubſtance of the affidavit that I made.

Lord *Mansfield.* It cannot be read without the attorney-general conſents to it.

Mr. *Attorney-General.* I don't conſent.

Lord *Mansfield.* If he conſents to it, I have no objection.

Mr. *Horne.* May I give it to the jury?

Lord *Mansfield.* No; I ſuppoſe they have all read it years ago.

Mr. *Horne.* My lord, that is my misfortune that it is ſo long ago.

[*Mr.* Horne *begins to read it.*]

Lord *Mansfield.* You muſt not read it.

Mr. *Horne.* I have proved the publication by the printer.

Lord *Mansfield.* It will have a different conſequence, if you only mean to prove that there was ſuch an affidavit publiſhed. If you mean to make that uſe of it, then you may produce the affidavit, or have it read.---If you mean to prove the contents of it, they muſt come from the witneſs, and then you will have a right to have it read.

Mr. *Horne.* I mean both to prove the contents true, and the publication of the affidavit: that indeed, I have already proved.

Lord *Mansfield.* Then you may read the affidavit, if you make uſe of the publication of it.

Mr. *Horne.* I make uſe of both; that it was ſo publiſhed, and charged, and that it is true.

'The *Public Advertiſer, Wedneſday May* 31ſt, 1775.'

[*The affidavit read.*]

Q. Are the contents of that affidavit true?

A. They are; it was made at the time I was wounded and taken priſoner.

Q. Pray, do you know that the *Americans* upon that occaſion ſcalped any of our troops?

A. I heard they did; but I did not ſee them.

Q. You ſaw none?

A. I did not.

Q. From whom did you hear it?

A. From a captain that advanced up the country.

Q. Was you, at the time when the orders were given to you to go to *Lexington* and *Concord*, apprehenſive of any attack by thoſe *Americans* againſt whom you went?

A. We were as ſoon as we ſaw them; we found them armed.

Q. Before you went from *Boſton?*

A. That day we did.

Q. How many miles is *Lexington* or *Concord* from *Boſton?*

A. The farther is about 25 miles, the nearer is about 12.

Q. Did you know, had you any intelligence that the *Americans* of *Lexington* and *Concord* were, at that time, marching, or intending to march to attack you at *Boſton?*

A. We ſuppoſed that they were marching to attack us, from a continued firing of alarm guns, cannon, or they appeared to be ſuch from the report.

Lord *Mansfield.* Did you ſay cannon?

A. Cannon.

Lord *Mansfield.* When was that?

A. As ſoon as we began the march, very early in the morning.

Mr. *Horne.* But did you hear thoſe alarm guns before your orders for the march were given, or before your march began?

A. No.

Q. But after you had begun your march?

A. Yes; after we began our march the alarm guns began firing.

Q. Did you ſuppoſe thoſe alarm guns to be in conſequence of your having begun the march?

A. I cannot ſay.

Q. I will not deſire you to ſuppoſe (though the gentleman has ſuppoſed that they were coming to attack him) but do you know of any intelligence whether the perſons who fired the alarm guns, whether thoſe were the perſons who were killed at *Lexington* and *Concord?*

A. No; I do not.

Mr. *Horne.* How thoſe orders came you cannot tell, therefore I do not mean to examine to it.

One of Jury. Pray who did the alarm guns belong to; to the *Americans* or our corps?

A. From the provincials.

Mr. *Horne.* What do you mean by an alarm gun?---Alarm may be miſunderſtood.

A. That is, what they term in the country an alarm gun; it is a notice given to aſſemble the country.

Q. After you had begun your march, you heard theſe alarm guns?

A. Yes.

Mr. *Horne.* My lord *Percy*, I thank your lordſhip for your attendance. I will not trouble your lordſhip with any queſtions. I ſhall not aſk your lordſhip thoſe queſtions I intended, ſince general *Gage* has not thought proper to attend: he is gone to *Germany* I underſtand, and will not be back, I ſuppoſe, theſe---three or four days!

Lord *Mansfield.* Then you have done?

Mr. *Horne.* Yes.

(REPLY.)

Mr. Attorney-General.

May it pleaſe your lordſhip, and gentlemen of the jury,

The gentleman has choſen to take the conduct of his defence himſelf; and in the courſe of the conduct of it, he has proceeded in as ſingular a way as I believe ever any cauſe was conducted that was ever tried in any court of juſtice. He certainly has done more than the wiſdom, than the propriety, than the decency of any counſel would have permitted him to do on a ſimilar occaſion; and if I conjecture his aim aright, from the manner in which he has attempted the defence, he has more caſt about to be ſtopped in a great variety of parts, for the ſake of making it a topic of complaint, than ſeriouſly ſtated them, as hoping they could be deemed by any by-ſtander (and more particularly by you that are to judge of them) at all pertinent to his defence. I did not recollect on the outſet that I had ſo totally paſſed over the terms of this charge, much leſs that I had ſo profuſely enlarged upon ſubjects foreign and impertinent to that charge, as to lay me open to any reflections upon that account. It is not to my purpoſe, and therefore I will trouble you with no reflections upon thoſe various ſtories (hiſtories of various adventures in many parts of the world) with which he has thought proper to interlard the ſpeech he has made to you upon this ſubject; which, before I ſit down, I hope I ſhall be perfectly juſtified in having ſtated to you as one of the plaineſt, and cleareſt, and ſhorteſt propoſitions that ever was laid before a jury. Gentlemen, it is certainly true, the charge in the information conſiſts in this, that he did write and publiſh, and cauſe and procure to be written and publiſhed, a certain falſe, wicked, malicious, ſcandalous, and ſeditious libel. I was afraid, when my ſpeech was loaded with the imputation of having thrown out invectives in the terms of the information, that the information had not been ſufficiently explicit upon the true nature and quality of the libel which it offered to bring before you. I admit that the information is explicit, that it is direct, and that it perfectly and juſtly qualifies the nature of the charge that is brought before you of ſcandalous and ſeditious. It is likewiſe inferred that this is concerning his majeſty's government; and the employment of his troops; the information has therefore undertaken to ſay, that the ſcurrilous matter which follows was delivered in writing, concerning the king's government, and concerning the employment of the troops. If it was delivered concerning either, it is ſufficient: that it was delivered concerning both, I take now (by this time at leaſt) to be perfectly clear.

Then the matter of the libel is this: that at the *Conſtitutional Society* it was propoſed a ſubſcription ſhould be immediately entered into for raiſing the ſum of a hundred pounds, to be applied in the manner in which it proceeds to ſpecify afterwards. And the gentleman has been at the trouble to prove, that that was not merely a conceit and device of his, in order to introduce the charge that follows; but that the charge which follows was (in point of fact) introduced upon the previous act; which, according to my poor conception of the thing, does not deſerve ſofter epithets than that which followed. It is no alleviation at leaſt of the libel that he has publiſhed upon the government, that it took ſuch a commencement as it did, and proceeded in ſuch conduct as has been imputed. I thought it a candour, an article of fairneſs to names mentioned or even alluded to in the moſt diſtant way, to ſuppoſe that it had not been exactly in the way he thought fit to ſtate it. But whether it were or were not, in what view has he even ſaid to you, that that circumſtance, true or falſe, goes an inch towards qualifying the virulence and indecency of the libel that immediately follows it? The next words that he puts in are---'to be applied to the relief of the widows, orphans, and aged parents 'of our beloved *American* fellow-ſubjects, who, faithful to the character 'of *Engliſhmen*, preferring death to ſlavery, were, for that reaſon only, 'inhumanly murdered by the king's troops at or near *Lexington* and '*Concord*, in the province of the *Maſſachuſets*.' Let us a little ſee, what is the nature of the obſervations he makes upon it. In the firſt place, that I left it exceedingly ſhort. And the objection to my having left it ſhort was ſimply this: that I had ſtated no more to you but this, that of imputing to the conduct of the king's troops the crime of murder. Now I ſtated it, as imputing it to the troops *ordered*, as they were, upon the *public ſervice.* And imputing to that ſervice the crime and the qualification of murder, was an expreſſion ſcandalous and ſeditious in itſelf; reflecting highly upon thoſe troops; reflecting highly upon the conduct of them; and reflecting upon them to all the purpoſes and concluſions which this information ſtates. But, it ſeems, I did not argue it ſufficiently! I confeſs very fairly, that to argue ſuch propoſitions as thoſe (according to that gentleman's notion of arguing them ſufficiently) is far beyond all the compaſs of all the talents and abilities that I have in the world. I cannot ſpeak four hours in order to demonſtrate to you, that taxing people with the crime of murder, and taxing the conduct of people with that imputation, is a ſcandal upon the parties ſo reflected on. If there be a man of more diffuſive talents, of better talents at ſpeaking, who can expend four or five hours by enlarging upon that propoſition in that manner, I do not envy him his talents; for my lungs would not be ſufficient, if my talents were. I truſted that I had ſufficiently demonſtrated that poſition.

Now, on the other ſide, what is the kind of anſwer that is made to this? In the firſt place, he is to prove that it was murder! Aſſerting that it was murder over and over again in the ſpeech, is the palliation, and is the defence of this! But he is to prove that it was murder! I confeſs very fairly, that this is the firſt hour in which it ever entered into my imagination, that that ſpecies of proof could be allowed to a defendant! I am not at all ſorry that it has been allowed: for the conſequence has been to refute more than half the ſpeech, and more than half the application of it; therefore I am not ſorry that it has been allowed. But I will never, ſo long as I live, accede to this as a propoſition of law, that a man ſhall be at liberty in a libel to charge you with the crime of murder, and when he is indicted for that libel (or otherwiſe brought into judgment for it by information), that it ſhould be competent for him to put you to try, whether you have been guilty of murder or no. I did ſay, what common ſenſe dictates, what the law of every civilized ſtate under heaven preſcribes (and there is not a maxim of law to be fetched from any country or age that contradicts that), that the man that calumniates, and does not accuſe, deſerves to be puniſhed with exemplary ſeverity. He told you a long ſtory of murders ſuppoſed to have been committed in St. *George*'s *Fields*, where he took to himſelf the merit of having proſecuted that murder. As far as that part of the ſtory goes, I don't quarrel with him. If he, ſeeing a tranſaction which he took to be murder, thought himſelf bound to proſecute that tranſaction, honeſtly, candidly, and with humanity and fairneſs to the priſoner, as well as to the friends of the deceaſed; if he did that, I do not quarrel with him: but whoever, in the moment of proſecuting that murder, publiſhed in the news-paper (either by advertiſement or otherwiſe) matter that was likely to cauſe an impreſſion upon the minds of the people at large, or upon the minds of the jury, before they heard that proſecution tried, did a moſt abandoned and a moſt wicked thing. Is that the way that people are to be tried for their lives? Are they to be brought before a jury in a regular courſe of trial, to be heard for themſelves upon the evidence then laid before them? and is the integrity of a libeller to interpoſe, by writing down their reputation; and by endeavouring to inſtil into people, where they cannot be heard, where they have no opportunity to contradict, and where witneſſes cannot be examined either on one ſide or the other, an impreſſion that they are guilty, without the form, without the eſſence of trial? If therefore there was ſuch an advertiſement as that publiſhed, that advertiſement I hold to be a moſt wicked one. Proſecuting men that are thought to be guilty, is a fair and an honeſt action. In this caſe, what is the excuſe here? That they cannot be proſecuted. Suppoſing the accident of the diſtance from that ſide of the water and other accidents ſhould ſo far intervene as to prevent the poſſibility of trying thoſe men, even if they had been guilty of murder, would it follow as a concluſion upon that, that they ſhall be libelled? and that it ſhall be in the power of any man alive to raiſe impreſſions behind their backs, by publiſhing in the news-paper imputations to their diſadvantage, which they cannot contradict or refute? calumniating them, accuſing them of murder? The time would undoubtedly come in which they would be to be tried for it, if guilty: and to be tried for it under that ſort of impreſſion! I am amazed that any man of common ſenſe could (even in his own caſe) imagine, that it would be tolerable doctrine in the ears of people that have lived for years in a civilized country, that that was the true way of proſecuting upon the ſubject of murder! He told you a ſtory of *Glenco*, which, if I underſtand him right, went directly the reverſe. They were to be *tried*. Unleſs he means to compare the authority of the *Morning* or *London Evening Poſt* to the councils of the whole nation! if he means to make that compariſon (which he did not make, and which is too abſurd for me to do for him); making that, a degree of idle analogy would ſeem to ariſe; but without that, abſolutely none.

Now with reſpect to the reſt, he has offered by evidence alſo to eſtabliſh, that this muſt neceſſarily be a murder; and the fate of thoſe people, it ſeems, is to be tried by the effect of that evidence! And what does that evidence amount to? Why, that the king's troops, under the command of general *Gage*, were in an hoſtile country; and that it was impoſſible for them to go upon any ſervice (ordered by that general and conducted by his officers) without an attack: that the moment they went out of *Boſton* alarm guns were diſcharged, in order to raiſe the power that poſſeſſed the country on the other ſide upon them, and to make the attack upon them. And this is the medium by which it is to be proved, that the ſoldiers who were ordered by their commander to advance from their poſt at *Boſton* into that country, were guilty of murder; becauſe they were ſurrounded upon the 18th and 19th of *April*, in conſequence of thoſe alarm guns, with an armed force on the other ſide, in order to withſtand and oppoſe their operations, they being at that time in an hoſtile country! Why, if I had meant, if I had thought it conſiſtent with law or with reaſon, to enter into a diſcuſſion of that queſtion with him, whether he is a libeller or not, for having charged them with murder by a printed paper, inſtead of charging them in a more direct way; if I had thought it neceſſary to eſtabliſh the caſe againſt him in the ſtrongeſt and moſt preciſe manner, it would have been by calling juſt ſuch a witneſs as that, in order to prove that the troops were themſelves attacked; and that, upon the moment of their going out of the place, they were ſurrounded with hoſtile attack. But neceſſity, it ſeems, neceſſity, according to the notion of law, is that which ſelf defence preſcribes, that a man muſt go to the wall who is attacked. He muſt fly firſt; and if he can eſcape by flight, then he ſhall not juſtify himſelf by turning and repelling the attack! What ſort of underſtandings does he imagine the audience to be compoſed of, when he repreſents an expedition and attack of this ſort in that manner? That the king's troops, when they heard the alarm guns and were attacked, were to fly, to get to the wall, and drop their arms! This is the notion of military diſpoſition in an hoſtile country! And this is the law that the learned gentleman has learned from the *State Trials*, the ſource of his reading! and which he has ſet forth with a dexterity, and a ſpecies of underſtanding, and a ſort of eloquence, which is peculiar to him. And I muſt ſay now, it is more than I ever heard before. If I had the honour of a converſation with him nine years ago, I had forgot it. I did not take notice of the converſation perhaps enough to retain it. I had ſtill leſs an idea that his abilities were ſo conſpicuous. But this ſpecies of eloquence I take to be peculiar to himſelf; as it could not have been delivered by a counſel: it would have been abſolutely impoſſible by a counſel uſed to practice; it would have been impoſſible to a counſel, uſed to feel the weight of his arguments, uſed to feel the ridicule of applying ſuch kind of arguments as theſe, and deterred by that means from doing it. No counſel would have thought himſelf warranted to do this. He would not have had conceit enough to think his own underſtanding ſo ſuperior to all that heard him, as to ſuppoſe he could paſs ſuch a propoſition upon his auditory, that the conduct of an army, in an hoſtile country, was to be like the caſe of a man indicted for murder to fly to the wall, for fear they ſhould do ſome miſchief! This is the ſort of defence he has thought fit to make upon this ſubject; and it gives me a ground for ſaying, that, if I was ſhort in applying the charges of the information as I ſhould have done, it is now compleatly applied.

All that part of the defence which went perfectly wide and foreign to all practical application to the caſe, I will now entirely drop. At the ſame time I cannot do it without making this obſervation; that, whatever be the degree of veracity claimed by and due to that gentleman, in the particular words that he thinks proper to impute to the various people whoſe words he has thought fit to quote; as far as my memory goes of the tranſactions which I do remember; as far as conjecture goes with regard to thoſe I have not a perfect memory of; I believe, that this failing at leaſt belongs to his repreſentation of them: that taking, as he has done, particular paſſages, for the ſake of remembering them to the diſadvantage of the ſpeaker, he has ſtripped them of their context. He has therefore made it impoſſible to recollect the whole, in order to ſee whether they would, or not, turn out ſuch nonſenſe as he has imputed to thoſe ſeveral ſpeakers. It may be true, for aught I can tell; though if any body had aſked me, whether I ever ſpoke upon that ſubject he mentions in the houſe of commons, I ſhould have ſaid no, directly; for I believe I did not. I believe Mr. *Oliver* will not ſay, that he brought any ſuch idle meſſage as that to me. I ſhould have treated it with ridicule. I have no objection to converſe with Mr. *Oliver* upon any ſubject he thinks proper. He does me honour by it. But if he had brought me ſuch a meſſage from a perſon in Mr. *Horne's* ſituation, reſpecting my conduct in parliament, a little laughing at the meſſage he muſt have excuſed. But he does not ſay he brought me ſuch a meſſage. I don't know that I bore any part in that debate. But he ſays, he took down ſome words; and that I ſaid, it was a *Gothic* cuſtom. --If I got up to make a ſpeech upon a propoſition of law of that magnitude and extent, of ſuch a variety of reading that that propoſition was open to, and contented myſelf with ſitting down, and ſaying, it was a *Gothic* cuſtom; I ſhould not have had any pretenſions to the ear of that houſe. If I made any diſcourſe about it; which I ſuppoſe I did, as he ſays I did; I ſuppoſe it is as idle, as fooliſh a kind of ſpeech as it is poſſible for any man to make. I ſhould not wonder if I was refuſed all audience there in all times to come, provided my ſpeeches were juſt thoſe which I have had the---(not misfortune, for I think it very natural) as I have heard to-day. Other people have ſhared exactly the ſame fate. Is it a fair thing, with reſpect to any judge, with reſpect to any court of juſtice? Is it a fair thing to ſtate one fiftieth part of a cauſe depending before them with an obſervation which the other forty-nine parts would never have juſtified upon it? Is it the part of a good citizen, of a man that reverences the laws of his country, of a man that wiſhes any thing but anarchy to riſe in a country? Is it the part of a good citizen to treat courts of juſtice in that manner, with reſpect to caſes cited from their deciſion in the way in which thoſe were cited? I mention them only in the way of obſerving that: for, to be ſure, it was perfectly impertinent to any queſtion depending before you; and unleſs it had been equally ſo with reſpect to the caſes themſelves, I ſhould not have given you the trouble of a ſingle word upon that. There was one thing which fell, which gave me ſome little aſtoniſhment to hear, and which I remember well. I don't take notes, but I have a pretty general remembrance of things delivered by me. I take myſelf to have ſtated to you in the outſet the very ſame doctrine of intention. Why, who doubts but that the intention conſtitutes the criminality of every charge of every denomination and kind? But the extreme ridicule of the thing is, the talking of that doctrine upon an occaſion like this! See what it is. The words are, that the *American* ſubjects for meritorious conſiderations upon their part, and for thoſe conſiderations only, were inhumanly murdered at *Lexington* and *Concord*, in the province of *Maſſachuſets Bay.* Nobody can doubt in the world, but that imputing inhuman murder to the conduct of thoſe troops, is abuſe! I ſuppoſe he did not mean it as flattery, to extol them, to deliver them down to poſterity (if ſuch paragraphs as theſe had any chance of reaching down to poſterity) to deliver them down to poſterity in terms of heroiſm! He meant to abuſe them: the words themſelves are abuſe. Then, I ſay, where words of direct, unqualified, indubitable abuſe are printed concerning any man alive; that the very circumſtance of printing calumny concerning a man, carries along with it an intention to abuſe him. Why it is nonſenſe to doubt it. One may ſpin words till one loſes the meaning of a ſentence, and the firſt words that are uſed in that ſentence; but it is nonſenſe to deny when you uſe direct abuſe;---when you revile them in the very attempt to juſtify the charge;---and again uſe terms of abuſe;---that thoſe terms of abuſe don't prove intention of abuſe: *primâ facie*, at leaſt, they will. If a man is called a raſcal, has he any doubt whether the man that called him ſo means to abuſe him or not? Why that is playing with words in a moſt ridiculous manner. And theſe are the kind of words that are now called in queſtion; and a jury are told, that where a libeller calumniates another with the imputation of a capital crime, that calumny carries along with it a proof of his intention to calumniate. That is the dreadful propoſition which is to prove an intention to overturn all the liberties of this country! I wiſh thoſe who talk about their liberties, would be pleaſed a little to have a ſmall regard for the liberties of others. The man that robs upon the highway, while he is unapprehended, is the freeſt of all human creatures: but the men whom he attacks, whom he plunders, whom he terrifies, theſe are not free as long as they are under his dominion and power.---The man that daſhes libels about him upon every one he is pleaſed to call his enemy, is the freeſt of all agents; but thoſe that he inflicts deep injury upon, are they free? And is it talking with common ſenſe to ſay it means the liberty of doing wrong? of attacking perſonal property, reputation, or what I pleaſe, without being controuled? Is that what you call freedom? It is a definition of freedom that I never expected to hear; and which can, I am ſure, do no good to any cauſe upon the ſide of which it is advanced, before any one gentleman of common ſenſe! That I call no freedom.

With regard to the reſt, what can one argue it more? Why, yes, it ſeems one may; becauſe if you will ſcan the conſtruction of theſe words well, they will not amount to a libel.---Not amount to a libel! it ſeemed to me a very hardy propoſition when it was firſt of all ſtated, that calling a number of men murderers was not a libel. No, ſays he, It is not a libel.---Obſerve, I called it under-writ, it is writ beyond common ſenſe, inſtead of below it, which was the firſt apprehenſion I had of the thing. For, he ſays, *non conſtat* that there were any perſons of that deſcription! *non conſtat* that there were any widows, orphans, or parents! —*non conſtat* that were any beloved *American* fellow-ſubjects---and I believe more about that laſt than any thing elſe; for I do not believe that our love to our *American* fellow-ſubjects was that ruling principle that governed this publication.---'Who, faithful to the character of *Engliſhmen*,'---(that may be true, for aught I know) 'preferring death to 'ſlavery, were, for that reaſon only, inhumanly murdered by the king's 'troops.'---*Non conſtat* whether there were or were not any king's troops! It happens unluckily in the laſt part of the ſentence, it is aſſerted that there *were*: for the ſentence runs---'who, faithful to the 'character of *Engliſhmen*, preferring death to ſlavery, WERE, for that reaſon only, inhumanly murdered by the king's troops:' ſo that if aſſertion was neceſſary, there is an aſſertion for you. But, however, how can any body trifle ſo much with his own underſtanding, or with the underſtandings of others, as to ſuppoſe that, if it had been without an aſſertion, ſuppoſe it had beeh a queſtion,---why did the king's troops murder our *American* fellow-ſubjects?---why would not that convey a libel juſt as much? Is there any neceſſary forms of words that compoſe a libel? I think it fair to ſay, that that was given up. It was uſed more to ſhew the ſkill of the adverſary than to the merits of the queſtion.

But, it ſeems, that a ſoldier may commit murder: Aye, to be ſure, ſo may any other man alive. There is no queſtion at all about that; but if any man is ſuppoſed to have committed murder, he ought to be tried. If any man is charged with having committed murder (otherwiſe than in a legal courſe) he is calumniated; he is libelled: and that is all that I have to contend before you. But it is a little doubted, whether this relates to the employment of the king's troops! I muſt admit that that doubt was ſtarted a little before the explanation of one of the witneſſes came: and I ſuppoſe, if that had been in the contemplation of the learned gentleman when he ſpoke, he would not have raiſed that as a matter of doubt; becauſe, as it ſtands now, it ſeems a very plain propoſition (both upon the evidence and the reaſon of the thing) that it was ſo applied, and meant to be ſo applied. Then he informs you, that I have uſed a number of words, and he gave you a liſt of them.---I wondered to find the words that I had uſed in a written ſpeech, brought in ſo many volumes into the court to be uſed again here. But, it ſeems, this is a collection of all the words I ever uſed in my life; and he ſits down in his chamber (the place he is moſt uſed to ſit in) collecting all theſe words, and then comes here with a criticiſm upon them. Now I have not the leaſt inclination to derogate from that learned gentleman's talents as a critic: and if the food of ſuch poor language as mine will ſerve the gentleman to employ himſelf upon, he is quite at liberty to do it upon this or any other occaſion, whenever he thinks proper to employ himſelf quite ſo innocently. The words, in ſubſtance, I will maintain. I really did not believe that the gentleman who had written that paragraph, would have undertaken to defend it juſt in the way in which he has done to-day. I thought that, inſtead of quibbling upon the force of it, that he would have advanced a great deal more boldly to it than he did; at leaſt in the outſet of the ſpeech to-day: and, in the latter part of his ſpeech, he ſo far juſtified what I foretold in my own mind upon the ſubject, that, I think, he has proved to a demonſtration (if that were an eſſential part of the caſe) that his true reaſon for writing that, was to defy the laws of the country; for ſo I ſtated it. I ſtated it that there was no affectation of diſcuſſing any ſubject; that there was no pretence or colour even of reaſoning upon any ſubject; under the maſk of which many others have thought proper to cloak themſelves, when they wiſh to write malignantly. But there was not even an affectation of that; but a blunt way of bolting out ſo much calumny, without qualifying it in any way in the world, or making it appear any thing more than that which I ſtated it to be;—an attempt to defy juſtice.—Either proſecute this, or never proſecute again as long as you live, is the true language of this advertiſement.

What is the reſt of his defence? It conſiſts in abuſing me; the judge; the jury; the *Crown-Office*; the law as it now ſtands; the counſel that appeared for the printers who were convicted of the ſame crime before, becauſe they did not do enough and act to his mind; and the ſolicitor of the Treaſury! That is the nature of the defence made in this cauſe! I have choſen to ſeparate it from the caſe, and yet I believe I ſhall be forgiven if I ſay a few words upon the reſt of the ſubject. The learned gentleman thinks proper to ſtate to you that this is a proſecution of two years old; becauſe the offence was committed on the ninth of *June* 1775, and becauſe you are now trying it in *July* 1777. Now if he could have made any thing of the obſervation, it would have been juſt as handſome to himſelf (it is nothing to me, for I deſpiſe all thoſe things) it would have been as handſome to himſelf, if he had thought proper to ſtate the facts preciſely as they were. This information was filed in *Michaelmas* term 1776; and it was not my fault, but his fault, that it was not brought on to trial in the *Hilary* term following. But ſtill there is between the 9th of *June* 1775 and *Michaelmas* 1776, ſome time, though not two years; a year and ſomething more. Then he complains that I thought proper to file my information againſt the printers firſt, although I might have applied to thoſe printers in order to have obtained evidence againſt him. In the firſt place, I have made it a rule to myſelf not to apply to any printers, in any other way than by charging them for their delinquency, and bringing them before a jury to be tried. That is the application that I make, and always will make to the printer of a libel. In the ſecond place, if I had thought proper to apply, as he calls it, to the printer, I might have had a fictitious converſation put upon me, in order to prove that I had practiſed with them to get Mr. *Horne* delivered up. Now in the third place, it is a matter of perfect indifference to me whether I proſecute the printer or the author. And I will tell you why. My notion with regard to authors are, that moſt of them are generated by printers; at leaſt more authors are produced by printers than printers by authors; and if the preſs was never to go till the good ſenſe of ſome author ſet it to work, it would prevent a great deal of the groaning of the preſs upon publications and ſubjects much too frivolous to be regretted if they were loſt; and I believe authors have grown more from the preſs, than the preſs has grown from authorſhip. If I ſtop the publication of libels, I think I do an eſſential good to the country. I know if they are printed and publiſhed oſtenſibly, where to apply to ſtop them: but I never did, nor ever will ſtop them by applying to the printers. He has explained, by examining the printers themſelves, that no ſuch application was made to them. I cannot ſtate exactly upon memory the time when I commenced *this* proſecution. I ſuppoſe it muſt have been about the time when the others were tried. If ſo, the conſequence is, that the *Michaelmas* term following, in conſequence of that application, was the very firſt time that I could file an information at all. I was told when the printers were tried here, Why do not you reſort to Mr. *Horne*? You are afraid of Mr. *Horne*. To be ſure, there was ſome reaſon. If I had known that I ſhould have been obliged to hear ſo much eloquence! eſpecially to have the trouble of replying to it; it would have been a proſpect I ſhould not have liked. But, I believe, I ſhould have waded through all that proſpect, if I had been ever ſo much apprized of it before. And when Mr. *Horne* was diſcloſed to be the author, I certainly ſhould have proſecuted him. But before he made that diſcloſure, what I ſaid is true; that he defied the laws of his country under the ſcreen of the printers. And he has proved himſelf that he was not to be diſcloſed without a proſecution. He gave no authority to the printers to go to the ſolicitor of the Treaſury, and make a diſcloſure of him: or, if he did, they made no ſuch diſcloſure. And yet this manner of delaying the cauſe is one of the grounds upon which he has thought proper to treat me juſt in the manner in which he did. Now I would beg you a little to recollect how that part of the converſation aroſe, when the learned gentleman ſpoke without book; when he ſpoke at firſt, and had not his words ſo well meaſured as the well-timed labour of his cloſet enables him to meaſure his words upon paper: he certainly took the freedom of charging me of uſing all means, right or wrong, foul or fair, in order to get a conviction.

Well, what is the next article of his harangue? I am reproached for having boaſted of the integrity of my character, becauſe I denied the truth of a falſe and impertinent charge; becauſe it is neither true nor pertinent, that ever I had employed myſelf in the way in which I am ſo repreſented to have employed myſelf. And what is the boaſt upon that? It is a very high one; for I called upon him to name his inſtances. That was my boaſt! and innocence, when it is able to call upon its reviler to name his inſtances, does make a proud and magnificent boaſt. So far I boaſted. Well, when called upon, what are the inſtances? The firſt is, that I proſecute before a ſpecial jury. That in a proſecution which I *(the ſervant of the public)* think proper (for reaſons of public weight and importance) to produce, I wiſh to have men of the firſt character, of the firſt ſituation, men of the higheſt and moſt approved honour, my judges! that is the firſt article in which the opprobrium is to be juſtified of my uſing all means, foul or fair, in order to obtain a conviction! In this he has all the advantage that an accuſer can poſſibly have: I confeſs the whole charge. It is my deſire to have all my actions ſo tried; it is my deſire, and I will, whenever I can, obtain a tribunal of that ſort; which (from the great dexterity and wiſdom of eloquence) is looked upon to be the beſt topic *(before them)* to condemn me for reſorting to! This is another matter he would have been totally deprived of, if he had ſubmitted, as thoſe poor printers did, to be defended by counſel. They would never have thought of abuſing the attorney-general (before a ſpecial jury) only becauſe he thought proper to lay his cauſe before that jury! It is a ſingular way to take thoſe topics which go beyond the ability or practice of any counſel whatever!

Then the next attack is upon the poor maſter of the *Crown-Office*, ſir *James Burrow*. I do not believe that there exiſts in this world a man of more inflexible integrity than ſir *James Burrow*. I never heard him charged in my life with any thing like opprobrium. I know perfectly well that if I were to apply to ſir *James Burrow*, in order to get any particular manner of ſtriking a jury, either in *London* or *Middleſex*, that he would ſet himſelf, for the whole evening after, to contrive how he could beſt croſs the purpoſe of that application. I know he would. I know him very well. I am ſure he is a very honeſt man; and I am ſure I ſhould fare exceedingly ill, if I was to attempt to make any ſuch application. None ſuch is ſuggeſted. But it is ſaid, that the ſolicitor of the Treaſury deſired ſir *James* to take this part; to take two ſpecial jurymen out of every leaf; giving this reaſon for it, becauſe the books might be made up; and that if it was once known to be the practice of ſir *James* to begin in the middle, or the end, or any part, they might be made up by the addreſs of the officer, ſo as to get a particular ſet of men for a jury. I will take it as ſaid by the gentleman: the ſolicitor propoſed that there might be taken two out of every leaf, which would produce the faireſt collection of the jury in the broadeſt manner, and out of the greateſt number and variety of names and people. So far I think nothing unfair in the ſolicitor's application: and I do not know, I proteſt to God, at this very moment, what earthly reaſon ſir *James Burrow* could have to refuſe that, except the one which I ſtrongly ſuſpect him of, namely, that one---that it was deſired by the ſolicitor for the crown:---for if he apprehended that it would give the ſlighteſt ground for ſuſpicion by taking any one article of conduct whatever, he is very nice, I know, and very obſtinate; and I am ſure, nothing would bind him more ſurely to refuſe to take a jury in that, which appears to me to be the moſt impartial way; ſtronger and quicker than an application on the part of the ſolicitor of the Treaſury. That is not all; but the ſheriffs of *London* are abuſed: the jurors are named merchants, who are not ſo! Why, do I make up that book? Is that one of my crimes? The ſheriffs of *London* make it up. When it is returned to the *Crown Office*, the names are taken out of it, in the moſt impartial manner; and the whole ſtate of that, inſtead of loading me or any one concerned with the ſlighteſt calumny, is the fulleſt acquittal that could be had! It does not therefore relate to any one concerned in this proſecution. Then I am wrong in another thing; for under all bad adminiſtrations, there is nothing ſo rife as proſecutions for libels! I ſhould be glad to know in the abſtract (without referring to thoſe documents, ſo many of which the learned gentleman produced himſelf) in the eight years I have had the honour of being attorney-general, how many proſecutions for libels have been brought? I wiſh that was ſtated, in order to ſhew the monſtrous number of proſecutions for libels! They are not ſo many as I could wiſh; for if you compare the proſecutions with the daily publications, that man that looks at thoſe publications, and ſees how rife and rank the ſcandal is upon all orders and denominations of men, upon all branches of the government and the ſtate, as well as private men; whoever ſees that, muſt look at them with a very peculiar eye, if he does not ſee that the encreaſe of the ſcandal is a great deal more than the encreaſe of the proſecution for that ſcandal! and yet this is one of the topics alſo for which I have been abuſed! It is ſaid alſo that I am corrupt in another reſpect, becauſe I condeſcend to conſider myſelf as the ſervant of the whole public, and ſo liable to receive orders from every branch of the legiſlature. The arguments that one hears uſed upon theſe occaſions, they are made only for the moment. I ſhould not be aſtoniſhed if from the ſame quarter I had heard that it was one of the moſt monarchical ſentiments in the world, to inſiſt that there is any public officer who was not under the orders of either houſe of parliament. I always took it to be the aſſuming of thoſe that call themſelves Whigs (for want of a better nickname) what I hold—that in a free ſtate the repreſentatives of the people aſſembled in parliament are a ſovereign member of that ſtate; and that every public officer, great or ſmall, is amenable to them. But how amenable to them? I wiſh that had been a little more ſtated. Amenable to them to do wrong? No man ought to be amenable to the greateſt and the proudeſt body of men whatever to do wrong. I have not been ſo amenable: for in thoſe inſtances in which I have thought it would be wrong to proſecute, I have ſtated it to the houſe; and the houſe has forborne the proſecution upon my repreſentation. That has been the conduct which I have held upon the occaſion; and a conduct which, if I am queſtioned for it (in any place where it would be pertinent), I ſhould be very glad to render an account of that conduct. But, ſays the gentleman (with a ſtrain peculiar to himſelf), will you ſubmit to be ſworn in order to be examined by me?—To what? Yes, ſir; to any one fact which can be alledged in your defence, I will ſubmit to be ſworn to the truth of it. But will you ſubmit to be ſworn in order to undergo impertinent queſtions about the motives and ſteps of your conduct from time to time, ſuch as I ſhall think proper to put to you?

Gentlemen, I put myſelf upon your good ſenſe! I put myſelf (for the queſtion was not meant for you) I put myſelf upon the candour and the good ſenſe of the audience, that I was impertinently treated in the propoſal; and that I ſhould have been ridiculous to have ſubmitted to that propoſal! I ſpoke to ſome perſons about it (whoſe authority I am not permitted to cite to you) who concurred in opinion with me: but I am ſure, and I put it to the mind of every gentleman, whether I did not act right in that matter. To have refuſed him juſtice would have been a hard and improper meaſure; I did not refuſe that. To refuſe to anſwer impertinent queſtions, I did refuſe it; and I appeal to the candour and good ſenſe of this audience that I did right to refuſe it; and it would have been ridiculous to have done otherwiſe.

Theſe are the topics which, as far as I can recollect, have been produced againſt me. With regard to the reſt, the gentleman informs you, that the law as it ſtands is full of a great variety of hardſhips. I don't know that ſyſtem of law under heaven which may not be perverted to purpoſes of hardſhip. I don't know any thing ſo perfectly ridiculous as to argue from the poſſibility of the corruption of a good thing to its worthleſſneſs. In order to make any thing of that, he ſhould have gone the length not only of ſtating what might have been done, but what was done; otherwiſe you may ſit and hear that glorious conſtitution (which I have known ſo many able and eloquent writers and ſpeakers extol in the higheſt terms to the ſkies) you may ſit and hear it reviled from one end to the other: not for the miſchief that it actually does; not for the inequality in point of juſtice that it actually adminiſters; but which it might! But let him prove that there is any thing in my conduct of this proſecution that deſerves thoſe epithets with which he charged it, and I muſt ſubmit to be covered with them. But that will not make an iota of difference in your verdict. What does it ſignify to you (who ſit to conſider whether this be a true or a falſe charge) that it comes at this time or at any other? The gentleman taxes me with folly in ſaying, that if it were a crime in 1775, it muſt be ſo in 1777! I ſhould hold it to be the utmoſt folly to ſay otherwiſe. If there were any improper practices with regard to the proſecution, it might be a reaſon of objection to thoſe who proſecute; but with regard to the mere queſtion to be put to the jury ---*is he guilty in manner and form?---it is abſolutely nothing*; it would be folly to aſſert it.

I have now ſtated to you the progreſs of this buſineſs, referring to his own witneſſes for the truth of that progreſs; and I truſt, that upon that repreſentation, I ſhall not be found to have miſconducted myſelf even in the courſe of this proſecution. I have gone very much out of my way, and very contrary to the turn of my temper, when I have embarked ſo far in a defence of myſelf at all; but when facts are ſtated, I thought it neceſſary to re-ſtate and explain theſe facts. Beyond that, let general and looſe reflections take what place they pleaſe. I put myſelf upon my public conduct for my juſtification, without boaſting of that conduct either one way or the other. If I am wrong in that conduct, let it condemn me: if I am right in that conduct, let it approve me. It is upon that only that I deſire to reſt it; without boaſting or without diſclaiming, either on one ſide or the other. I will ſay no more upon that ſubject, but refer it to you to determine what ought to be done upon a charge thus ſtated, and thus induſtriouſly proved upon the part of the defendant, if any proof had been wanting to ſupport it upon the part of the proſecutor.

Lord *Mansfield.* Gentlemen of the jury, if ever there was a queſtion, the true merits of which lay in a very narrow compaſs, it is the preſent. This is an information againſt the defendant for writing and compoſing, and printing and publiſhing, or cauſing to be printed and publiſhed, that is, for being the author and publiſher of a paper, which the information charges as a ſeditious libel. If it be a ſeditious libel in its own nature, there is no juſtification attempted: why then there are but two points for you to ſatisfy yourſelves in, in order to the forming of your verdict.

Did he compoſe and publiſh; that is, was he the author and publiſher of it? Upon this occaſion, that is entirely out of the caſe; for it is admitted. As to the excuſe of ignorance, or being impoſed upon (which is a topic in the caſe of printers and others) it is out of this caſe, becauſe it is avowed to be done deliberately; and it is now avowed, and the contents of it. Why then there remains nothing more but that which reading the paper muſt enable you to form a judgment upon, ſuperior to all the arguments in the world; and that is,

Is the ſenſe of this paper that arraignment of the government, and the employment of the troops, upon the occaſion of *Lexington*, mentioned in that paper? Read! You will form the concluſion yourſelves. What is it? Why it is this: that our *beloved American* fellow-ſubjects ---(therefore innocent men)---in rebellion againſt the ſtate——They are our fellow-ſubjects; but not ſo abſolutely *beloved* without exception! Beloved to many purpoſes: beloved to be reclaimed: beloved to be forgiven: beloved to have good done to them: but not beloved be ſo as to be abetted in their rebellion!---and therefore that certainly conveys an idea that they are *innocent*.---But farther it ſays, that they were inhumanly murdered at *Lexington* by the king's troops, merely on account of their acting like *Engliſhmen*, and preferring liberty to ſlavery! The information charges the libel to relate to the king's government and the employment of his troops. Read it, and ſee whether it does relate to them. If it does, what is the employment they are ordered upon? what is the employment that they execute? To murder, the paper ſays, innocent ſubjects; becauſe they act like *Engliſhmen*, and prefer liberty to ſlavery! Why then, what are they who gave the orders? what are they who execute them? Draw the concluſion. It don't ſtand upon argument. If any man dares to give orders to murder a ſubject, or to execute thoſe orders, or to make any ſubject a ſlave, he is as high a criminal as can exiſt in this ſtate. Evidence has been examined, and though (unuſual) I was very deſirous every thing offered ſhould be heard; and you have had Mr. *Gould* examined: and whatever doubt there might be with regard to the occaſion of hoſtilities at *Lexington*; whatever weight the obſervations might have before; yet now, upon his evidence, you ſee how it ſtands! The unhappy reſiſtance to the legiſlative authority of this kingdom by many of our fellow-ſubjects in *America*, is too calamitous an event not to be impreſſed upon all your minds; all the ſteps leading to it are of the moſt univerſal notoriety. The legiſlature of this kingdom have avowed that the *Americans* rebelled, becauſe they wanted to ſhake off the ſovereignty of this kingdom; they profeſs only to bring them back to be ſubjects, and to quell rebellion: troops are employed, money is expended upon this ground; that the caſe is here, between a juſt government and rebellious ſubjects; for a juſt and a good purpoſe, for the benefit of the whole. If I don't miſtake, the firſt hoſtilities that are committed---(though many ſteps on both ſides leading to them exiſted before)---but, if I do not miſtake, the firſt hoſtilities are thoſe committed upon the 19th of *April*, 1775. If ſome ſoldiers, without authority, had got in a drunken fray, and murder had enſued, and that this paper could relate to that, it would be quite a different thing from the charge in the information; becauſe it is charged as a ſeditious libel, tending to diſquiet the minds of the people. Now what evidence has Mr. *Gould* given? Why, he ſays, that he was ſent with a part of the king's troops, by the orders of general *Gage*, the governor of the province, the commander of the king's troops; that when they began their march (which was about two or three in the morning) he heard (I think he ſays he heard) a continual firing of alarm cannon, which is a ſignal, at certain diſtances, uſed in *America* to raiſe the country; and *that* they heard as ſoon as they began their march; and from thence they concluded that the provincials were marching to attack them. When they came within ſight of them, they found them armed, in bodies of troops armed. This was not a ſtated time of peace when the king's troops, under the authority of the governor, go from one part to another; to have bodies of men, in military array, armed, and ſignals fired! but this they found. And he ſays, he cannot tell himſelf; but to a queſtion aſked him, he ſays, he heard the provincials charged our troops. He ſays in his affidavit, which he has likewiſe ſworn to, and which you may compare, that he ſaw, on their arrival, he ſaw a body of provincial troops armed, to the number of about 60 or 70 men: 'on our arrival they diſperſed, and ſoon after firing 'began; but which party fired firſt I cannot exactly ſay.' And then, towards the latter part of the affidavit, he ſays, 'the provincial troops 'returned, to the number of about three or four hundred. We drew up on 'the *Concord* ſide of the bridge. The provincials came down upon us; 'upon which we engaged, and gave them the firſt fire.' And ſays he, 'this was the firſt engagement after the one at *Lexington*. A continued 'firing from both parties laſted the whole day. I myſelf was wounded 'at the attack of the bridge, and am now treated with great humanity as 'a priſoner.' Now from this account you ſee, that they had erected in effect their ſtandards; each had their troops in battle array; they were ready to fight. Who (from this evidence) fired firſt, he cannot tell; that is, *originally* the firſt. He heard that the provincials charged; but whether the one or the other fired firſt, he cannot tell; when the two bodies were in the field, each expecting the other to attack.---This is the account given by the *defendant*'s witneſs: that it was the king's troops, by order of the commander and the government, that were engaged in this fray, in which thoſe lives were loſt! Then if there is nothing particular, but it is a conſequence of the general diſpute, of the cauſe of this moſt lamentable and unhappy war, no good man but muſt lament it, and wiſh them reclaimed. If it is barely the conſequence of that which has led to further hoſtilities ſince, you will read this paper, and judge for yourſelves. You will judge whether it conveys a harmleſs, innocent propoſition for the good and welfare of this kingdom, the ſupport of the legiſlative government, and the king's authority according to law; or whether it is not denying the government and legiſlative authority of *England*, and juſtifying the *Americans*; averring that they are totally innocent; that they only deſire not to be ſlaves; not diſputing to be ſubjects, but they deſire only not to be ſlaves; and that the uſe that is made of the king's troops upon this occaſion (for you will carry your mind back to the time when this paper was wrote) was to reduce them to ſlavery. And if it was intended to convey that meaning, there can be little doubt whether that is an arraignment of the government and of the troops employed by them or not. But that is a matter for your judgment. You will judge of the meaning of it; you will judge of the ſubject to which it is applied, and connect them together; and if it is a criminal arraignment of theſe troops, acting under the orders of the officers employed by the government of this country, to charge them with murdering innocent ſubjects, becauſe they would not be ſlaves, you will find your verdict one way: but if you are of opinion that the conteſt is to reduce innocent ſubjects to ſlavery; and that they were all murdered (like the caſes of undoubted murders, of *Glenco*, and twenty other maſſacres that might be named) why then you may form a different concluſion, with regard to the meaning and application of this paper.

Without giving you any reaſon, you will eaſily gueſs why I paſs over a great deal that has been ſaid; that ought not to have been ſaid; but there is one thing that is relative to the ſubject, and therefore it ought to be ſaid: that was, a doubt (upon one of the former trials upon the printers) that occurred to the jury, in which they had a difference of opinion; and they agreed to come in and leave it to my deciſion. I had told them (as I told you) that one of the points to guide your verdict was, whether you underſtood the meaning of the writing to be as charged by the information. One of them underſtood, or doubted, whether (this was in the caſe, you ſee, of a printer of a third perſon) whether actual proof of a ſeditious intention (diſtinct from the inference from the act itſelf) was neceſſary to be proved. The other thought that a ſeditious intent was by law to be inferred from the ſeditious act; and they came in and propoſed their doubts. And I told them what I tell you (and what I believe never was doubted, and what was not queſtioned upon that occaſion, though I deſired they would move the court upon it, if they had any doubt) that it is not neceſſary to prove an actual intent, which is the private operation of a man's mind; but a jury were to exerciſe their judgment from the nature of the act, as to the intent with which it is done. As, if a man writes and publiſhes a ſeditious libel, a libel that has a ſeditious tendency, that is a ground to a jury from whence to infer---(when it is without any juſtification, without any excuſe)---that is a ground from whence to infer a ſeditious intent. Juſt as if a man murders another without any juſtification of that act, it is a ſufficient ground for the jury to infer that he did it maliciouſly. That anſwer was given to the jury.

Gentlemen, here I conclude every thing I ſhall trouble you with, by way of charge, becauſe you will exerciſe your judgment, as I have ſaid before, upon the paper and the information, by reading them, which you may have to carry out with you. But merely for the ſake of the audience, as ſomething has been ſo much mentioned in the cauſe (for I don't give you any reaſon for taking no notice of any thing out of it) I think proper to ſtate it in ſo particular a manner, that when you come to ſee it miſrepreſented, you may all of you remember what it is, and what it was, and upon what ground it paſſed; and that is, with regard to the attorney-general's reply. You ſee, as the caſe is, it is entirely out of this cauſe: for the defendant has called witneſſes; and I thought it right that he ſhould know it early, that he might not abſtain from calling witneſſes to avoid the reply, and in that manner be ſurprized. Now I will tell you what I take to be the practice with regard to that matter. The nature of a reply is the plaintiff's anſwer to new matter advanced by the defendant. The plaintiff knows his own caſe; he knows his own witneſſes; he opens it; he obſerves upon his witneſſes; and he draws ſuch concluſions from them as he thinks proper, to perſuade a jury to encreaſe the damages. The defendant, if he only makes obſervations upon the ſame evidence, and only draws concluſions from the ſame evidence to the jury, to leſſen the damages; why there, there is nothing new, there is no new matter at all: and by the practice, for the expedition of buſineſs in civil cauſes, and in proſecutions in the name of the king, with common informers, the practice is, that they don't reply where that is the caſe. But, notwithſtanding that, if the defendant was to ſtart a point of law, the other muſt be heard. If he was to throw out to the jury, to catch and to ſurprize them, allegations of fact which he called no witneſſes to prove---you recollect how many millions of facts you have had urged to-day, for which no witneſſes were called---(how many extrinſic to the cauſe)---there the counſel for the plaintiff may ſet the jury right, and lay them out of the cauſe, and ſhew that they are abſolutely irrelevant and immaterial. But, in ſolemn trials, in ſtate proſecutions, where the attorney-general attends, I never knew it denied but that he had a right to reply. I was many years ſolicitor-general: I was attorney-general: I have known it often, where nothing has been ſaid for the defendant that they thought called for a reply. I never knew it denied to the attorney-general, where he inſiſted upon being heard in reply: and I believe the preſent attorney-general has replied ſeveral times. This is ſo much the law of the land, that (if my memory does not fail me) in the moſt ſolemn caſes (and as I ſpeak from memory only, if there ſhould be any ſlip in it, I hope I ſhall be excuſed) and, to the beſt of my memory, in the trial of my lord *Byron* (if any gentleman can correct me, I ſhall be very glad to be corrected---I dare ſay there are ſome here that were of counſel in that cauſe) in the trial of lord *Byron*, who called no witneſſes, no evidence, the attorney-general replied. The houſe of commons, as the public proſecutor for the nation, inſiſt upon it as an abſolute right, that they are to reply. It is a great while ago; but, if my memory does not fail me, I think I replied for the houſe of commons upon the trial of lord *Lovat*, though he called no evidence. I ſpeak from memory, it is many years back; and therefore, if I am miſtaken, I do it with that reſerve and qualification to be ſet right.---This has nothing at all to do with the cauſe; but it at leaſt explains, to thoſe who want to underſtand it, the light in which I ſee that matter, and the ground upon which I determined it.

[The jury withdrew about five o'clock, and returned into court about half an hour after ſix; and gave in their verdict, that the defendant was *Guilty*.]

Further Proceedings in the Court of King's-Bench *at* Weſtminſter *(a)*.

Wedneſday, November 19, 1777.

(The attorney-general moved for judgment againſt Mr. *Horne.*)

Lord *Mansfield.* Is the defendant here?

Mr. *Daniel,* the defendant's attorney, anſwered, that he was.

(The information was read by order of the court.)

Mr. HORNE.

MY lords, with great ſubmiſſion and reſpect to your lordſhips, and in full confidence and ſecurity of protection by the laws of my country, I preſume to offer to your lordſhips that I am not, upon this information, a proper object for the judgment of this court. And, my lords, I cannot mention what I have to ſay in arreſt of the judgment which Mr. Attorney-General has prayed againſt me, without firſt acknowledging the obligations which I have, and the thanks which I owe, to my proſecutor and to my judge: for, my lords, it is to them, and to the arguments which they uſed in order to obtain a verdict from the jury, it is to them that I am indebted for that argument which muſt prevent the judgment. At the ſame time, my lords, it is but juſtice in me to declare, that whatever ill-founded doubts might, at the beginning of the trial, have harboured in my mind concerning any perſonal enmity, hoſtility, or prejudice towards me, before the cloſe of the trial they were all entirely effaced: for enmity, my lords, is not a ſupine and careleſs, but an active and curious principle, prompting men to neglect nothing which may tend to produce the deſired miſchief. And your lordſhips, I am perſuaded, will ſee reaſon to believe with me, that, ſo far from any uncommon diligence having been uſed againſt me, neither my proſecutor, nor my judge, nor my jury had ever ſo much as once caſt an eye over the information brought againſt me; for your lordſhips will inſtantly perceive, by looking at the record, that I am not therein charged with any crime.

My lords, when firſt I ſaw the charge in the information, I thought of it the ſame which I now offer to your lordſhips; and therefore, fearing nothing but the inattention of the jury, the greater part of my defence conſiſted of motives preſſed upon the jury for their attention: and when I hoped I had ſecured that point (the only favour, as I then declared to them, which I had to requeſt) I then proceeded to ſhew that there was not any crime in that which was alledged againſt me; keeping my eyes always fixed upon that with which alone I had to do, namely, the charge in the information; and I deſired the jury to take the information out of court with them.

But, my lords, when I heard the reply of Mr. Attorney-General, and the addreſs of the judge to the jury, I was no longer at a loſs to underſtand how it happened that I could not ſee in the charge againſt me that criminal matter which they imagined it to contain: for, my lords, I then heard, for the firſt time, that there was an inſurrection or rebellion in the colony of *Maſſachuſett's-Bay*; that certain perſons—and thoſe perſons denominated king's troops—were employed by his Majeſty and by the government for the purpoſe of quelling that inſurrection or rebellion; that in this their employment and ſervice an engagement enſued between the ſaid rebels or inſurgents and the ſaid king's troops ſo employed; that in this engagement certain of the ſaid inſurgents or rebels were ſlain by the ſaid king's troops; and that my advertiſement and the charge of murder, ſaid to be contained in it, related to the ſaid inſurgents or rebels ſo ſlain by the ſaid king's troops ſo employed.

And, my lords, the judge did very fairly, and very plainly and preciſely, and in expreſs words ſhew to the jury, that on theſe circumſtances did depend the whole criminality of the charge againſt me.

Now, my lords, though the jury did, through want of attention, forget to conſider that theſe circumſtances were neither proved nor charged; your lordſhips, I am ſure, who are to look to nothing but to the record itſelf; your lordſhips, I am ſure, will not fail to conſider, that no indictment or information can be cured or made good by any implication, argument, ſuppoſed notoriety, or intendment whatever. Nothing can be aſſumed or intended againſt me, but what is expreſſed in the record itſelf. If therefore in the whole range of poſſible occurrences there can any one be imagined in which it would not be criminal to ſay that the king's troops (no technical term, my lords, *troupeaux*,—flocks—companies—even deſerters may be comprehended under that term)—if therefore any one poſſible occurrence can be imagined (and I ſuppoſe there are a great many, the judge who tried me helped me to ſome, above twenty)—if any one can be imagined, in which it would not be criminal to ſay that the king's troops have committed murder, then your lordſhips cannot, upon this information, proceed to judgment; becauſe the information wants thoſe neceſſary averments, which cannot by any means be intended. For your lordſhips will find, by looking at the record, that in each of the various counts which this information contains, it is ſimply averred, that I did write and print and publiſh, and cauſe and procure to be written and printed and publiſhed, to the tenor and effect following.

Your lordſhips will therefore be pleaſed to examine the record; and I have not the ſmalleſt doubt that your lordſhips will do me that juſtice which my jury, through want of attention, did not.

Mr. *Attorney-General.* My lord, if I underſtand the effect of this motion, it is, that the matter of the information, as charged, does not ſtate a crime. That indeed is the neceſſary *form* of the objection to be made in this ſtage of the buſineſs; for, in this ſtage of the buſineſs, every thing is to be taken to be ſolemnly true which that information has ſtated as eſſential to the conſtitution of the crime, and which the jury conſequently have found. Now, my lord, it is ſaid that nothing is to be aſſumed but what appears upon the record; and that the information wants ſome averments. I was very attentive to collect, if I poſſibly could, what ſpecies of averment it was that the information was ſuppoſed to want. But I miſſed it, if it has been ſtated on the part of the defendant. What kind of averment inſerted in this information would have ſupplied it, and have made it a perfect deſcription of the crime? I ſhall take up the information itſelf to ſhew, in the courſe of the argument, that there is enough ſtated in it to make the crime. The information does not end, as is ſuppoſed on the part of the defendant, merely in theſe words,---that he had 'written and publiſhed, and cauſed and procured to be written 'and publiſhed, *according to the tenor and effect following.*' The information ſtates expreſly that he had---'written and publiſhed a certain 'falſe, wicked, malicious, ſcandalous, and ſeditious libel *of and concerning his majeſty's government and the employment of his troops,* according to 'the tenor and effect following.' So that the matter found by the jury, and upon which your lordſhip is either to pronounce judgment, or to ſay that, ſtated ſo upon the record, it amounts to no crime in eſtimation of law, is, that he did write that falſe, wicked, malicious, ſcandalous, and ſeditious libel *of and concerning the king's government and the employment of his troops.*

I own I expected that he would have gone farther, and that he would have endeavoured to prove that ſuch words as are included under the *tenor and effect following,* delivered in writing to be printed and publiſhed *concerning the king's government and concerning the employment of his troops* were, in themſelves, ſo manifeſtly innocent, that it was neceſſary for a court of juſtice, upon this record, to ſay that, notwithſtanding the jury has found a libel publiſhed according to the tenor and effect following, yet there is, in truth, no LIBEL.

Your lordſhip will obſerve what it is that he had ſaid concerning the king's government, and concerning the employment of his troops;---that 'our beloved *American* fellow-ſubjects, faithful to the character of '*Engliſhmen,* preferring death to ſlavery, were, for that reaſon only, in- 'humanly murdered by the king's troops, at or near *Lexington* and *Con- 'cord* in the province of *Maſſachuſett's-Bay,* in *New England,* on the 19th 'of laſt *April.*' This therefore is what he has ſaid concerning the government and concerning the employment of the troops;---that they were to commit murder upon the king's ſubjects, only becauſe they were, ſomething better than innocent,---*meritorious,* in being faithful to the character of *Engliſhmen,* and in preferring death to ſlavery. If it be poſſible to ſtate that theſe words (uttered and applied in the manner in which this record applies them, to the public government of the country, and the employment of the troops) are innocent words, then the argument might have taken ſome foundation. But to ſay that there is any want of averment in this---till I hear what averment could have made this charge more plain, more diſtinct, as a charge of murder upon the king's ſubjects, againſt the employment of the troops, againſt a national exertion of public force; it cannot, in my mind, by words be made more ſtrict and plain than it now ſtands upon the record.

The effect of theſe words I induſtriouſly avoid to ſpeak of now: the degree of favour that belongs to them will be the ſubject of farther diſcuſſion: the only queſtion that is at preſent before the court, is ſimply this;---whether the libel, as ſtated in the record, does or does not contain ſufficient matter of ſlander.

(REPLY.)

Mr. *Horne.* I ſhould be very happy, my lords, at all times to pay to Mr. Attorney-General all thoſe compliments which are perſonally and officially due to him; and I would rather have riſqued the chance of expoſing myſelf, than not to pay to him the compliment of a reply; if indeed I could have found in his anſwer any thing to which even the appearance of a reply could be given. However, I will do for him what I can.

Mr. Attorney-General has ſaid, that he could not diſcover from any thing which I had advanced, what omitted averments were ſuggeſted by me to be neceſſary to the information. My lords, though Mr. Attorney-General may have miſſed them, your lordſhips, I am ſure, did hear me very plainly and diſtinctly: and though I did not formally ſay, ſuch and ſuch averments are neceſſary to the information; yet when I told your lordſhips, that in the reply of the attorney-general, and in the addreſs of the judge to the jury, I then heard, for the firſt time, that there was a rebellion in *Maſſachuſett's-Bay,* and that certain perſons were employed to quell that rebellion; your lordſhips, I am ſure, and the whole court very well underſtood that thoſe were the averments which were neceſſary to the information. And, my lords, it was not out of any ſatirical inclination that I imputed the omiſſion of thoſe averments to careleſſneſs; I had other reaſons. For, indeed, I know very well (and upon reflection I dare ſay your lordſhips will know very well) why thoſe averments were omitted. My lords, the truth is, that Mr. Attorney-General found himſelf between *Scylla* and *Charybdis*. If he inſerted theſe averments, he ſplit on one ſide, on the proof. My lords, the advantages are very numerous and great which I ſhould have derived from thoſe averments. The information would have been deſtroyed, for want of proving what was averred; therefore he did not chuſe to aver them. By the nature of his anſwer to me, I am perſuaded he was aware of it: and, from certain intelligence, I know that there was a conſultation on the drawing up of the information againſt me. It was propoſed to alter the information; but having obtained verdicts upon the other informations, it was, upon conſultation, agreed by the learned gentlemen, the king's counſel, that the information againſt me ſhould be literally the ſame. I know it from certain information, which I obtained without the leaſt treachery in my informants; for the gentlemen who cauſed me to know it, had not, in what they ſaid, the leaſt notion that they were telling me any thing.

(a) "*Further Proceedings on the Trial of* John Horne, *Eſq. upon an Information* "*filed* ex officio, *by his Majeſty's Attorney-General, for a Libel, in the Court of* King's-"Bench, *on* Wedneſday *the* 19*th and* Monday *the* 24*th of* November." Publiſhed by the defendant, from Mr. *Gurney*'s ſhort-hand notes.

My lords, before I heard Mr. Attorney-General's anſwer, I was a little apprehenſive that I might meet with ſome difficulties. I was ſure I ran no hazard in the *principle* of my objection. I thought, indeed, that I might perhaps be puzzled in the *application* of it, by caſes of law, or by precedents that I had never before heard of. Now, my lords, tho' Mr. Attorney-General has not favoured me with any, and though I cannot myſelf give you an adjudged caſe; yet your lordſhips will forgive me, unuſed to theſe matters, if I read to you the opinion of a learned judge in a matter exactly ſimilar to this. It is in the caſe of lord *Ruſſell.* The opinion I mean is that of Mr. Juſtice *Atkins.* His words are remarkably fortunate for me; and it being that kind of law obvious to perſons who pretend to underſtand no more than what common ſenſe will direct them to, I did happen to have read that book long ago. I beg leave to read ſome little of it, becauſe it literally applies. He takes notice of that part of the indictment where it is averred againſt lord *Ruſſell*, that he was at a conſultation for the purpoſe of ſeizing the king's guards. He ſays, ‘guards’ [there is no difference between guards and troops,---except indeed that troops is a much wider word than guards.---Troops! we ſay a troop of ſtrolling players.]

‘The guards---What guards? What, or whom does the law underſtand or allow to be the king's guards, for the preſervation of his ‘perſon? Whom ſhall the court that tried this noble lord, whom ſhall the ‘judges or the law that were then preſent, and upon their oaths, whom ‘ſhall they judge or legally underſtand by theſe guards? They never ‘read of them in all their law-books. There is not any ſtatute law ‘that makes the leaſt mention of any guards. The law of *England* takes ‘no notice of any ſuch guards; and therefore the indictment is uncertain ‘and void.'---He ſays, ‘the love of his ſubjects is next under God, the ‘beſt guard of kings.' He ſays,---‘The very judges that tried this noble ‘lord were the king's guards, and the kingdom's guards, and this lord ‘*Ruſſell*'s guard againſt all erroneous and imperfect indictments, from ‘all falſe evidence and proof'---(What immediately follows does not, indeed, apply in my caſe)---‘from all ſtrains of wit and oratory'---(there has been none here, my lords)---‘miſapplied and abuſed by counſel. It had been fit for the court that tried this noble lord on this indictment, to have ſatisfied themſelves from the king's counſel, what was ‘meant by theſe guards.---But admit the ſeizing and deſtroying of thoſe ‘who are now called the king's life-guard, had been the guard intended ‘within this *overt fait*,' or OPEN DEED, (theſe, my lords, are the averments which are ſimilar to thoſe that I propoſe---theſe are the averments which Mr. Attorney-General enquired after) ‘yet (he ſays) ‘the indictment ſhould have ſet forth, that *de facto* the king had choſen ‘a certain number of men to attend upon and guard his perſon, and ſet ‘forth where they did attend, as at *Whitehall*, or the *Meuſe*, or the *Savoy*, &c. and that theſe were the guards intended by the indictment to ‘be ſeized and deſtroyed; that by this ſetting forth, the court might ‘have taken notice judicially, what and who were meant: but to ſeize ‘and deſtroy the king's guards, and not ſhew who and what is meant, ‘makes the indictment very inſufficient.'

My lords, Mr. Attorney-General (I beg the court's pardon, I ſhall take up very little of their time) the attorney-general ſays, he expected I ſhould have ſaid that the matter contained in the information is no libel.---I ſhould perhaps have ſaid ſo, if *libel* had been ſuch a technical term that I could have known what it meant: and if it was ſuch a definite and technical term, then perhaps my objection would not have all that weight with you which I now believe it will.---The ſending of a wooden gun was adjudged by this court to be a libel. There are many other things that might be adjudged libels. It is impoſſible for me to ſay what *libel* means. It is not a technical term; and perhaps if it had been, the attorney-general would not have had quite ſo much difficulty to make this information good: but not being a technical term, it makes thoſe other averments the more neceſſary.

Mr. Attorney-General has then tried to help the deficiency of the averments in the information by, *of and concerning*—‘of and concerning ‘his majeſty's government and the employment of his troops.'—I believe there is no crime comprehended in *of and concerning*; for it may be of and concerning good, as well as bad. The word *concerning* means, looking at together; and that is the only, and the ſingle meaning of the word *concerning*.

Now, my lords, if Mr. Attorney-General ſhould ſucceed in this his prayer, he will be a very fortunate, though not a very reaſonable gentleman.

My lords, a proof of all thoſe matters which ſhould have been averred (which I am founded in ſaying by the opinion of the judge, who preſſed them upon the jury as motives for their verdict, and which I firmly believe he would not have done, if he had not believed that they were contained in the information) a proof, my lords, of all thoſe circumſtances was ſupplied for the attorney-general by the judge on the trial; for he produced no evidence of them himſelf: and he will be very fortunate, indeed, if he can now prevail upon the court to ſupply likewiſe the deficiencies in the information.

Lord *Mansfield.* Whatever the degree of guilt may be, how ſtrongly ſoever it may have been proved, or whatever obſervations may have ariſen in this caſe; yet if the defendant has a legal advantage from a LITERAL FLAW, God forbid that he ſhould not have the benefit of it. It is moſt certain, that at the trial the information was conſidered to be words ſpoke of and concerning the king's government and HIS employment of his troops; that is, the employment of the troops by *government.* Upon that ground the defendant called a witneſs, Mr. *Gould.* The attorney-general roſe to object to him; but it was very clear that he was a proper witneſs; and he acquieſced immediately, becauſe it was *extremely material* to ſhew *what the ſubject-matter was to which the libel related*—if it was the employment of the troops under proper authority that came within the charge in the information.—Had it been a lawleſs fray (which I believe I ſaid at the trial), had it been a lawleſs fray, it would not. Though the ſaying ſo might have been a libel of the individual's, yet it would not have been this libel: it would not have been this libel of the king's troops employed by him. Now at firſt, and at preſent, it ſeems to me, that ‘of and concerning the king's government and the employment of his troops,' pins it down. But I doubt a little upon it. There is ſome weight in the objection, whether in the form of drawing there ſhould not have been inuendos. In common reaſon and underſtanding, it is charged; but whether technically charged or not, I do not know; and therefore as to this point, without prejudice we will take ſome time to conſider of it; to ſee whether *precedents* can be found which *require this technical ſcrupuloſity* over and above that certainty which is ſufficient to every reader: and we will go on with the reſt, *de bene eſſe*, as we could not pronounce judgment upon it now, and will conſider of it till he comes up again, if we find ſufficient to ſatisfy us to over-rule the objection.

[*Lord* Mansfield *then read his notes of the evidence given upon the trial as follows.*]

Lord *Mansfield.* This is an information filed by the attorney-general againſt *John Horne*; and it was for publiſhing the advertiſements that have been read from the information.

Thomas Wilſon proved the advertiſements in queſtion, the manuſcripts, to be the hand of *Horne*; and *Henry Sampſon Woodfall*, he publiſhed the advertiſements. He ſwears that the defendant gave him a paper the 7th of *June*, to publiſh in his own and ſend to the other papers; and that the defendant paid the fees. Then he produced two advertiſements to publiſh. The defendant croſs-examined him, and he aſſented to the queſtion of the croſs-examination, by ſaying, "By your deſire I inſerted theſe advertiſements, and publiſhed them as your act and deed. You never deſired to be ſcreened; but you deſired to be given up. You ſaid, they ſhould not want full evidence." *William Woodfall* proved likewiſe a paper given him by the defendant to be inſerted in *The London Packet* and *Morning Chronicle*; which were the advertiſements in the record. Therefore, upon the fact of printing and publiſhing there is no doubt at all.

The defendant called a witneſs to prove, that really and in truth there was a ſubſcription, and that the money was actually raiſed; and he likewiſe called *William Lacey*, who proved that 100*l.* was paid to him, and *by him remitted to Dr.* Franklin: that was 100*l.* and no more. And then the defendant called *Thoroton Gould.* And he ſaid, that at *Lexington*, on the 19th of *April* 1775, he was a ſubaltern officer. He was ordered there by the adjutant of general *Gage*, *the commander in chief of his majeſty's troops*, and *governor of the province*: and he, together with the other troops, ſet out; and between two and three in the morning he was taken priſoner: that *he heard the provincials charged our troops.*—"We found them armed. We ſuppoſed they were marching to attack us, from a continual firing of alarm cannon, early in the morning, as ſoon as we began to march. Notice or alarm guns are to raiſe the country." Upon this evidence the jury found him guilty.

Lord *Mansfield.* Mr. Attorney-General, have you any thing to ſay?

Mr. *Attorney-General.* Mr. *Horne*, I ſuppoſe, will ſay what he can in extenuation.

Lord *Mansfield.* Mr. Attorney-General, have you any thing to ſay?

Mr. *Attorney-General.* It belongs to the defendant, I apprehend, to ſtate what he can to the court in his extenuation.

Mr. *Horne.* I ſhall ſtate nothing in extenuation till your lordſhip's deciſion has told me that there was a crime. I do not know where the crime lies at preſent. My objection goes, that there is no crime in the information. It is impoſſible for me to extenuate that which I do not acknowledge.

Lord *Mansfield.* Have you no *affidavits of circumſtances*, or any thing?

Mr. *Horne.* None in the world.

Lord *Mansfield.* Let him be committed.

Mr. *Horne.* Will your lordſhip commit me before it appears whether I am even accuſed of any crime?

Lord *Mansfield.* No, then you may come up on *Monday.*—You came voluntarily now?

Mr. *Horne.* I did.

Lord *Mansfield.* Then come up voluntarily again.—If you ſhould find any precedents on either ſide, I wiſh you would give them to us.

[*This recommendation to bring precedents was repeated to the attorney-general and to the defendant, two or three times.*

To which Mr. Horne *replied, that he was not himſelf very likely to produce precedents.*]

King's-Bench, Monday, Nov. 24, 1777.

LORD MANSFIELD.

IN reading my notes the other day in the caſe of *The King* and *Horne*, I overlooked the reference to a written piece of evidence that was given by him at the trial, and I am told I did not ſtate it; and therefore I will ſtate it now.

He produced to captain *Gould* the *Public Advertiſer* of the 31ſt of *May* 1775, which purported to be the copy of an affidavit made by captain *Gould*, while he was a priſoner in the cuſtody of the *rebels* at *Medford*, and printed in that paper: and he aſked him whether the contents were truly printed. I told him, that if he meant to prove the facts to be true as above, it could not be proved by affidavit, the man being preſent; and even if he was abſent, they could not be proved by affidavit: but that if he meant to ſhew that, at that time, there exiſted a public account of it in the paper; that might be of uſe to reſtrain or qualify the meaning of the paper that was in queſtion by the information. *He ſaid, he deſired it to be read in that light*; and in that light it was read, and is as follows:

'I *Edward Thoroton Gould*, of his majeſty's own regiment of foot, being of lawful age, do teſtify and declare, that on the evening of the 18th inſtant, under the orders of general *Gage*, I embarked with the light infantry and grenadiers of the line, commanded by colonel *Smith*, and landed on the marſhes of *Cambridge*, from whence we proceeded to *Lexington*. On our arrival at that place, we ſaw a body of provincial troops armed, to the number of about 60 or 70 men. On our approach they diſperſed, and ſoon after firing began; but which party fired firſt, I cannot exactly ſay, as our troops ruſhed on ſhouting and huzzaing previous to the firing, which was continued by our troops ſo long as any of the provincials were to be ſeen. From thence we marched to *Concord*. On a hill near the entrance of the town we ſaw another body of the provincials aſſembled. The light infantry companies were ordered up the hill to diſperſe them. On our approach they retreated towards *Concord*. The grenadiers continued the road under the hill towards the town. Six companies of light infantry were ordered down to take poſſeſſion of the bridge, which the provincials retreated over. The company I commanded was one. Three companies of the above detachment went forward about two miles. In the mean time the provincial troops returned, to the number of about three or four hundred. We drew up on the *Concord* ſide of the bridge. The provincials came down upon us; upon which we engaged and gave the firſt fire. This was the firſt engagement after the one at *Lexington*. A continued firing from both parties laſted through the whole day. I myſelf was wounded at the attack of the bridge, and am now treated with the greateſt humanity, and taken all poſſible care of by the provincials at *Medford*.

Signed

Edward Thoroton Gould.'

There was a motion made the other day in arreſt of judgment, and many objections, I underſtood, that were taken to ſhew that the charge, as it ſtands upon this record, is inſufficient in law to ſupport any judgment: that there was no averment as to the ſtate of the *Maſſachuſett*'s colony at that time; either that there were *riots*, inſurrections, or rebellions: that there were no averments that the king had ſent any troops: that there was no averment that there was any ſkirmiſh or engagement; or how it began; or the nature of it: how it began, or how it went on, or ended: and that it was not averred that the employment of the troops was by the king's authority. The only objection that had colour in it was, what I mentioned laſt—that the employment of the troops was not averred to be by the king's authority. I thought then, and ſaid, that the averment of the words being written 'of and concerning the king's government," was an anſwer; but no precedent was cited or alluded to on either ſide. I fancy the attorney-general was ſurpriſed with the objection. But there was no precedent; and I could not ſay upon my memory whether *precedents* might not *require ſome technical form* of expreſſion as to that medium through which words are averred to be written of the king's government. And if any flaw had happened formally, technically, or verbally, that were not at all founded in the ſenſe or reaſon of the thing, I ſhould in this caſe be of the ſame opinion that I was in the caſe of an outlawry---that the defendant ought to have the benefit of it: and therefore I deſired that we might think of it for ſome time, that precedents might be ſearched, and the books looked into. We have fully conſidered of it, and the precedents have been looked into, and we have fully conſidered the information, and all the objections that were mentioned, and all the objections that we could think of; and we are all clearly of opinion, *without any doubt*, that the information is ſufficient. An indictment or information muſt charge what in law conſtitutes the crime, with ſuch certainty as muſt be proved: but that certainty may ariſe from *neceſſary* inference; in the manner ſettled in the caſe of *The King* and *Lawley* in *Strange*. Plain words, in a libel, ſpeak for themſelves. If they are doubtful, their meaning muſt be aſcertained by an inuendo. Here the words are plain; they want no inuendo. They are averred to be written 'of 'and concerning the king's government and the employment of his 'troops." The obvious meaning is, that *the employment* of the *king's troops muſt be under his authority*; and it neceſſarily is ſo, if the words alſo relate to and are written of and concerning the king's government. This muſt now be taken to be true; becauſe the verdict finds it. Had the queſtion aroſe upon a demurrer, it muſt equally have been taken to be true. The *giſt of every charge of every libel conſiſts in the perſon or matter of and concerning whom* or which the words are averred to be ſaid or written. In *The King* againſt *Alderton* the information was held bad, becauſe it was *not* laid in the information, it was *not* laid that the libel was of or concerning the juſtices of *Suffolk*. Where the words are averred to be written of the king's government where—(there are ſeveral precedents)—or of the government of the kingdom, or of the government, ſuppoſe, of the navy; as to any thing further as to which they are alſo written, thro' the medium of which they calumniate the king's government, there is no form of expreſſion technically neceſſary. And it cannot be; becauſe there may be caſes where the king's government might be calumniated through an imputation upon the *groſs licentiouſneſs* of his troops. The queſtion to be tried is, whether the words laid are written of the king's government. It may vary the degree of miſchief, guilt, or malice; but it is totally immaterial as to the conſtitution of the crime upon the record, whether the words refer to ſomething that has exiſted, or are an entire fiction. Had *Lexington* been left out; or had any other place been mentioned, where there had been no ſkirmiſhes, or engagement, inſtead of *Lexington*; it would without any inuendo have been equally a libel. It is the duty of the jury, to conſtrue plain words and clear alluſions to matters of univerſal notoriety, according to their obvious meaning, and as every body elſe who reads muſt underſtand them. But the defendant may give evidence to ſhew that, in the caſe in queſtion, they were uſed in a different, or in a qualified ſenſe. If no ſuch evidence is given, the obvious meaning to every man's underſtanding muſt be deciſive. Before this trial, five ſeveral juries had found thoſe words, from their neceſſary meaning, to be of and concerning the king's government. Here, in this caſe, the defendant gave evidence: and the *evidence* he gave *demonſtrated* that the words related to *troops acting under the king's authority*; and conſequently related to the king's government. And I am the more confirmed that upon this occaſion there is *little colour of doubt of any flaw* in the information, that in thoſe five trials that I allude to, in one or other of them, a *great variety of counſel of learning, eminence, and ability*, were employed. They were *called upon to pry* with all the ſharpneſs that they had into the information, to pick a hole in it: there were three judgments given upon conviction upon them; and *no counſel ſaw or imagined there was any flaw* in it. THEREFORE we are all ſatisfied that the information is ſufficient.

Mr. *Attorney-General*. The defendant has been convicted on the oaths of twelve of his countrymen with having written, printed, and publiſhed, and cauſed to be written, printed, and publiſhed, a certain falſe, wicked, malicious, ſcandalous, and ſeditious libel of and concerning the king's government and the employment of his troops; aſſerting, that the *national force* of this country has been employed in the murder of the king's ſubjects, for as meritorious an attribute as can be imputed to man: and he has ſpecified the time and place at which that was done.

The charge, as contained in the information, reſts within a narrow compaſs. I might have ſtated, perhaps, and proved a different crime to have ariſen upon it; but I did ſtate that which, according to my judgment, was a crime of ſuch quality, was a crime of ſuch heinouſneſs, and of ſuch a ſize, as fairly called for the higheſt reſentment which any court of juſtice has thought proper to uſe with reſpect to crimes of this denomination. My lord, although the crime, upon the ſtate of it in the information, reſts within the compaſs which I have now mentioned; yet, as it now comes before the court, the matter that now requires the conſideration of juſtice does not lie within that narrow compaſs. The defendant himſelf has thought it important to the ſituation which he wiſhes to hold with a certain body of men in this country, not to leave it juſt in the place in which the information does: he has thought it eſſential to his views (which I don't enter into particularly what they are), but he has thought it eſſential to his views, to prove how much he meant by writing in that manner to the public; and alſo to prove how much he meant, and how directly, how pointedly, and how confidently, to inſult the public juſtice of the country, by not only committing as high a crime as could be committed within the deſcription of miſdemeanor againſt the *public authority* and welfare, but by ſtating himſelf to have committed that crime with a view of inſulting the public juſtice of the country. My lord, if it had been eſſential to us to prove that that crime, and that that caſe which is ſpecified in the indictment, was the ſubject of a murder committed under *public authority* by the *national forces* of the country, he has himſelf thought proper to ſtate and to prove *by his witneſſes*, that he meant the attack made by the king's troops upon a body of *rebels*. Your lordſhip has taken notice of the addition of this affidavit that was introduced into the cauſe. The effect of that evidence was to prove that which was but too well known before, namely, that in the time there ſpecified, the 19th of *April* 1775, the *rebels* had arrayed themſelves in arms; had formed magazines; had taken ſtations in the country in which they had placed themſelves; were ready to ſurround the forces of the king, as far as their abilities could do it, upon any motion to be made by theſe forces: that upon the inſtant, very early in the morning, (and whether accidentally or otherwiſe let that be decided by the *witneſſes*) the king's troops, marching in perfect ſilence—that, upon the inſtant of that happening, the firſt demonſtrations that were made upon the part of the *rebels* was the firing alarm-guns; underſtood exceedingly well by the witneſs, and exceedingly well explained by him: it proved that he underſtood them perfectly, namely, by the *rebel* troops inſtantly ſurrounding them. I ſtate that to have been induſtriouſly proved on the part of the defendant, in order to mark that he meant to fly at the very higheſt ſubject, and to offend in the moſt heinous manner in which it was poſſible for him to contrive to offend.

My lord, he did not think it enough to have proved that ſuch was the intention of the paper with which he was at that time charged; but he alſo thought it incumbent upon him to produce witneſſes to prove another part of the contents of that paper; namely, that he had attended a ſolemn meeting; at which meeting he, with certain other perſons there aſſembled, had contributed money to the amount of about 100*l.* and that the purpoſe for which they contributed it, was the comfort and relief of thoſe whoſe merits with them was ſtated to conſiſt in no other particular than the circumſtance of their relation to thoſe *rebels* that ſtood in arms againſt the king's forces: he brought witneſſes to prove the fact. That the money was actually paid, is not the thing that I pin upon: let it be doubted whether the 50*l.* came actually to the hands of the banker; or that the money was afterwards applied to any of the purpoſes that are there ſtated. To be ſure, there was not proof alledged upon that ſubject. Whether it is to go to thoſe people, or whether it is to go to any other purpoſes ſimilar to thoſe, in the intention of thoſe who ſubſcribed the money (that is, the inſulting and affronting government and the king), it is a matter of very little conſequence to the point I am now ſpeaking to. He was at the pains to prove that they went through that buſineſs that I am ſtating to your lordſhip, in order to afford comfort and relief to thoſe who ſtood in that ſpecies of relation to *rebels*; which, as far as it goes, is to excite *that rebellion*, by offering that degree of encouragement to thoſe who ſhall happen to periſh in ſuch a flagitious offence: as far as it goes, it amounts to that. The libel therefore that now ſtands before your lordſhip, which the occaſions of the defendant of a different ſort (which I ſhall have occaſion to ſpeak more particularly to preſently) obliged him to aggravate, obliged him to go to the extent that I have now ſtated, is ſuch a one that I believe it will be totally impoſſible for the imagination of any man, however ſhrewd, to ſtate a libel more ſcandalous and baſe in the fact imputed, more malignant and hoſtile to the country in which the libeller was born, more dangerous in the example, if it were ſuffered to paſs unpuniſhed, than this which I have now ſtated to your lordſhip.

Your lordſhips have ſeen that the libel is ſuch, that it is impoſſible by any epithets to aggravate it. I depend entirely upon the ſtate which I refer to---which your lordſhip has delivered to the court---I depend upon that for the moſt emphatical deſcription of every circumſtance that tends to create criminality, which is poſſible to be alledged not only againſt this, but againſt any other libeller whatſoever.

My lord, ſuch was the nature of the libel. The next queſtion that I meant to trouble your lordſhip upon, is the conduct of the preſent defendant in the article of publiſhing the libel; and, ſubſequently to that publication, in the article of avowing it, holding it up, maintaining it to the world, thruſting it in the face of juſtice, and proclaiming—— *Sic honor et nomen divinis vatibus.* It is a language addreſſed to the loweſt and moſt miſerable mortals. There is no man of any value in point of underſtanding in this country, that does not know that the information contained in it is falſe, abſurd, impoſſible, even below the worth of refutation; but it is addreſſed to the loweſt of the mob and to the bulk of the people, who it is fit ſhould be otherwiſe taught, who it is fit ſhould be otherwiſe governed in this country. My lord, the occaſions of this reverend gentleman to keep up the opinion of a particular part of the factions in this country, his private occaſions obliged him to be very diſtinct, and very anxious to explain it. On the part of the proſecutor, it was enough to prove that he had publiſhed the libel. The evidence for the proſecutor went plainly and diſtinctly to that fact. We produced the original paper under his hand. We produced the man to whom it was delivered, *Woodfall*, in order to publiſh it in a paper which he printed himſelf, called *The Public Advertiſer*. We proceeded to prove that the occaſion of delivering it to him, and the office in which he was employed, was not merely to publiſh it in that paper, but to carry it round to all the other public papers, and to make the diſperſion of it as univerſal as he poſſibly could. Here therefore we did eſtabliſh upon him, by theſe plain facts, a publication of as univerſal a ſort as it was poſſible for him to obtain.

One would have thought that theſe facts ſo ſtated had conſtituted crime enough. But it is not enough to be criminal, with this man; he muſt be criminal in a way that may ſhew himſelf able to defy juſtice; in a way to convey to the people, who believe in thoſe fooliſh repreſentations, that they actually do trample upon juſtice. I believe a great multitude of thoſe gentlemen called authors, Mr. *Woodfall*'s contractors, are men, in fact, who are juſt capable of writing in an impudent ſtyle. The ſingle, ſimple merits of an impudent ſtyle is, I ſuppoſe, qualification enough to prevent any material diſtinction between his whole rabble of authors. If there is any diſtinction at all, it muſt ariſe from the ſuperior confidence of thoſe who cannot only write in that ſtyle, but ſtand forth in the face of the juſtice of the country, and ſay—'punish me if you dare.'——Theſe men loſe their credit, theſe men loſe their opportunities with their own faction, if, when called upon for their crimes, they don't preſerve the ſame impudence. That made it neceſſary for the preſent defendant not to be ſatisfied with what the proſecutor had proved upon him, but to undertake a proof of his own; to put him upon ſtill higher ground with his connections. By the examination of *Woodfall*, he has undertaken to prove that the method of his tranſactions with him had been at all times, that he ſhould at all times, for his own ſake, if called upon, give him up to juſtice. A good decent ſort of contract, that long way back, between a divine of the church of *England* and his printer! that he ſhould print for him upon the terms of the ſaid divine being ready to be given up to juſtice, at all times when he ſhould be called upon! My lord, the firſt inſtance of the execution of that contract was upon a *polemical ſubject of divinity*, between this gentleman and one of his *pariſhioners*, ſir *John Gibbons*. Mr. *Woodfall* did not ſtate to the court which part was taken by which: I cannot poſſibly tell how the controverſy ended: but in an *extract* upon the *ſubject of religion*, for the *edification* of the *pariſh*, it was neceſſary that there ſhould this contract intervene, that the reverend author ſhould be ready to ſtand forth, in caſe the printer was called upon. But with regard to the preſent publication, this was to be much more emphatical. He had been called upon in another place. He was afraid that he had not been thought by his friends to be confident enough in maintaining what he was charged with; and that, if he eſcaped, it was upon ſome doubt, whether the guilt was proved upon him or not: upon which he called upon this *Woodfall* to depoſe, that, in the manner of delivering him that paper, it was done with an induſtrious and affected ſolemnity. The words of it were, '—did I, or did I not, formally before the witneſs, when called in, deliver that paper as my act and deed; as if it had been a bond?'—And, in the latter end of the evidence,—'if they now chuſe to take notice of this advertiſement'——it was to that purpoſe; for this reaſon, that 'in the laſt tranſaction before the houſe of commons it was pretended they let me off becauſe they could not get full evidence. Do you remember I ſaid, that if they now choſe to take notice of this advertiſement, they ſhould not want full evidence?'——Now, my lord, to be ſure what had paſſed between this author and this printer, (whether it was more or leſs in confidence) would have made it of no conſequence whatever to the public. It would have been impoſſible for us to have known it; or, if it had, to have adduced it in evidence. That would have been of no conſequence whatever to the public. It never could have attained to the public knowledge, excepting that intereſt I have ſo often alluded to, that intereſt of recommending himſelf to his patrons, and defying public juſtice.

I don't ſtate the offence to have conſiſted in the converſation that was held between him and the printer; but I ſtate the offence to ariſe in his anxiety to proclaim to the public, that ſuch is the manner in which he dares to inſult the juſtice of the country. There ariſes the aggravation of the crime, in the manner in which I have ſtated.

With regard to the reſt, the ſtrange conduct of the defendant—I don't know whether that is properly before the court, any more than his miſrepreſentation of the proceedings of the court; which I ſhall urge for no earthly purpoſe but this: in order to demonſtrate that the aim and object of publiſhing ſo very infamous a libel as this, went even beyond the libel itſelf; to endeavour, if he could, to make a paradeful triumph over juſtice. That, I take it, is the aim and object of the whole.

I have done my duty with regard to the charge that is now before the court. With regard to the puniſhment alſo, it is my province and my duty to ſpeak.

All other crimes of ſpecific denomination are followed by the letter of the law with peculiar puniſhments: and they are held forth, by that puniſhment and by that denomination, to the people in the true point of view in which it is the intereſt of the public that they ſhould be ſeen. The law, by enacting particular puniſhment upon ſpecific crimes, has ſtated to the public that degree of terror to ariſe from the example of puniſhment, which in wiſdom, it is hoped, will be ſufficient to reſtrain offenders from committing the ſame crimes. My lord, that is not ſo in the caſe of a miſdemeanor; which in its variety and conſequences may involve crimes of a different nature and complexion, and of very different degrees of guilt. Concerning thoſe crimes the public neither has a right nor can poſſibly be informed in any other manner than by the judgment of this court. My lord, this court, in pronouncing judgment upon this offence, is to do by this ſpecies of offence, with regard to the reſt of the public, and to the purpoſe of deterring crimes, what the law does when it ſpecifies particular puniſhments. Your lordſhips are in theſe caſes to ſupply the deficiencies of the law, and to ſhew to thoſe who have been deſirous to offend the laws of their country, by the example of its puniſhment, in what ſort of eſtimation this degree of guilt is held by the law: and I, whatever I have thought upon the ſubject, ſhall be obliged to confeſs, that if the puniſhment is leſs than the *old* deliberate judgment has gone to and reſted upon, that I have been miſtaken in the nature of the crime. All my apology for the miſtake muſt conſiſt ſimply in this ſingle circumſtance: that, lying ſo near to high treaſon, it was very difficult for my imagination and judgment to draw the line between them. That muſt be my apology, if I have miſtaken the nature and quality of this crime.

My lord, the puniſhments to be inflicted upon miſdemeanors of this ſort, have uſually been of three different kinds; fine, corporal puniſhment by impriſonment, and infamy by the judgment of the pillory. With regard to the fine, it is impoſſible for juſtice to make this ſort of puniſhment, however the infamy will, always fall upon the offender; becauſe it is well known, that men who have more wealth, who have better and more reſpectful ſituations and reputations to be watchful over, employ men in deſperate ſituations both of circumſtances and characters, in order to do that which ſerves their party purpoſes: and when the puniſhment comes to be inflicted, this court muſt have regard to the apparent ſituation and circumſtances of the man employed, that is, of the man convicted, with regard to the puniſhment.

With regard to impriſonment, that is a ſpecies of puniſhment not to be conſidered alike in all caſes, but varies with the perſon who is to be the object of it: and ſo varies with the perſon, that it would be proper for the judgment of the court to ſtate circumſtances which will make the impriſonment fall lighter or heavier, as the truth is, upon the perſon preſented to the court. I ſay, my lord, that would be proper, if I had not been ſpared all trouble upon that account by hearing it ſolemnly avowed in your lordſhip's preſence, by the defendant himſelf, that impriſonment was no kind of inconvenience to him: for that certain employments, which he did not ſtate, would occaſion his confinement in ſo cloſe a way, that it was mere matter of circumſtance whether it happened in one place or another; and that the longeſt impriſonment which this court could inflict for puniſhment, was not beyond the reach of accommodation which thoſe occaſions rendered neceſſary to him. In this reſpect, therefore, impriſonment is not only as with reſpect to the perſon not an *adequate* puniſhment to the offence, but the public are told, and told by a pamphlet which bears the reverend gentleman's name (may-be his name may have been forged to it; but by a pamphlet that bears that name) that it will be *no* puniſhment. And your lordſhips (according to the uſual ſtyle with which he has affected to treat juſtice, from the beginning to the end) are told that you cannot puniſh him in that way: and therefore, if that is a ſpecies of puniſhment which cannot affect him, as your lordſhip has been before told in a manner to be relied upon, he has made it manifeſt that your lordſhips judgment in that part of the puniſhment, operates nothing with reſpect to him perſonally; and conſequently that it will loſe its whole force and efficacy as with reſpect to that example which the public juſtice ought to hold out to the world.

I ſtated in the third place to your lordſhips, the pillory to have been the uſual puniſhment for this ſpecies of offence. I apprehend it to have been ſo in this caſe for above two hundred years before the time when proſecutions grew rank in the Star-Chamber, and to thoſe degrees which made that court properly to be aboliſhed. The puniſhment of the pillory was inflicted, not only during the time that ſuch proſecutions were rank in the Star-Chamber, but it alſo continued to be inflicted upon this ſort of crime, and that by the beſt authority, after the time of the aboliſhing the Star-Chamber, after the time of the Revolution, and while my lord chief juſtice *Holt* ſat in this court. In looking over precedents for the ſake of *the other queſtion*, I obſerved that Mr. *Tutchin* (an author of ſome eminence in his day) was angry with *Holt*, the lord chief juſtice, for transferring, as he called it, the puniſhment of bakers to authors. That was upon a perſonal conceit which ſuch an author as *Tutchin* thought himſelf entitled to entertain of the ſuperior dignity of that character all along. He thought that the falſifying of weights and meaſures was a more mechanical employment than the forging of lies; and that it was leſs gentleman-like to rob men of their money than of their good name. But that is a peculiarity which belongs to the little vanity that inſpires an author. I truſt therefore, when I ſpeak of lord chief juſtice *Holt*, and of the time in which he lived, I ſpeak (for all, but particularly for this) of as great an authority as ever ſat in judgment upon any caſe whatever. His name was held high during his life, and has been held in reverence in all ſubſequent times. He deſerved *popularity*, by doing that which was right upon great, trying, and important occaſions. He obtained *popularity*, becauſe he deſpiſed all other means of aiming at it, but that of doing right upon all occaſions. From the temper of thoſe times, from the vehemence and deſigns of that faction that oppoſed him, ſir *John Holt* would have been reviled; if the revilers of that day had not obſerved in the greatneſs of his ſpirit and character, that it was impoſſible to reach him: and he has preſerved a name which was highly honoured during his life, and which will live as long as the *Engliſh* conſtitution lives. Citing him, therefore, in ſupport of this as a proper puniſhment to be inflicted upon this ſort of offence, is giving, in my apprehenſion, the greateſt authority for it.

My lord, in pronouncing an opinion upon the objections ſtarted by the defendant, I would deſire no better, no more pointed, nor no more applicable argument than what that great chief juſtice uſed, when it was contended before him that an abuſe upon government, upon the adminiſtration of ſeveral parts of government, amounted to nothing, becauſe there was no abuſe upon any particular man. That great chief juſtice ſaid, they amounted to much more: they are an abuſe upon all men. Government cannot exiſt, if the law cannot reſtrain that ſort of abuſe. Government cannot exiſt, unleſs when offences of this magnitude, and of this complexion, are preſented to a court of juſtice, the full puniſhment is inflicted which the moſt approved times have given to offences of much leſs denomination than theſe, of much leſs. I am ſure it cannot be ſhewn, that in any one of the caſes that were puniſhed in that manner, the aggravation of any one of thoſe offences were any degree adequate to thoſe which are preſented to your lordſhip now. If offences were ſo puniſhed then, which are not ſo puniſhed now, they loſe that explanation which the wiſdom of thoſe ages thought proper to hold out to the public, as a reſtraint from ſuch offences being committed again. It was my duty alſo to conſider this as with a view to the public conviction.

I am to judge of crimes in order to the proſecution: your lordſhip is to judge of them *ultimately* for puniſhment. I ſhould have been extremely ſorry, if I had been induced by any conſideration whatever to have brought a crime of the magnitude which this was (of the magnitude which this was when I firſt ſtated it) into a court of juſtice, if I had not had it in my contemplation alſo that it would meet with an adequate reſtraint; which I never thought would be done without affixing to it the judgment of the pillory. I ſhould have been very ſorry to have brought this man here, after all the aggravations that he has ſuper-induced upon the offence itſelf, if I had not been perſuaded that thoſe aggravations would have induced the judgment of the pillory. The puniſhment, however, to be inflicted for this crime reſts finally with your lordſhip. If the court is of opinion that that judgment is not to be pronounced, it will be my humble duty to ſubmit with the moſt perfect acquieſcence. I have no intereſt in the buſineſs but as the officer of the public. I am nothing near ſo good a judge of the intereſt which the public have in the buſineſs as your lordſhips ſitting in this court; but when I am ſtating a matter to the court for judgment, I muſt ſtate it as I feel it; and I feel it ſo. And if it were my province to do more than to ſtate it ſo, I ſhould ſtill continue to think of it as I do at preſent.

Mr. *Horne.* My lords, though your lordſhips judgment is to be pronounced upon myſelf, I ſhall attend to hear it with the indifference and curioſity of a traveller; which I was early inſtructed to do in ſuch circumſtances as theſe, long before I could imagine I ſhould ever be in them. My lords, I am a little the more at a loſs to addreſs your lordſhips, becauſe (and I am not aſhamed to be laughed at for my diſappointment) I acknowledge that I came this morning into the court in the full aſſurance, that I ſhould find leſs difficulty to go out of it than I did to come in. My lords, I had no notion at all that *evidence* could ſupply the defects of the *information*; or that it would be attempted to be ſo ſupplied by evidence. I did not, it is true, at the time I objected to the deficiencies of the information, I did not, amongſt other things, add *evidence*. I believe I am time enough now to move any thing in arreſt of judgment; and if I am, I deſire that your lordſhips would underſtand me now to object to the ſupplying of the defects of an information by any evidence whatever. My lord, I apprehend that your lordſhip had directed Mr. Attorney-General and myſelf (and I ought, if what he has ſaid of me be any thing like truth, to beg his pardon for coupling my unworthy name with his) but, my lord, I thought that he and I were directed, if we could, to produce precedents. I own to your lordſhip, I did not well underſtand the direction when I received it; becauſe I had laid before you a *ſacred principle*, with which I was much better acquainted than with precedents; and for one of which I would willingly give up all the precedents that ever exiſted.

My lords, I ſhall no doubt be very irregular in the order of what I ſhall ſay to your lordſhips; and I ſhould not have ſaid a word, if there were not in Mr. Attorney-General's harangue ſome things that might eaſily ſtir a man to anger, if he was not as little ſuſceptible of it as I am. My lords, I feel not the leaſt anger at any thing that has paſſed. The gentleman on the trial had ſtripped me of common ſenſe; but he allowed me a *ſort* of underſtanding. My lords, he ſhifted his ground in his reply. He firſt, out of kindneſs and compliment to me, ſuppoſed what I had written to be beneath common-ſenſe: my lords, he afterwards found it proper to make it beyond common-ſenſe. At firſt I was a fool: at laſt I was a madman. My lords, at firſt he thought it---(I forget his expreſſion) but he thought it candor (I think he ſaid) to the names of perſons alluded to, though diſtantly, to ſuppoſe that what I had written was falſe. To ſave others from ſome ſcandal of imprudence or impropriety, he thought it candor to impute falſhood to me. My lords, when that was proved to be true, he only ſaid, that he did not mend the matter: indeed, whichever ſide of the caſe I took, nothing could mend the matter.

It is not my buſineſs, my lord, to take the ſmalleſt notice of what fell from your lordſhip; nor ſhall I mention a number of things, which I might juſtly be permitted to mention, of wilful and groſs miſrepreſentations of the evidence upon the trial: I ſhould not have mentioned it at all; but Mr. Attorney-General has hinted, though not ſpecified, miſrepreſentations by me of the proceedings of the trial.

My lords, he has endeavoured to alarm me with monſtrous fines, with long impriſonment, with infamous puniſhment. My lords, infamy is as little acquainted with my name as with that gentleman's or with your lordſhips. I feel no apprehenſions from the pillory. I do feel ſome little pain that a gentleman, taking advantage of my ſituation, ſhould ſay and offer thoſe things, unfounded in appearances even of truth, againſt me, which neither he nor any man like him dare to inſinuate in any other ſtation but this.

He has attempted likewiſe to inſinuate, my lords, a ſpecies of robbery. When he did ſo he was guilty of falſhood. He ſaid, that my witneſs did not prove that the 50*l.* was paid into the bankers. My lords, he literally proved it.

My lords, he repreſents me as ſpeaking the language of---'if you 'dare to puniſh me;'---and he ſays, 'it is a language addreſſed to the 'loweſt of the mob'. Indeed I think ſo too: but it is his own language, not mine.

My lords, he has dwelt upon my occaſions, my deſperate ſituation, my want of character and fortune. My lords, it is my misfortune that from my cradle I have had as effeminate an education and care and courſe of life as Mr. Attorney-General. It is my misfortune that there was not a greater want of fortune: and as for my occaſions, my means have always been beyond them. I ſhould rather, my lords, if I was ſpeaking in extenuation or to mitigate your puniſhment, I ſhould rather cloſe in with Mr. Attorney-General, and acknowledge myſelf that deſperate, helpleſs wretch that he has repreſented me: perhaps it would be the moſt effectual motive to your lordſhips compaſſion. My lords, I never in my life ſolicited a favour: I never deſire to meet with compaſſion.

My lords, he has talked to your lordſhips of my patrons. I have had in my life, and very early in my life, the greateſt of patrons; aye! with all their power, greater than any that now hear me. My lords, I renounced my patrons, becauſe I would not renounce my principles; repeatedly, over and over again, of different deſcriptions, and in different ſituations. My lords, I am proud, becauſe I am inſulted; or elſe I certainly ſhould not have held any of this language.

My lords, Mr. Attorney-General through a blameful careleſſneſs has told you a ſtory of a theological, polemical diſpute between myſelf and a pariſhioner. I can eaſily conceive that he let himſelf fall into that miſtake for the ſake of drawing a ſmile from your lordſhips and the court upon the *reverend* gentleman. But in this, like the reſt, my lords, there is not a ſyllable, not the ſmalleſt foundation of truth. I never had a theological, polemical diſpute. My lords, I am free to acknowledge, that no theological diſputes that ever I read, and I have endeavoured to read all that ever happened, none of them ever intereſted me in the manner that the preſent diſputes do intereſt me. My lords, I never was made to be a martyr. I have opinions of my own; but I never intended to ſuffer for them at the ſtake.

My lords, he has endeavoured to inſinuate that all that I wrote, and all that I ſaid, was for the ſake of a paradeful triumph over juſtice: and he has talked again and again of the mob. My lords, the mob have conferred no greater favours upon me than upon Mr. Attorney-General. I have been repeatedly followed by very numerous mobs in order to deſtroy me, ſingle and alone, for a great length of way; not once, or twice, or three times, but four and five times; two or three thouſand at my heels. I am ſenſible of the ridicule of the ſituation, even whilſt I mention it. Theſe are the only favours that I have ever received from the mob; theſe are the only favours that I have ever ſolicited; and I proteſt to your lordſhips I had much rather hear the mob hiſs than halloo: for the latter would give me the head-ach, the firſt gives me no pain. My lord, I have heard of thoſe who have expreſſed more wiſhes for popularity than ever I felt. I have heard it ſaid, and I think it was in this court, that they 'would have popularity: but it ſhould be that 'popularity which follows, not that which is ſought after.' My lords, I am proud enough to deſpiſe them both. If popularity would offer itſelf to me, I would ſpeedily take care to kick it away.

My lords, as for ambition, and bodies of men, and parties, and ſocieties, there is nothing of it in the caſe. There is no body of men with whom I can think, that I know of. There is no body of men with whom I am connected. There is no man or men from whom I expect help, or aſſiſtance, or friendſhip, of any kind, beyond that which my principles or ſervices may deſerve from them individually. Private friendſhips I have, like other men; but they are very few: however, that is recompenſed to me, for they are very worthy.

My lords, Mr. Attorney-General has ſaid, that I repreſented impriſonment as no kind of inconvenience to me. As no kind of inconvenience, my lords, will not certainly be true; becauſe the great luxury of my life is a very ſmall but a very clean cottage: and though impriſonment will be ſo far inconvenient to me, the cauſe of it will make it not painful.

My lords, I find that not only I have a *ſort* of underſtanding very different from that of Mr. Attorney-General, but my notions of law, and my notions of humanity, are equally different. My lords, between the time that I had laſt the honour of appearing before you and the preſent time, it happens very unfortunately for Mr. Attorney-General that he has proved, that not only my notions of law and decency, but my notions of propriety and humanity, are widely different from his: and I mention it, my lords, becauſe it goes immediately to the doctrine now attempted to be eſtabliſhed. Mr. Attorney-General has heard a perſon, as great as himſelf, between that time and this, juſtify the legality, the propriety, the humanity of the tomahawk and the ſcalping-knife. Between the laſt time I appeared here and this time, theſe have been the ſort of *king's troops* juſtified, by a high officer of the law, to be employed, as legal, proper, mild, and humane.

My lords, Mr. Attorney-General has ſaid, that I declared upon the trial that I had a certain employment which made it *neceſſary* for me to be confined as long as your lordſhips ſhould or would confine me. That is not true. My lords, I did ſay that I had an employment, had ſomething to do, that would confine me to my room longer than your lordſhips would confine me. I believe I ſaid more---I neither intended when I ſaid it to affront you, nor will attempt at this time to appeaſe you.---I ſaid longer than your lordſhips *dare* to confine me; thoſe were the words: and I ſaid it, becauſe I did believe and do ſtill believe that your lordſhips dare not wilfully do injuſtice. My lords, as for that certain employment, I did not ſay it was *neceſſary*. It is an employment of amuſement merely; an employment that I meant to make public; but not for the ſake of gain or praiſe. My lords, when firſt I began my life, I was encouraged to worthy and to virtuous actions by the temptation of praiſe: I have long ſince learned, my lords, to be able to do thoſe actions which I think virtuous, in deſpite of ſhame.

My lords, Mr. Attorney-General has done what I have before heard attempted to be done with very great ſorrow: he has attempted to reinſtate the Star-Chamber. The fault he finds with it is only its *rankneſs*,---'before the proſecutions grew ſo rank in the Star-Chamber, and which '*rankneſs* cauſed it to be aboliſhed.'---I don't recollect the words of that act by which it was aboliſhed; but I am ſure that its rankneſs alone is not the reaſon given. If the gentleman would lend me his memory, I ſhould then repeat that none of the powers, nor none like them (your lordſhips know better the words, I don't recollect the words) but nothing like them was ever to be put in uſe again in that or in any other court, as well as I can remember.

Mr. Attorney-General has talked of the perſonal conceit of *Tutchin* concerning authors. I thought myſelf, till a ſtrong zeal made me act otherwiſe, as little likely to become an author as any of thoſe gentlemen who hear me. I have never been a contractor with any news-papers; he knows I have not. If I deſired the printer of the *Public Advertiſer* to give me up always to juſtice, my lords, I cannot eaſily conceive how Mr. Attorney-General could find any thing to juſtify his oratory upon that ſubject. Is that a defiance of a court of juſtice? Is that flying in the face of the juſtice of the country? To be willing to abide its ſentence; not to withdraw myſelf from its cenſure; not to wiſh even to avoid any enquiry into my conduct; is that to be that bold-faced audacious man that defies the juſtice of his country? My lords, if it is, I can only again deplore that a gentleman, who muſt have great underſtanding, and great talents and abilities, from the office which he holds, that the underſtanding of that gentleman ſhould be ſo very different from mine.

My lords, I have already appeared in this ſituation often enough; and if I had, as he imagines I have, any luxury or pleaſure in holding myſelf forth in public; if I had, it would long before this have been ſatisfied. ----There are many other things which I might ſay to your lordſhips; but as I truſt, and fully truſt, that I ſhall ſtill find a remedy, my lords, againſt the preſent deciſion, I ſhall forbear ſaying one ſyllable in extenuation of what the attorney-general has been pleaſed to charge me with; and leave your lordſhips to pronounce your judgment without the leaſt conſideration of me, without the ſmalleſt deſire that you ſhould abate a hair from what you think neceſſary for the juſtice of my country. I ſhall leave it entirely to your lordſhips diſcretion.

Mr. Juſtice *Aſton*. *John Horne*, clerk, you ſtand convicted, upon an information filed againſt you by his majeſty's attorney-general, of writing and publiſhing, and cauſing to be printed and publiſhed, a falſe, wicked, and ſeditious libel of and concerning his majeſty's government and the employment of his troops. The libel has been openly read in court from the record; and, upon the report of his lordſhip who tried this information, it appears that, upon your own croſs-examination of one of the witneſſes, you gloried in the publication of it; that you avowed you did not deſire to be ſcreened; and that you avowed yourſelf the author of it. Since that indeed, in this court, you attempted to gloſs over parts of this libel, and to confine its tendency to a poſſible private charge upon the king's troops, and not concerning his majeſty's government; to treat that word to be indeterminate in its ſignification, and not to carry with it the conſtruction which the information avows, and which the jury have found, of its concerning the king's government and the employment of thoſe troops by his authority. You have ſaid very truly that evidence is not to ſupply any defect in an information. There is no defect in the information: the information ſets forth the libel at large; and the information charges that libel to be of and concerning his majeſty's government, as I before-mentioned. Upon that the court has now decided agreeable to the finding of the jury; and no man can really miſtake the malicious meaning and *inſinuation* of it. It is a libel which contains a moſt audacious inſult upon his majeſty's adminiſtration and government, and the conduct of his loyal troops employed in *America*. It treats thoſe *diſaffected* and *traitorous* perſons who have been *in arms and in open rebellion* againſt his majeſty, as faithful ſubjects---faithful to the character of *Engliſhmen*: and it falſely and ſeditiouſly aſſerts, that for that reaſon only they were inhumanly murdered by his majeſty's troops at *Lexington* and *Concord*. By this ſame libel ſubſcriptions too are propoſed and promoted for the families of thoſe very *rebels* who *fell in that cauſe*, traitorouſly fighting againſt the troops of their lawful ſovereign. This is the light in which this libel muſt appear to every man of a ſound and impartial underſtanding; this is the plain and the unartificial ſenſe of it. The contents of this libel have been too effectually ſcattered and diſperſed by your means, as charged in the ſeveral counts of the information, and they have been inſerted in divers and different news-papers. The contents are too well known, and I truſt abhorr'd, to need any repetition from me, for the ſake of obſerving farther upon their malice, ſedition, and falſehood. The court have conſidered of the puniſhment fit to be inflicted upon you for this offence: and the ſentence of the court is, ——That you do pay a fine to the king of 200l. that you be impriſoned for the ſpace of twelve months, and until that fine be paid; and that upon the determination of your impriſonment, you do find ſureties for your good behaviour for three years, yourſelf in 400l. and two ſureties in 200l. each.

Mr. *Horne*. My lord, I am not at all aware of what is meant by finding ſureties for the good behaviour for three years. It is that part of the ſentence that perhaps I ſhall find moſt difficulty to comply with, becauſe I don't underſtand it. If I am not irregular in entreating your lordſhip to explain it to me——your lordſhips, I ſuppoſe, would chuſe to have your ſentences plainly underſtood, and I know not the nature of this ſuretyſhip.

Lord *Mansfield*. It is a common addition.

Mr. *Horne*. And it may be a common hardſhip.

Mr. Juſtice *Aſton*. Not to repeat offences of this ſort.

Mr. *Horne*. Of this ſort?

Lord *Mansfield*. Any miſdemeanour.

Mr. Juſtice *Aſton*. Whatever ſhall be conſtrued bad behaviour.

Mr. *Horne*. If your lordſhips would impriſon me for theſe three years, I ſhould be ſafer; becauſe I can't foreſee, but that the moſt meritorious action of my life may be conſtrued to be of the ſame nature.

Lord *Mansfield*. You muſt be tried by a jury, by your country, and be convicted. You know it is a moſt conſtant addition. You know that yourſelf very well.——Where are the tipſtaves?

APPENDIX.

A P P E N D I X.

No. I. *Proceedings on the Caſe concerning the King's Prerogative in reſpect to the Education and Marriage of the Royal Family.* Hilary Term, 4 Geo. I. 1717.

[*The following caſe is chiefly taken from the* Reports *of lord* Forteſcue, *who was a judge of the* Common-Pleas *at the time the opinion of all the judges was taken upon it.* Forteſc. Rep. 401. *The only addition, we make, to lord* Forteſcue's *ſtate of the arguments is to ſupply a conſiderable deficiency in the copy of the written opinion given by the two diſſenting judges. What we have introduced for this purpoſe is the opinion of the two diſſenting judges at length, inſtead of the imperfect copy of it in lord* Forteſcue. *This part is taken from a book intitled the* Life of Judge Price.—*In lord* Forteſcue's Report, *the caſe is called* '*The grand* Opinion *for the prerogative* '*concerning the royal family.*'

Since the caſe we now preſent to the reader, one part of the ſubject of it has undergone a parliamentary diſcuſſion, the occaſion of which was the act paſſed in 1772, *for better regulating the marriages of the royal family.* 12 G. III. c. 11. *The preamble to that act contains a declaration, that* '*the kings of this realm have ever been* '*intruſted with the care and approbation*' *of ſuch marriages. The generality of this recital, together with the reſtraints introduced to guard the deſcendants of* George *the ſecond from improper marriages, cauſed much debate in parliament, both on the ancient law and the policy of the new regulation concerning this important ſubject. In the houſe of lords two proteſts were ſigned againſt paſſing the act; and theſe will enable the reader to judge, what were the principal objections to it. See the* Hiſtory *and* State Papers *in the* Annual Regiſter *for* 1772, *and* Almon's Parl. Deb. *for the ſame year. Whilſt the act was under conſideration of the lords, they conſulted the judges on the extent of the prerogative of the crown in reſpect to marriages of the royal family; who concurred in opinion, that the approbation of the marriages of the king's grand-children belonged to his majeſty, and alſo the approbation of the marriage of the preſumptive heir of the crown, in whatever degree related to the king; but confeſſed, that they could not preciſely aſcertain, to what other branches of the royal family this prerogative extended. Beſides the inſtances of the crown's interpoſition noticed in the following caſe, our late moſt diſtinguiſhed commentator on the law of* England *refers to many others, which he arranges according to the degrees of relationſhip.* 1 Blackſt. Comment. 8th edit. 225. *See alſo the caſe of the counteſs of* Shrewsbury, ante page 108 *of his volume.*]

THE judges met on the 22d day of *January* in *Hilary* term in the fourth year of his late majeſty king *George*, and in the year of our Lord 1717, at the right honourable the lord *Parker*'s chambers in *Serjeants-Inn* in *Fleet-ſtreet*, he being then lord chief juſtice of *England*, (afterwards lord chancellor of *Great Britain)* in purſuance of the then lord chancellor *Cowper*'s letter from the king.

The judges being met, the chancellor's letter was read, which was to ſignify the king's pleaſure, that all his judges ſhould meet, with all convenient ſpeed, and give him their opinion upon the following queſtion, *viz.*

' Whether the education, and the care of the perſons of his majeſty's grandchildren, now in *England*, and of prince *Frederick*, eldeſt ſon of his royal highneſs the prince of *Wales*, when his majeſty ſhall think fit to cauſe him to come into *England*, and the ordering the place of their abode, and appointing their governors, governeſſes and other inſtructors, attendants and ſervants, and the care and approbation of their marriages, when grown up, do belong of right to his majeſty, as king of this realm or not.'

Soon after the judges were met, they had a meſſage ſent them, from his royal highneſs, *George*, then prince of *Wales*, now king of *Great Britain*, by his ſecretary Mr. *Molineux*, now deceaſed, and by his own ſolicitor-general, Mr. *Carter*, ſince ſir *Lawrence Carter*, a baron of the *Exchequer*, to this effect: that his royal highneſs the prince of *Wales*, underſtanding that a queſtion relating to his right of guardianſhip to his children was before them, deſired, that before any determination was had upon it, they would give leave that he might be heard by his counſel concerning the ſame, and then the meſſengers withdrew.

After which the judges having conſulted together about this meſſage, agreed on this anſwer, *viz.*

We have conſidered of what you have been pleaſed to propoſe from his royal highneſs the prince of *Wales*, and we are all of opinion, that in caſes wherein our advice is required by his majeſty, we cannot hear counſel without his majeſty's leave.

The ſame meſſengers being called in again, the ſaid anſwer was given to them by the lord chief juſtice *Parker* in the name of all the judges.

Thereupon the judges agreed to acquaint the lord chancellor with this meſſage, and with the anſwer, in order to acquaint the king.

Immediately after this, without loſs of time, the judges entered on the conſideration of the queſtion referred to them.

Blencow juſtice. I don't ſee, my lords, but marriage takes in the whole queſtion, but let us debate the whole matter minutely, and give our opinions *ſeriatim.*

Dormer juſtice, for the king. What is very material to this purpoſe, is, the marriage articles of *Car.* 1. then prince of *Wales*, with the infanta of *Spain*, in the life-time of his father, king *James* 1. under the great ſeal. One of thoſe articles relates to the education of the iſſue of that marriage, which was, that the ſons and daughters, born of that marriage, ſhould be under the care, and brought up by the infanta of *Spain* until the age of ten years. Thereupon the prince himſelf ſays, if they thought that term was not enough, that he would intercede with his father, the king, that the ten years of education with the infanta might be lengthened to twelve years: and ſays further, ' and I promiſe, ' and freely, and of mine own accord ſwear, if it happen that the intire ' power of diſpoſing this matter be devolved to me, I will approve of the ' ſaid term of twelve years.' And theſe articles were ſworn to by both king and prince. 1. *Ruſhworth* 86, 87.

Chief juſtice *King*, afterwards lord chancellor, quoted *Rymer*, 4 *tom. fol.* 605, 608. 8 *Edw.* 3. and *fol.* 620 and 624.

Lord *Parker* chief juſtice. The caſe of *H.* 3. is very material. The king's ſiſter *Joan* was abroad, and with her own mother in *France*, and yet the king here in *England* made the match with *Alexander* king of *Scotland.* The king ſays, *dabimus in Uxorem, et nos & concilium noſtrum fideliter laborabimus ad eam habendam.* Rymer 1 tom. p. 240, 350. 4 H. 3. Anno 1220. *Et ſi forte eam habere non poterimus, dabimus ei in uxorem* Iſabellam *junior' ſororem noſtram.* And many other ſtrong expreſſions there are, as *maritabimus et conceſſimus in uxorem*; *laborabimus per nos & amicos noſtros.* Rymer, *vol.* 1. 241, 407. Madox Tit. Aid 412. *H.* 3 had aid to marry his ſiſter. 12 *Co. Rep* 29, 30.

The king of *Sweden* was propoſed to the lady *Elizabeth*, (afterwards queen *Elizabeth)* for marriage; but ſhe refuſed, becauſe it was not firſt communicated to her majeſty the queen. *Cotton*'s *Record*, 326.

There is alſo the famous caſe of the counteſs of *Shrewſbury*, and ſhe was ſent to the *Tower*, and impriſoned there for a high miſdemeanor and great contempt, in being privy to the flight of lady *Arabella*, who being of the blood royal, had married one Mr. *Seymour* without the conſent of the king, and he was likewiſe impriſoned in the *Tower* for that marriage. *Co. Rep.* 12. *p.* 94.

In the caſe of the duke of *York*, being to be married to the ducheſs of *Modena*, there was an addreſs of the houſe of commons to the king, that he might not be married to that princeſs. The king's anſwer (which was remarkable) was, that the marriage was compleated, and by his royal authority and conſent. See lord *Clarendon*'s Hiſtory.

About *December* 1699, an addreſs was moved for by the houſe of commons to the king, to remove the then biſhop of *Saliſbury* from being preceptor to the duke of *Glouceſter*, and it paſſed in the negative, which ſhews the parliament thought the power to be in the crown.

Another inſtance is, the caſe of the earl of *Marlborough*. The king appointed him governor of the duke of *Glouceſter*, as a mark of his qualifications for an employment of ſo great a truſt, and as an inſtance of this prerogative.

So in the caſe of the marriage of the princeſs of *Orange*, it was made wholly by the king, againſt the father's conſent.

In *Rymer*, *tom.* 8. 698. there is a power given by the king to certain lords to treat of a marriage of the king's ſon, the prince of *Wales*, with one of the daughters of *John* duke of *Burgundy*, and earl of *Flanders*.

Friday, *Jan.* 24, 1717, the judges met again at the ſame place, and thereupon the paſſage in *Edw.* 5. was read out of *Kennett*'s Hiſtory of *England*, *viz.* The queen continuing in the ſanctuary with her ſon, the duke of *York*, the archbiſhop of *Canterbury* was ſent by the duke of *Glouceſter*, and other lords, to the queen, to perſuade her to deliver up the duke of *York*, or elſe they were to take him away by force.

Here the prince of *Wales*'s ſecretary, the ſaid Mr. *Molineux*, attending the judges, with Mr. ſerjeant *Reynolds* the prince's counſel, ſent in to the judges, and brought an order with them from the king in the following words:

The king having been informed, that his royal highneſs the prince of *Wales* deſired to be heard by his counſel, his majeſty's pleaſure is, that any one ſingle perſon that his royal highneſs ſhall think fit to appoint may apply to the judges, and ſhall be admitted to lay before them what he has to offer in behalf of his royal highneſs, in relation to the queſtion before them. Upon this Mr. *Molineux* offered to come in, but he was refuſed to be admitted, becauſe he was not within the order of his majeſty; but Mr. ſerjeant *Reynolds*, afterwards lord chief baron, was admitted as counſel for the prince of *Wales*, according to the king's leave, and argued as follows:

Reynolds ſerjeant at law, for the prince. My lords, I have orders from the prince of *Wales* to attend on a queſtion relating to the guardianſhip of his children.

Whereupon the lord chief juſtice *Parker* informed him exactly what the true queſtion was, which was read to him *verbatim*, though he confeſſed he knew what the queſtion was before he came.

And then the ſerjeant went on thus. The guardianſhip of the children of right belongs to the father. 3 *Co.* 37. *Ratcliff*'s caſe. 2 *Roll's Abr.* 40, 41, 42. The caſe of the father and grandfather is diſtinctly conſidered, and the cuſtody appears to belong to the father, and not to the grandfather, and ſo is 30 *Ed.* 3. 17. *a.* and *Vaughan* 180. None can have the cuſtody of the ſon and heir apparent but the father. *Co. Litt.* 84. *a.* In the caſe of younger children the argument is as ſtrong againſt the grandfather, and ſo is 4 & 5 *Ph.* & *M. cap.* 8. Now why is the power here ſuppoſed to be in the grandfather, when 12 *Car.* 2. is poſitive that the power is in the father, and that the father can appoint a tutor and guardian, and the prince of *Wales* is within that act? 2 *Roll*'s *Abr. tit. Guardian*, *p.* 37. Though the prince is but a ſubject, yet in dignity he is made much greater, and ſuppoſed in ſome caſes to be almoſt equal with the king, as *Seld. tit. Honour*, 495. So that the reaſon ſhould be ſtronger for the prince to have greater power than ordinary perſons have. Now as to *Bracton*, who treats of this ſubject, that is tranſcribed from *Juſtinian*. Therefore that book and the inſtance there ought not to be regarded, for he deviates from the common law, and is nothing but civil law. Vide *Selden*'s *Diſſertation on Fleta*.

There is little to be found in *Rymer* concerning this matter, for there is no inſtance where there is a father and grandfather alive together, but one in the 8th *vol. Rymer*, *p.* 608. In *H.* 4th's time, grants were indeed made by the king for the maintenance of the earl of *March* in the cuſtody of the prince of *Wales*. But there is nothing here can eſtabliſh a prerogative in the crown. I have only looked over the firſt ten volumes of *Rymer*, and ſhall not trouble your lordſhips with hiſtory, as that of *Ed.* 5. in *Kennett*'s Hiſtory, where the queen ſaid that ſhe had adviſed with learned counſel, and they told her that ſhe had the right of wardſhip to the duke of *York*.

There is no inſtance or caſe whatſoever in any law book or record, in the caſe of the crown, or indeed any where elſe, that the cuſtody belongs to the grandfather, nor was ever claimed or pretended to by the grandfather.

As to marriage, every man may marry his daughter where he pleaſes. The antient feudal law did extend pretty far as to marriages. *Britt. cap.* 67, 68. *p.* 168. *b.* So is *Co. Litt.* 140. and never denied but only in the caſe of a widow holding of the crown, who cannot marry without leave of the crown. *Mag. Cha. cap.* 7. 2 *Inſt.* 18. 6 *H.* 6. *Cotton*'s *Records*.

Marriage always belongs to the father, and the prince of *Wales* here would be intitled to aid *pur file marrier*. It is true the ſtatute of 28 *H.* 8. *cap.* 18. makes it high treaſon to marry any of the royal family; but then this ſhews it was lawful before this act, becauſe reſtrained by act of parliament, and now that act is repealed.

Rymer, *vol.* 4. 605, 608. which was in 8 *Ed.* 3. ſeveral procuratorial letters *quantum in nobis* were granted to the archbiſhop of *Canterbury* to marry, and in *page* 620. are procuratorial letters, in the caſe of *Edmund* earl of *Cornwall*, *quantum in nobis* to be married. *Sandford* 216.

There is one inſtance indeed in *Rymer* of the marriage of a daughter in the life-time of the father, who was the king's ſiſter, which is in *vol.* 1. *Rymer* 407. and in 26 *H.* 3. *de matrimonio contrahendo*, &c. *promittimus & modis quibus poterimus laborabimus per nos & per amicos noſtros.* But this ſhews it was not done by the prerogative alone, and indeed there is nothing to ſupport any notion of that nature. As to the caſe in *Ruſhworth*, *page* 87, 88. concerning the oath and marriage articles there mentioned, they were allowed to be contrary to the known laws of *England*, and the treaty therefore confirmed by parliament.

The prince's counſel, ſerjeant *Reynolds*, having ended his argument, withdrew: and then the

Lord chief juſtice *Parker* went on with the caſe of *Ed.* 5. The queen being in the ſanctuary ſays, my ſon, as my learned counſel tell me, is my ward, becauſe he hath no lands by deſcent holden by knights ſervice, but only by ſocage; and therefore to me by law the guardianſhip of my ſon does belong. *Kennett*'s *Hiſtory* 490. Then

The ſtory in *Ed.* 3. was read, to ſhew *Richard* the ſecond, then prince of *Wales*, and ſon of the late *Black Prince*, was in the cuſtody of his mother, for he was at *Lambeth* with his mother, which is nothing to the purpoſe. But what brother *Reynolds* ſays about the ſtatute 12 *Car.* 2. it is neither law nor reaſon, nor is, or can the prince of *Wales* be within that act of parliament.

As to the authority of *Bracton*, to be ſure many things are now altered; but there is no colour to ſay it was not law at that time, for there are many things that have never been altered and are law now. And as to what is ſaid as to the articles and oath quoted out of *Ruſhworth*, their being againſt law, that is only *gratis dictum*; for whether it was a fair treaty or no, is not the queſtion, for this matter was only between the king and the prince.

Price baron. There is ſuch an oath on the occaſion of the ſaid marriage as has been mentioned; but I do not know whether it has not been proteſted againſt. We muſt truſt to collectors for theſe articles. The articles of marriage of *Car.* 1. with *Henrietta Maria*, are in *Rymer*, *vol.* 17. 673, 676. one of the articles much like what was mentioned before, which was, that ſhe was to have the nurture of her children till 13 years old, theſe articles were agreed on in king *James*'s time, 12 *Rymer* 658. The prince's counſel ſeemed to agree, that marriage and education go together.

King chief juſtice of the *Common-Pleas*, afterwards lord chancellor. In the bill of precedency it fully appears, that the king's grandchildren are children. In the caſe of children of the royal family ſent beyond ſea, the king's grandchildren are within that law. So prayers for the king and his royal family, includes all his grandchildren, though the king had no ſon living.

Chief juſtice *Parker*. The law of God and law of nature are rather with the grandfather, and the ſucceſſion cannot be altered, for that every man has a right in the royal family.

Eyre juſtice. It is the conſtant cuſtom for all the king's ſervants to aſk the king's leave to marry. *Rymer*, *vol.* 16. *p.* 710.

Price baron. There is no judicial determination, nor any caſe that comes up to this. The queſtion here is, whether this power be in the king, excluſive of the prince? If there be an ill king upon the throne, it may be very miſchievous.

King chief juſtice. The queſtion is, whether the king's grandchildren can marry without the king's leave; for the father cannot compel them. It is impoſſible this queſtion ever ſhould come into *Weſtminſter-Hall* to be determined there, and therefore to ſay there is no legal determination, is to ſay nothing to the purpoſe. This is in its nature ſo great a truſt that it cannot by the conſtitution be lodged any where but in the crown.

Parker chief juſtice. There is no law againſt any one for marrying without the father's conſent; but the crime is to marry any of the royal family without the king's conſent. The king's conſent was always held neceſſary, in the caſe of marriage of any of the royal family, always uſed and never conteſted. Were it otherwiſe it would be ſetting up two independent powers, and is a truſt too big for any ſubject.

The caſe of the princeſs of *Orange*'s marriage, and that of the princeſs *Anne* of *Denmark*, are great inſtances of the power and prerogative of the crown. Theſe matches were publicly declared by the king himſelf, and againſt the conſent of the father.

Montague baron quoted *Stair*'s Inſtitutions of the Laws of *Scotland*, *fol.* 38. which agrees with *Bracton*, *lib.* 1. *cap.* 9. exactly, and with *Fleta*, *lib.* 1. *cap.* 6.

Eyre juſtice quoted *Cowell*'s *Inſt. tit.* 9. *p.* 14. *de patria poteſtate*; then he ſaid that *Edward* the *Black Prince* diſpoſed of the governance of his ſon *Richard* of *Burdeux*, afterwards *Richard* 2. to *Simon Burleigh* made his tutor at *Burdeux*. *Hollingſhead* 414.

And in the caſe of the counteſs of *Shrewſbury* no offence was declared. *Hob.* 235. *Dugdale*'s *Baronage*.

Dormer juſtice quoted *Ruſhworth*'s *Collect.* 1*ſt part.* 168. *Eachard* 974. *Bacon of Government*, *fol.* 14. And in lord *Clarendon*'s Hiſtory, Baby *Charles* is ſaid to be the child of the kingdom.

Then the judges proceeded to give their opinions *ſeriatim*, beginning from the junior, which was baron *Forteſcue Aland*, who had been ſolicitor-general to the then prince of *Wales*, one of the firſt officers in his ſervice, as follows.

Forteſcue Aland baron. My lords, this is a queſtion of great importance to the whole kingdom, and I am content for the better diſcuſſing it to divide it into two parts; becauſe it has been ſo done by ſome of my brothers, though I ſhould have thought that if the king has the marriage of his grandchildren, of neceſſary conſequence he had their education too.

I will then conſider firſt, whether the king has the care and approbation of the marriage of prince *Frederick*, and his other grandchildren; and whether of right it belongs to his majeſty, as king of this realm, or not.

This ſubject, touching the power of a grandfather, may be treated of, either as a public or a private right. It has been treated of pretty much as a private right by the two judges that differ, and by the counſel for the prince of *Wales*, which I think is an error, in the foundation of their argument; for it ought manifeſtly to be treated as *jus publicum*, ſuch a right as our law books expreſs it to be, *quod ad ſtatum reipublicæ ſpectat*, and that makes it the king's prerogative, and that is the king's inheritance, as king of this realm, which is too great a point to be governed by the narrow rules of private property. Now to treat this otherwiſe, I think, is injurious to the prince himſelf and all his children. Our law books ſay he is eſteemed as one neareſt to the king. So it has been determined in full parliament, in the caſe of the prince of *Wales* in *H.* 6th's time; and in his patent, which was made by authority of parliament in 33 *H.* 6. the introduction of the patent is, *ut ipſum, qui reputatione juris cenſetur eadem perſona nobiſcum, digno preveniamus honore, &c.* ſo that in the eye of the law, they are to be reckoned but as one perſon.

It is for the ſame reaſon that an act of parliament which relates to the prince, is a public law, of which every body is to take notice, becauſe whatever concerns the prince, concerns the king, and whatever concerns the king concerns every ſubject in *England*; and therefore the act that relates to the duchy of *Cornwall* has been held to be a public law. Now let us ſee what is ſaid in my lord *Coke*'s 8 *Rep.* called the *Prince's Caſe.* Speaking of the prince, 'tis ſaid, *coruſcat radiis regis patris, & cenſetur una perſona cum ipſo rege.* So ſays lord *Hobart*, who was the prince's chancellor, *Hob. Rep. p.* 226.

'Tis for the ſame reaſon, that it was high treaſon, by the common law of *England* (before any ſtatute) to compaſs and imagine the death of the king's eldeſt ſon and heir, who is generally made prince of *Wales*, though now born duke of *Cornwall* (but is not ſo of a collateral heir to the crown); and this offence is called *crimen læſæ majeſtatis*, a crime that hurts the majeſty of the king himſelf. It follows then that as they are but one perſon in law, ſo in point of law they are ſuppoſed to have but one will in relation to the education, marriage, and management of the grandchildren; and the prince of *Wales* in point of law is ſuppoſed in every thing to concur with his majeſty; which quite ſubverts and deſtroys the diſtinction in common perſons of grandfather, father and ſon. Now the king as he is *parens patriæ*, he is alſo *parens nepotum*, parent of his grandchildren, as lord *Coke* himſelf expounds the king's nephew to ſignify his grandſon, alſo from the *Latin nepos*, which ſignifies both. So in the caſe of a queen conſort, ſhe is the firſt wife in the kingdom, *Quen* in the *Saxon* language ſignifying wife. And therefore by reaſon of excellence it was the name for the king's wife, who conſider her in her private capacity, as the private wife of a common ſubject, ſhe cannot ſue or be ſued by herſelf, nor can grant to or from (a) her huſband; but then conſider her in her public character and capacity, as a queen, ſhe can ſue and be ſued by herſelf, and make grants to and from the king her huſband, by her prerogative; and antiently ſhe had a great many. Now I think in this caſe much may be argued from the names and appellations of the children of the royal family.

In hiſtory they are called the children of *England*, and all of them born princes and princeſſes of *England*, before they had any title, and all of them kings and queens *in potentia*, and may one day reign over us. *Selden* calls them heirs apparent of *England*, and they are called ſo in the parliament rolls. This agrees with the moſt early times in our kingdom, for till *H.* the firſt's time they were diſtinguiſhed from all other perſons, by calling both the eldeſt and the reſt of the king's ſons *Clito* and *Clitones*, and they had no other titles. Now *Clito* is a *Latin* word which comes from the *Greek* work Κλειτὸς which ſignifies *Inclytus*, moſt noble and famous. So the word *Ætheling*, as *Edgar Ætheling*, who was not the king's ſon, but his great nephew, from the *Saxon* word *Ethel*, *nobilis*; which ſhews that all the royal family were called by the ſame name as the king's ſons, and ſo ſets out the admirable union of the royal family. *Selden*'s *Tit. Hon.* 498, 499.

The firſt ſon of the king is called prince of *England*, before any creation. And ſo it is in *Scotland.* Before the Union he was called prince of *Scotland.* And ſo ſays Mr. *Selden* it is in other nations. As in *France*, the duke of *Orleans*, regent of *France*, was called *Petit Fitz de France*, grandſon of *France*, not grandſon to the king. So *Henrietta Maria*, in the marriage articles with *Charles* the firſt, was called *Fil'e de France*, daughter of *France*, and not daughter of the king. *Rymer* 17. *tom. p.* 674. *Selden*'s *Titles of Honour* 493, *&c.*

Having then made it appear, I think clearly, that all the children and grandchildren of the royal family are public perſons, and princes of the nation, and the prince of *Wales* himſelf one and the ſame perſon with the king; it follows manifeſtly, as a juſt corollary and conſequence, that the king, who has the executive power in him, is to have the care and command in the marriages of theſe children, for the good of the whole nation. It is part of that original truſt, which, by the conſtitution of our government, is repoſed in the king, for the ſecurity of his people.

And as this is a prerogative veſted in the crown, in the reaſon of the law, and nature of a monarchy; ſo in all ages the crown has practiſed, and been in poſſeſſion of this right.

Now in the point of marriages there are precedents from the time of *H.* 3. down to this time.

In 28 *H.* 6. it was one of the articles of impeachment of high treaſon againſt the duke of *Suffolk*, for attempting only to marry his ſon to *Margaret* the daughter and heir of the duke of *Somerſet*, who had a right to the crown, after the death of the king without iſſue, although ſhe was not heir apparent, for there was a prince of *Wales* then living. *Cotton* 642, 643.

When he came to his trial he did not deny but it was an offence, but inſiſted it was not true, for that ſome of the lords then preſent knew, that he intended to marry his ſon to the earl of *Warwick*'s daughter.

And this is ſtill the ſtronger, becauſe this lady was in ward to him, and ſo he had a private right in her marriage.

By an act of parliament of 28 *H.* 8. it is made high treaſon to marry any of the royal family. It is thereby enacted, that if any perſon preſume to marry any one of the king's children lawfully born, or otherwiſe, or commonly reputed or taken for his children or grandchildren, without the ſpecial leave of the king, he ſhall be adjudged a traitor to the king and the realm; and thereby it is made high treaſon in the lady too, being againſt the king and realm; which ſhews plainly, the whole kingdom is concerned.

And though this act is now repealed in a crowd with other acts, to bring all treaſons to the ſtandard of 25 *Edw.* III. yet it is impoſſible the parliament ſhould make that high treaſon that was no crime at all before, and eſpecially high treaſon in his own children, nay when it was lawful before to marry any perſon of the royal family, (if the doctrine we are taught be true) and each had a private right to marry as they pleaſed. And it is obſervable here, the parliament makes no difference whether the father be living or not, nor takes any care of that paternal right which is pretended.

In queen *Mary*'s time, though this offence ceaſed to be high treaſon, yet it did not ceaſe to be a crime: for in the year 1558, the king of *Sweden* ſent a meſſage ſecretly to the lady *Elizabeth*, the queen's half ſiſter only, afterwards queen *Elizabeth*, who was then at *Hatfield*, to propoſe marriage to her; but ſhe rejected it with warmth, for this reaſon, becauſe the propoſal came not to her by the queen's direction. And upon an excuſe made by the king of *Sweden*, that he firſt made love as a gentleman of quality to gain her conſent, and then he would, as a king, addreſs himſelf to the queen in proper form; her anſwer was, ſhe was to entertain no ſuch propoſitions, unleſs the queen ſent them to her. Upon this the queen ſent ſir *Thomas Pope* to the lady *Elizabeth*, to let her know ſhe well approved of the anſwer ſhe had made; and the lady *Elizabeth* further declared, ſhe would never ſee the meſſenger more, becauſe he had preſumed to come to her without the queen's leave. *Burnet*'s *Hiſtory of the Reformation, vol.* 2. 361.

So that here is one foreign king and two queens of *England* concurring in the ſame ſentiment; which ſeems ſtrongly to argue it is the law of nations, as well as the prerogative of this crown.

The next inſtance I ſhall mention, is the caſe of lady *Arabella*, and a law book to ſupport it, and that is the counteſs of *Shrewſbury*'s caſe, 12 *Co.* 94. in the tenth year of king *James* the firſt. The counteſs of *Shrewſbury* was then in priſon, and ſent for before the council to anſwer to a contempt of dangerous conſequence, becauſe ſhe refuſed to anſwer, when examined about lady *Arabella*'s flight, for marrying Mr. *Seymour*, ſhe being of the royal family: and there the attorney and ſolicitor-general of the king charge it as a crime, that lady *Arabella* being of the blood royal, had married Mr. *Seymour*, ſecond ſon of the earl of *Hertford*, without the king's privity and conſent. Now it appears *Seymour* was committed to the *Tower* for this offence, but eſcaped; and that lady *Arabella* was alſo committed, and ſhe eſcaped, and was taken flying beyond ſea, before ſhe got over.

The firſt crime charged upon the counteſs, was her abetting the flight of lady *Arabella* her niece, and the immediate crime was her not anſwering in that caſe. Now, if marrying without the king's leave was no crime, ſhe could never have been accuſed, for not anſwering to her abetting the flight for ſuch marriage; ſo that the marrying without leave was plainly charged as a crime. They both were committed for a crime, and they both fled as for a crime, and it is admitted and taken for granted to be a crime; and her contempt in not anſwering, in the caſe of marriage in the royal family, reſolved to be a crime: and this was done by all the great miniſters of ſtate, and by the chancellor, and two chief juſtices, *Fleming* and lord *Coke*, and chancellor of the *Exchequer* and duchy, and chief baron, in the fifteenth year of king *James* the firſt; and in the end ſhe was fined 10,000 *l.* and committed to the *Tower.*

The next caſe I ſhall mention is the marriage of the princeſs of *Modena* and the duke of *York.* There was an addreſs of the houſe of commons to the king, to prevent this marriage. The king's anſwer is very remarkable. 'It is compleated,' ſays the king, 'but it was with my conſent and authority;' and the parliament acquieſced in that anſwer.

Now this addreſs was abſurd, if the king had no power to prevent it; ſo that this amounts to the judgment and opinion of the king and parliament, that this right was in the crown, excluſive of his brother. So here is the king claiming this authority, even againſt his own brother, and his private right, and the parliament confirming it.

Then there is the marriage of the princeſs *Mary*, daughter of the duke of *York*, with the prince of *Orange.* This match was made intirely by the king's conſent, even without the knowledge of the duke her father, and againſt his liking and conſent. The king, ſpeaking to ſir *William Temple* about this match, ſays, 'If I am not deceived, the prince of *Orange* is the honeſteſt man in the world, and I will truſt him; therefore he ſhall have his wife, and you ſhall go and tell my brother ſo, and that it is a thing I am reſolved on.' The duke was chagrin'd a little, but ſaid, 'the king ſhall be obeyed.' See ſir *William Temple*'s *Memoirs.*

Here is a father acknowledging the right to be in the king, to marry his own daughter, who was only a collateral relation to the king, and married againſt the father's will, as every one knows.

In 1683, the match with the princeſs *Ann*, the other daughter of the duke of *York*, was made by the king, in the ſame manner. And both theſe marriages were eſtabliſhed by a public declaration of his majeſty to the whole nation.

And thus I beg leave to conclude the inſtances of marriage; but with this remark: that happy it is for this nation, that the king in the two laſt inſtances had this prerogative; for had this pretended paternal right then prevailed, the *Engliſh* nation had been for ever undone, and our religion deſtroyed, and we had never ſeen the many and great bleſſings we enjoy, and are likely to enjoy by this family ſitting on the throne of *Great Britain.*

Thus the nation ſees the trace of this happy prerogative, from *Henry* the third's time to this very day, being the compaſs of almoſt 500 years, uninterrupted, undiſputed, and not one ſingle inſtance to the contrary.

Theſe inſtances concerning marriages of the royal family being ſo numerous, and the light ſo glaring, from hiſtories, records, public acts, ſtatutes, and law books, the two judges, who differ, could not reſiſt this part of the queſtion; but have retired to the other part, that of the education, though I hope to prove that if the king has the marriage, he muſt have the education too.

The reaſon that my lord *Coke* gives, why the queen dowager cannot marry without the king's leave is, *ne capitalibus inimicis regis maritentur.* Now the reaſon for the king's having the wardſhip of his grandchildren, and education too, is ſtronger, *viz.* leſt the heir of the crown himſelf be led aſide by ill principles, and bad politics, and become himſelf an enemy to the conſtitution, and to the kingdom. Marriage is one of the main ends of the education, and that education is a principal qualification for that marriage, and therefore can never be ſo properly placed as with him who has the marriage. *Vide* 6 *H.* 6. 2 *Inſt. p.* 18.

(a) There is conſiderable inaccuracy of language in this and other parts of the Report.——EDITOR.

Beſides, theſe two powers, if placed in different perſons, may claſh, and be repugnant; for which of them is to determine when the marriage is to begin, and to whom, and when the education is to end.

Again: if the king has the marriage, he has the appointment of the time of that marriage, and conſequently he can at any time appoint it; and he that can at any time appoint the marriage, can at any time call for the cuſtody of that perſon; and he that can at any time demand the perſon out of cuſtody of another, has the intire power over that perſon.

Again: it is a true and regular argument, and concluſive to ſay, that whoever has the end, muſt have the means alſo, otherwiſe he cannot be ſaid to have the end.

If I have the marriage of any perſon, I can never be ſure of that, unleſs I have the cuſtody and education of that perſon. But his majeſty's prerogative, in this part of the queſtion relating to the education, is as clearly to be made out, though not by ſo many inſtances as the caſe of marriage.

When prince *Charles* had by ſurprize got leave of his father to make a journey to *Spain*, to fetch home his miſtreſs the infanta; revolving in his mind the hazard of that expedition and the ill influence it might have on the people, king *James* then declared that the prince was looked upon by his people as the ſon of his kingdom. *Clarendon*'s *Hiſtory*, *p.* 14. And this being related by him, carries with it his authority too, who was a very great lawyer, and chancellor of the realm.

The law books of *Bracton* and *Fleta*, which have been quoted, are the antient law of the land extending to all caſes; but this law being altered only in private caſes by uſage and ſtatute, it remains law to this day, as to the royal family; becauſe as to them this law has had no alteration by any law or ſtatute whatever, and the uſage has gone accordingly.

Theſe law books are ſo ſtrong, that there has been no way thought of to evade them, but by denying the authority of them, and calling it civil law. But I own I am not a little ſurprized that theſe books ſhould be denied for law, when in my little experience I have known them quoted, almoſt in every argument where pains have been taken if any thing could be found in thoſe books to the queſtion in hand; and I have never known them denied for law, but when ſome ſtatute or uſage time out of mind has altered them. We have been told indeed that they were quoted in the caſe of ſhip-money; but I believe that objection would not have been made, if they had been aware, that theſe very books were quoted on both ſides the queſtion: which deſtroys the objection, and ſhews they were approved of by all who argued in that caſe, both of one ſide and the other.

But if it be meant civil law, becauſe it is in force in all civilized nations, I believe that is true; for I take this to be the prerogative of all kings: nor has there been any inſtance given in any monarchy, where the law is otherwiſe.

Mr. *Selden* ſays the king of *England* is an emperor, and this realm an empire, and ſo called in ſtatutes and records without number; and if ſo, he will have this prerogative equal with other kings and emperors, if no ſtatute, law, or uſage ſays the contrary.

If the prerogative then be the law of nations, that is part of the law of the land, and will give the king a clear title to it.

See the ſtatute of precedency which is 32 *H.* 8. *cap.* 10. It enacts, that no perſon preſume to ſit at any ſide of the cloth of ſtate (except the king's children). Then when it goes on to place the great officers of ſtate, it ſays, that being barons they ſhall be placed on the left ſide of the parliament chamber, above all dukes, except the king's ſon, the king's brother, the king's uncle, the king's nephew, *i. e.* his grandſon, or the king's brother's or ſiſter's ſon.

Now this ſhews that the king's ſon, and the king's nephew or grandſon, is comprehended under the term, king's children, becauſe the latter is ſubſtituted in the place of the former.

17 *Edw.* 3. archbiſhop of *Canterbury* came into parliament and demanded, *ſi les enfans notre ſen. le roy*, born beyond ſea, ſhould inherit in *England*, becauſe born out of the king's dominions, and aliens; and all the parliament agreed, let them be born where they would, they ſhould inherit. *Cotton* 38. It would be a jeſt to imagine that the king's grandchild was not within that law, and within the words *les enfans* children: and there is the ſame reaſon in this caſe.

Another reaſon is, that the king's grandſon is higher in dignity, becauſe nearer the crown, than any other of the king's ſons, except his own father, therefore ought to be eſteemed equal with his own ſons: and therefore if prince *Frederick* were here, and the king had other ſons beſides the prince, he would take place of all thoſe, as *Richard* of *Burdeaux* did, when his grandfather placed him at a public table, above all his own children who were his uncles. *Speed* 723.

Purſuant to this notion, grandchildren of the crown are ſtiled children in records.

There is 50 *Edw.* 3. *Richard* prince of *Wales*, his writ of ſummons to parliament is directed thus: *rex* Edwardus *chariſſimo filio meo* Ricardo *principi* Walliæ. *Cotton* 143.

So is 51 *Edw.* 3. This prince *Richard* holds a parliament, by commiſſion from his grandfather, and that runs in the ſame manner: *de circumſpectione & induſtriæ magnitudine chariſſimi filii noſtri* Ric'i *principis* Walliæ. *Pat. Rol.* 51 *Edw.* 3. *m.* 41.

Now, I think education is of greater conſequence than marriage, both to the perſon and to the people of *England*. To the perſon, becauſe if he be bred either in the Popiſh religion, or is trained up in any other communion, though Proteſtant, except the church of *England*, he is not capable of reigning; and if bred up in arbitrary principles, inconſiſtent with a limited monarchy, the whole nation will then be in danger: whereas an ill choſen match will only be the moſt uneaſy to the prince that marries, and will little affect the ſtate, ſo long as the prince is ſteady, and adheres to the conſtitution.

Where is a prince to be educated, who is to be bred up a king, but in the palace and court of a king, and under his ſpecial care and influence?

The learned ſir *John Forteſcue*, called by ſir *Walter Rawleigh* the bulwark of the law of *England*, who was chief juſtice and chancellor, and alſo tutor to the prince of *Wales* in *H.* 6th's time, in his Treatiſe *De Laudibus Legum Angliæ*, which conſiſts of dialogues between him and the prince about his education, ſays, that there were two things that a prince, who is like to be heir to the crown, ought principally to be inſtructed in; that is, martial diſcipline, and the laws and conſtitution of *England*: and where are thoſe to be had but in the king's armies, and among the great officers and miniſters of the king?

The ſame ſir *John Forteſcue* ſays, ſpeaking of the king's wards in knights ſervice, the princes of the realm alſo holding of the king, muſt be well educated, ſince theſe orphans in their childhood are brought up in the king's houſe; therefore I cannot but greatly commend the riches and magnificence of the king's court, becauſe it is the ſupreme ſchool for the nobility of the land, whereby the realm flouriſhes and is preſerved: *ca.* 45. *p.* 107.

There is a patent in the 13th of *Edw.* 4. from the king to the biſhop of *Rocheſter*, whereby he was conſtituted tutor to the prince, and preſident of the prince's council, which is very remarkable. In the preamble it ſays, Howbeit every child in his youngage ought to be brought up in virtue and knowledge; yet nevertheleſs ſuch perſons as God has called to the pre-eminent ſtate of princes, and to ſucceed their progenitors in the ſtate of regality, ought more ſingularly to be informed and inſtructed in knowledge and virtue. We therefore, deſiring our deareſt ſon the prince, perfectly, knowingly and virtuouſly to be educated in his youth, and wholly truſting in the truth, wit, knowledge and virtue, and alſo love and affection that our reverend father hath to us and to our iſſue, we have committed and deputed him to teach and inform our ſaid ſon, and alſo appointed him preſident of his council, giving him power to aſſemble all the counſellors of our ſaid ſon.

Now, what I would obſerve from this patent is, in the firſt place, that it ſhews the great regard that is to be had to all the prince's or king's children, all who are like to ſucceed to the crown, that they above all others ought moſt ſingularly to be educated, and makes no diſtinction in the education between the firſt or any other of the princes of the royal blood, and the education to be perfect in knowledge and virtue.

In the next place, it ſhews the qualifications of ſuch tutors, and who is to chooſe them.

This does not invade the paternal right, but is conſiſtent with it. It is very poſſible that a grandſon may obey both father and grandfather; nor can it be ſuppoſed that the father and grandfather will give contradictory commands without breach of duty in the ſon: but it ought to be preſumed by all reaſonable men, that they will both concur in material parts of the education, both for the good of their child and for the ſafety of the kingdom; ſo that in this concurs the law of God as well as man: for I believe nobody never yet doubted but a grandſon was within the fifth commandment; and in obedience to that law, the patriarchs always conformed themſelves. But theſe ſticklers for paternal right ſeem to have forgot the right of the mother, which by the fifth commandment is as well eſtabliſhed as the right of the father; and ſome civilians give a ſuperiority to the mother, at leaſt by the law of nature: and I believe that nobody ever thought that giving this power to the father excluded the right of the mother: nor can the ſuppoſition that the mother ſhould contradict the command of the father, any more deſtroy the ſuperiority of the huſband in the one caſe, than the ſame groundleſs ſuppoſition in the ſon, deſtroy the right of the father in the other caſe.

But to ſuppoſe for once an unreaſonable thing, and what will never happen, that there ſhould be contradictory commands, the public good muſt be preferred, and duty to parents muſt be always ſubject to the ſafety of the whole community; and the king, who is *parens patriæ*, as well as *parens nepotis*, muſt be obeyed; to whom there is a double obligation, by nature and by allegiance, *i. e.* by the law of God and law of man.

As to what was ſaid by brother *Reynolds*, the prince's counſel, in relation to the ſtatute of 12 *Car.* 2. *cap.* 24. that the prince was within that act of parliament, I deny it to be law, or any thing like it: for then it would be in the power of the prince to grant or appoint by deed or will the guardianſhip, cuſtody or tuition of his ſon to the king of *France*, the *Turk*, or any perſon whatever; which would be in effect to give him a power of diſpoſing of the crown. And by this learned doctrine the royal family might be diſperſed all over *Europe*; and this nominee would be intitled to take the profits of all the lands of ſuch heir to the crown, and the management of all his eſtate.

What was ſaid by my brother *Eyre*, as to the *Black Prince*'s diſpoſing of his ſon's governance, that was a caſe of abſolute neceſſity, and in the abſence of the king in foreign parts, for he was then on his journey to the *Holy Land*. Vide *Acta Regia*.

Montague baron. I do not know that I ever was or could be of any other opinion than for the king in this caſe. What gave me the firſt impreſſion was the government and diſcipline among the patriarchs, who educated and governed all the grandchildren and great-grandchildren under them.

In the patent for the ſole making of cards, the king is called *parens patriæ, et cuſtos regni, et pater-familias totius regni.*

I inſiſt on *Bracton* and *Fleta* being good authorities. It is objected, indeed, this is civil law. That may be, and yet it may be and is the law of the land alſo; and theſe books take notice of ſeveral things that are law now, beſides this caſe. Theſe books are often quoted by the greateſt judges and lawyers heretofore in *England*, and allowed as law. The lord chief juſtice *Holt* in the caſe of *Coggs* and *Bernard*, *Trin.* 2 *Anne*, which was (a very fine caſe) in the *King's Bench*, grounded himſelf on *Bracton* in giving the opinion of the court. There is too but one family, and the prayers of the church are formed accordingly; and it would make great confuſion if the prince of *Wales* ſhould differ from his majeſty. On great reaſon then, is this prerogative founded; becauſe the royal family ſhould not be of any other religion whatſoever than that of the church of *England:* and not only that, they ſhould not be *Papiſts.* If you ſecure the crown, the king muſt have the education, and ſo the children of the crown will be bred up accordingly; and children do include grandchildren, no doubt. Now the law of purveyance was for all the royal family, not confined to children, but extends to grandchildren.

As to the caſe of *Edward* 5. there may be ſome ſatire in it, but no argument, ſo as to bind us to take notice of what was ſaid only in the ſanctuary by the queen. And as to what was ſaid about the governance of *Richard*, ſon of the *Black Prince*, he was abroad then, as has been obſerved.

Pratt juſtice, afterwards chief juſtice of *England.* The caſe of marriage in the royal family is an undoubted prerogative of the crown, proved by all the arguments the nature of the thing is capable of; conſtantly claimed, always enjoyed, and conſtantly ſubmitted to; and when done and acted contrary, it was always taken to be a great offence, and ſome time thought high treaſon. And that the crown has been in poſſeſſion of this prerogative, appears by the many inſtances out of *Rymer*, where it appears the crown granted proxies for that purpoſe very often.

The counteſs of *Shrewſbury*'s caſe in 12 *Co. Rep. p.* 94. is ſtrong, though it did not proceed to judgment, not pretended to be ſaid, nor was it ſaid to be no offence. The caſe of the duke of *Suffolk*'s attempt only was thought to be high treaſon: from thence it may be inferred it was a very great offence. Then there is the opinion of the parliament in 28 *H.* 8. 18. and no inſtance is or can be given to the contrary. The caſe of the princeſs of *Orange* is very material: the king made the match, and the duke of *York*, her father, was againſt it. But it was ſaid the princeſs of *Modena* deſired the king to prevent it: but what was the king's anſwer? His anſwer was, it is too late, it was by my conſent. Here is the claim of prerogative, againſt the opinion and conſent of the father. So much as to the point of marriage.

Now as to the education of the children and grandchildren of the royal family, that is a natural and neceſſary conſequence, that if the crown has the marriage of the royal family, it hath the care of their education. If not educated well, they cannot be married well. The king having the end ſhould have the means; he ſhould take care of their perſons, that they ſhould not be diſpoſed of to the prejudice of the nation, for it cannot be undone afterwards. I do not ſee any anſwer given to that caſe in *Ruſhworth*, about the infanta of *Spain.* The ſon might in fact have contracted as well as the father, though perhaps wrong; yet he does not any way contradict the power of his father. And this carries authority of parliament with it. I am of opinion this prerogative was never diſputed by any of the royal family, and many have been proſecuted for the breach of it; and indeed we never can have any inſtances in this affair, but when there is diſcord in the royal family. Great inconveniencies attend the contrary. How great diſtractions and confuſions attended the differences between the houſes of *York* and *Lancaſter*, when one of the family was at home, and the other abroad!

Eyre juſtice, and the prince of *Wales*'s chancellor. I am of a contrary opinion to my brothers that ſpoke laſt. The queſtion is, whether the king has a legal right to diſpoſe of the marriage and education of his grandchildren, excluſive of the father? The inconveniencies are above me to expatiate upon; but if any thing be amiſs, the legiſlature will ſet it right. No authority has been produced out of any of our law books, no guardianſhip by the prerogative has yet been proved. The lord chief juſtice *Coke* ſays nothing of this prerogative: he would tell us ſurely when theſe prerogatives began, and where they ended. As to *Bracton* and *Fleta*, what is quoted out of them is not law, nor accounted ſo. There is no ſuch term in our law, as *emancipatio* or *foriſfamiliatio:* Dr. *Cowell* reſtrains it to the father's dying. *Cowell's Inſt. tit.* 9. Grandchildren may be children, but that argues nothing as to wardſhip; but whether the practice in the crown, as to this prerogative, be otherwiſe, is the queſtion. It doth not appear in any of theſe cuſtodies, whether it was in the life of the father or not; and there is reaſon to think it muſt be by reaſon of ſome tenure. As to the caſe of the duke of *Glouceſter*, that does not appear to us, but it was by conſent. A motion was made in parliament, to remove him from his preceptor, and it paſſed in the negative. To be ſure, the public has an intereſt in all the king's children. The parliament ſometimes interpoſes in the caſe of proclaiming peace and war, and yet the king has that right. So the king has interpoſed in theſe caſes; but it cannot be inferred from thence it is a right. And give me leave to ſay, the crown has not always been in poſſeſſion of this prerogative; for *Edward* the *Black Prince* came over and returned to *Berkhamſtead* till the death of the grandfather, *Hollingſhead:* and it is material that he had the governance and education of his ſon *Richard.* In the caſe of *Edw.* 5. it was not pretended, nor thought of, that the king had this right. The queen's inſiſting, and being in poſſeſſion, is an inſtance againſt the uſage. They did not inſiſt on any law to take the duke of *York* out of her hands. The prince is the guardian to his ſon by nature and by law; and no law book makes any other diſtinction. Inconveniencies are not what is left to my conſideration, and the uſage is on our ſide the queſtion.

As to marriages of the royal family, they are of a public conſideration. Alliances and treaties depend upon them. The crown has always interpoſed in theſe. So in private families the grandfather has interpoſed ſometimes.

As to the caſe of the duke of *York*'s children, though thoſe marriages might be without the actual agreement of the duke, yet it does not appear that it was againſt his conſent; ſo is no inſtance at all: and indeed there is no inſtance appears that they have been diſpoſed of againſt the conſent of the father.

As to that caſe of the duke of *Suffolk*'s being impeached of high treaſon, can any one ſay it was high-treaſon? In the caſe of lady *Arabella*, there was no ſuch declaration there: it was a contempt indeed, but not ſaid ſo by the judges. There may be inſtances of high treaſon concerning thoſe marriages in former ages, but there is no law caſe, or law book, or ſtatute, that now declares the king has this prerogative; therefore I cannot be convinced that the king has any legal right to it.

Dormer juſtice. I am of a contrary opinion to my brother *Eyre*, and that the king has a legal right to this prerogative. The king is *pater patriæ*, and his grandchildren are the children of the kingdom, and of the public. And I think the king that has the marriage has the care of education alſo. The duke of *Norfolk* at his trial confeſſed it was a great contempt in him, to attempt to marry the queen of *Scots.* So in the caſe of the king of *Sweden*, queen *Elizabeth* would not hear of it, nor ſee the perſon who was to propoſe the match to her, without the queen's leave, though *ſui juris.* The father has not the diſpoſition of his eldeſt ſon in the caſe of the royal family. In the caſe of the duke of *Glouceſter* this right was taken for granted. As to the caſe of *Edward* 5. what the queen ſaid there in the ſanctuary, that argues nothing; and ſhe did deliver him up at laſt. It is ſaid, here is no particular caſe. If no particular law book in the caſe, yet there are many notorious facts, records and inſtances out of *Ruſhworth* and other books, which amount to uſage with ſuch a conſtancy, as makes it law, and gives this prerogative to the king.

Price baron. This is a caſe of great conſequence, ſo that I am in great perplexity. Not that I am afraid to give my opinion, but I cannot come into the opinion which moſt of my brothers have given. The queſtion is, whether the king has this prerogative, excluſive of the prince his ſon? The father hath the guardianſhip againſt the grandfather. So is *Roll*'s *Abridgment*, and 30 *Edw.* 3. and *Littleton*, *ſect.* 114. Preſcription to the marriage of the tenant's ſon againſt the father, was againſt the law of nature. *Vaughan's Reports* on 12 *Car.* 2. is ſtrong. The father is guardian by nature, *Dyer* 190. It's againſt any law whatſoever, between ſubject and ſubject. It is very plain and clear the prince is a ſubject, and the prince held by tenure at firſt, and that tenure is taken away by the act of 12 *Car.* 2. But this they ſay does not bind the king's prerogative. And why ſo? The court of wards and liveries were once his prerogative, but not ſo now. I wiſh there is nothing in the belly of this queſtion, to get ſomething after it: they muſt have diſtinct ſettlements, if you ſet the grandſon above the father: dependance creates duty. It was an article of impeachment, to endeavour to introduce the civil law. *Bracton* and *Fleta* are old civil law books. They may fetch out of theſe books, ſhip-money, and diſpenſing power: they were all fetched out of theſe old books. As to *Rymer*, he is anſwered by this: either the king had the right of wardſhip in thoſe caſes, or he interpoſed out of care to the royal family. The nobility themſelves did ſometimes maintain and portion their relations abroad. To call all bounties, rights, is very hard. As to the caſe of *H.* 6. not to marry a queen, without the king's conſent, they would not make that law if they had a law before. *Owen Tudor* married the widow of *H.* 6. That was the reaſon of that law; and when repealed, that ſhewed it to be unreaſonable. Nobody can ſhew any legal proſecution for theſe things. As to the articles of marriage of *Car.* 1. I can hardly think the king would make ſuch an oath, I have ſuch an opinion of his piety; for thoſe articles are void; and it is no wonder that kings will not treat but with kings. That caſe of the princeſs of *Orange* was with conſent, there being an agreement between the two brothers. That of the duke of *Glouceſter* was alſo by agreement, for who would deny the king? All theſe are no more than conceſſions or agreements. We have a legiſlature which will interpoſe, if there be any miſmanagement in the prince. I will ſuppoſe for once, the prince could be a *Papiſt* or an *Atheiſt:* the parliament would interpoſe in ſuch a caſe. It is with great anxiety I ſpeak in this caſe.

Tracy juſtice. I differ from my brother that ſpoke laſt. This power is part of the original truſt repoſed in the king. We owe the bleſſings of this government to a marriage made againſt the conſent of the father. Here are all ſorts of proofs, from *Henry* the third's time to this very time, of marriages in the royal family; the expreſſions are not only *laborabimus*, but *dabimus et conceſſimus.* The caſe of the princeſs of *Orange* is a ſtrong caſe. The king made that match by his own authority: no notice taken of the father, who was forced to ſubmit to it. So that of queen *Elizabeth* is very ſtrong when *ſui juris*; no need to compliment in ſuch caſe. That caſe of lady *Arabella* is very material. She was committed to the *Tower* and charged with this crime, and ran away, and eſcaped with hazard from this crime. If it were not criminal, there could not be all that ſolemn examination by two chief juſtices and a chief baron, and other miniſters of ſtate. The parliament alſo has affirmed this power. The ſtatute 28 *H.* 8. is a ſtrong argument that the parliament thought it to be unlawful, when it was once made high treaſon. That addreſs in the duke of *York*'s caſe to ſtop the marriage with the princeſs of *Modena* is very material; and, in ſhort, I think this power in the crown has been proved very well. And this I would obſerve, does not exclude the father's advice and counſel. Now if this be ſo in the caſe of marriages in the royal family, it is a great argument it is ſo as to education. Suppoſe the duke of *York* had brought up thoſe two princeſſes *Papiſts*, we ſhould have been all undone, and loſt our religion. Nothing can be of greater concern than the care of education. To be deprived of education is of much more conſequence than marriage: the law muſt then of neceſſity be the ſame in both. We cannot expect like inſtances in education as in marriage, becauſe theſe are tranſacted with other perſons, with princes, and of the greateſt quality abroad, and beyond ſea, and are to be made public; but directions about education are of a private nature, and not likely to be tranſmitted beyond ſea. Of latter times we have them in *Spaniſh* matches, as in the articles of the prince of *Wales* himſelf. The caſe of the duke of *Glouceſter* is directly in point, and which I rely upon. King *William* named all his ſervants by his own authority, without any notice to any body: ſo the ſuppoſed conſent has no proof nor probability. The very addreſs to the king ſuppoſes he had a right. I think there are more inconveniencies in denying this prerogative, than in any other prerogative whatſoever; and the prerogative muſt prevail. The *ſtat.* of 12 *Car.* 2. could never intend that any father had power to diſpoſe of the royal family. They would have prevented ſuch inconveniencies by this act, if they had imagined any ſuch thing, or that it would be ſo conſtrued.

Blencow juſtice. I am of the ſame opinion with my brother that ſpoke laſt. The precedents are ſo ſtrong, and the objections ſo weak, that I am clear of opinion the king has this prerogative: it is a prerogative *ſo eſſential*, that the kingdom cannot ſubſiſt without it. Inſtances of marriage go to full age, as well as infants. They have produced no inſtances on their ſide of the queſtion. Marriage is nothing without education. It is a dreadful thing to ſeparate the intereſt of the king and prince. Children of the crown are the greateſt ſtrength of the nation, greater than the ſhipping or militia: it is of infinite conſequence, and the nation cannot ſubſiſt without it; and we are to adviſe the king according to law.

Powis juſtice. I am of the ſame opinion this prerogative clearly belongs to the kings of *England.* This being of ſuch infinite conſequence, it would deſtroy us all if it were otherwiſe. We always conſider inconveniencies, in all matters of law. And in other nations it is ſaid, *Salus populi eſt ſuprema lex.* To give the children of the king education, and to breed them up for kings, is a neceſſary prerogative; and particularly, to ſee them brought up in the *Proteſtant* religion, and to reform their morals, and to learn the conſtitution, and how to govern. The king is the fitteſt and only perſon to breed them up with the love of their king and country; and he is the head of the family; and he is moſt able to do it, becauſe he is aſſiſted with the pockets of his ſubjects. As to marriages, *Rymer* is full: and to ſay they were by agreement is an odd argument; for this is an anſwer to every right and prerogative of the crown. There are no facts or inſtances on the other ſide, but all on this ſide the queſtion; but they would have them all to be by accident or agreement. The main objection is, there are no book caſes. That is impoſſible, as has been mentioned. As to this peculiar prerogative, how could ſuch an affair come into *Weſtminſter-Hall?* Counteſs of *Shrewſbury*'s caſe is a great authority, and ſhe was fined ten thouſand pounds. Afterwards was the marriage of the duke of *York* to the ducheſs of *Modena*, and the princeſs of *Orange*'s caſe; which are very ſtrong. As to education, that is a conſequence of marriage; *a fortiori*, becauſe education is of greater concern than marriage; for the education concerns the public much more, the other private life only. Now the principal article, in that match of *Charles* the firſt, was the education of thoſe children; and by ſecuring the education, they ſecured our religion from *Popery*, in the opinion of both courts. The caſe of the duke of *Glouceſter* runs throughout as an authority, and the governor or preceptor ſubmitted to it after a conteſt.

If the contrary were true, this would be a monſtrous inconvenience; for then the father might deviſe away the heir to the crown, and they might bring him up as they pleaſe, a *Mahometan*, or what not; and this deviſe could not be altered until the heir came of age. *Vaughan* 180. That caſe of *Edw.* 5. was only about the ſanctuary: that was the conteſt there and nothing more.

Bury chief baron. As to marriages, that prerogative in the crown is very clear. The crown has had it in all ages, and claimed it as their right. That of *dabimus et conceſſimus* in *Rymer*, is very ſtrong. In all times it has been accounted a crime to marry any of the royal family without leave from the crown; and all that have had a hand in ſuch marriages have been accounted criminal. As to education, ſo many inſtances cannot be expected, becauſe it has ſeldom happened that there are grandchildren in the royal family. The caſe of the duke of *York*'s children is ſtrong: the king claimed it as a right, and made the contract, and the duke gave it up. As to the authority of the houſe of commons, they did not interpoſe as a legiſlature; and that affirmed the power of the crown. Though there be a law to the contrary, yet the parliament may interpoſe. I own I did not think that ſo many precedents could be found, as are here produced both as to marriage and education too.

King chief juſtice, afterwards lord chancellor. The queſtion is, whether the care and approbation of marriages in the royal family, excluſive of the father, belong to the crown? That queſtion doth not touch the paternal right, to be ſure; but the queſtion is, whether ſuch marriage can be without the conſent of the crown? And that is plain it cannot. As to marriages in fact in the royal family, nobody can inſtance any to be made theſe five hundred years without the crown's conſent. The crown in fact has done it; and where the crown has not been conſulted, it has been conſidered as a crime. The caſe of lord *Brandon* in *Henry* the eighth's time, and the caſe of lady *Arabella*, are ſtrong precedents. It was taken for granted that it was a crime and contempt, in the laſt caſe. If this had been no crime, the counteſs of *Shrewſbury* could not have been guilty of any crime whatever. The houſe of commons addreſs in 1673, was ridiculous, if the king had no power. As to education, ſo many inſtances of marriage is a good argument for education too. But it is objected, this invades the right of the father. Not at all ſo; nor is this againſt the law of God in any ſenſe: for duty to parents is ſtill ſubject to the public good; and there is a duty ſtill to the mother, as well as to the father.

In the next place, this is not a guardianſhip by tenure; ſo is not within 12 *Car.* 2. And if there be a guardianſhip by prerogative, as this is, it could not be within that ſtatute; which ſhews, that this could not come in queſtion in *Weſtminſter-Hall* or our law books: we can learn it no otherwiſe than by facts or uſage. You could have no inſtance but from *Edward* the *Black Prince* to *Charles* the firſt's time: you could have none in all theſe reigns. As to that caſe of *Edw.* 5. that is only of a queen who claimed it in the ſanctuary, but it does not follow that it was law. *Ruſhworth*, in all the addreſſes about the *Palatinate*, mentions the children of the *Palatinate*. It is reaſonable to ſuppoſe the king did take care of the education of the princeſſes of *Orange* and *Denmark*. By order of council, the king declares he had concluded that marriage; and that ſhews it was done by the king's authority. In that of the duke of *Glouceſter*, every body knows the king appointed him his tutor. The addreſs of the houſe of commons was to remove him. Why ſhould the king remove him if he had no power over him? So that I am clear the king has this prerogative.

Lord *Parker* chief juſtice of *England*, and afterwards lord chancellor of *Great-Britain.* I am of the ſame opinion with my lord chief juſtice *King.* The firſt queſtion is as to the care and approbation of marriages in the royal family. In private families, if a daughter grows up and is marriageable, there is no law againſt the daughter's marrying againſt the father's conſent; but if againſt the king's conſent, and ſhe is one of the royal family, that is againſt the law expreſsly. The fifth commandment requires obedience from the grandſon, as well as from the ſon. If the grandfather command the ſon any thing, the ſon ought to comply, elſe it is diſobedience, and in the king only to command. Then as to the education of the royal family, that is in the king only, as his peculiar prerogative. The marriage articles of *Car.* 1. is a very ſtrong caſe, and ſtronger than I could expect to find it. There being no grandchildren ſince *Edward* the third's time, ſo many inſtances cannot be produced; nor can this happen, but where there is a diſagreement in the royal family. In this caſe of *Car.* 1. it is not only an agreement, but a ſolemn treaty upon oath, and many years a-doing. The king did not need to enter into a treaty, if the prince had it in his own power intirely; but he ſays conditionally, if this devolves to me, then I will alter it. The contract was not of ſo much uſe if the grandfather lived; but if he died it would devolve to him, and then he would alter and enlarge it. And whether this contract was well or ill made, is not the queſtion, and nothing to the purpoſe: there was a power to make this contract in the king; nor is it a queſtion, whether an ill uſe be made of the power or not. But the prince has almoſt in expreſs words ſaid, he has not that power. The power is not in the prince till it devolves to him as king. And this was on a very ſolemn occaſion. It is never to be ſuppoſed the king will make an ill uſe of any power he has by law, nor is it to be preſumed the king will do wrong, becauſe all power is committed to him by law. You may ſuppoſe any ſubject, though never ſo great, to be in the wrong, but not the king. No man that talks like a lawyer can ſay otherwiſe; and therefore I think clearly this is the king's prerogative.

Both theſe opinions were afterwards drawn up in ſhort by the ten judges, for the prerogative, and alſo in ſhort by the two judges, that differed in opinion from the ten, againſt the prerogative, and were delivered ſeverally under their hands to the lord chancellor, to deliver to the king. They are as follows.

To the KING's Moſt Excellent MAJESTY.

May it pleaſe your Majeſty,

IN humble obedience to your majeſty's commands, ſignified to us by the right honourable the lord chancellor, requiring the opinion of all your majeſty's judges upon the following queſtion, *viz.*

'Whether the education and the care of the perſons of his majeſty's 'grandchildren, now in *England*, and of prince *Frederick*, eldeſt ſon of 'his royal highneſs the prince of *Wales*, when his majeſty ſhall think fit 'to cauſe him to come into *England*, and the ordering the place of their 'abode, and appointing their governors and governeſſes, and other inſtructors, attendants and ſervants, and the care and approbation of 'their marriages, when grown up, belongs of right to his majeſty, as 'king of this realm, or not?

We whoſe names are hereunto ſubſcribed, being ten of your majeſty's judges, together with the other two judges, having taken the ſame into conſideration, and after the moſt diligent ſearch that we could in this time make into acts and proceedings of parliament, treaties, public inſtruments, and records, hiſtories and law books, and conſideration of the powers and prerogatives, which from time to time in very many inſtances have been exerciſed, and owned to belong to your majeſty's royal anceſtors and predeceſſors, with relation to the marriages and care of the perſons of the branches of the royal family, and of the great concern of the whole kingdom in ſo important a truſt; and after having, purſuant to your majeſty's farther command, ſignified in like manner to us, heard a learned ſerjeant-at-law, who, by the command of his royal highneſs, laid before us ſeveral things relating to the queſtion aforeſaid; and after ſeveral conferences, and deliberations upon all the matters aforeſaid, and what occurred to us, and the other judges thereupon; we are humbly of opinion, that the education and the care of the perſons of your majeſty's grandchildren now in *England*, and of prince *Frederick*, eldeſt ſon of his royal highneſs the prince of *Wales*, when your majeſty ſhall think fit to cauſe him to come into *England*, and the ordering the place of their abode, and appointing their governors and their governeſſes, and other inſtructors, attendants and ſervants, and the care and approbation of their marriages, when grown up, do belong of right to your majeſty, as king of this realm.

All which we moſt humbly ſubmit to your royal majeſty's great wiſdom.

Parker.
P. King.
T. Bury.
L. Powys.
J. Blencoe.
R. Tracy.
Robert Dormer.
J. Pratt.
J. Mountague.
Forteſcue A.

Mr. baron Price's *and Mr. juſtice* Eyre's *opinion upon the prince's caſe.*

Feb. 1, 1717.

To the king's moſt excellent majeſty.

May it pleaſe your majeſty,

IN humble obedience to your majeſty's commands, ſignified to your judges by the right honourable the lord chancellor, we have taken into conſideration the following *queſtion*, viz.

Whether the education and care of the perſons of your majeſty's grand-children, now in England; *and of prince* Frederick, *eldeſt ſon of his royal highneſs the prince of* Wales, *when your majeſty ſhall think fit to cauſe him to come into* England, *and the ordering the place of their abode, and appointing their governors, governeſſes, and other inſtructors, attendants, and ſervants, and the care and approbation of their marriages, when grown up, belong of right to your majeſty, as* king *of this realm, or not?*

And we are humbly of opinion, that the *education and care of the perſons of your majeſty's grand children, the ordering the place of their abode, and appointing their governors, governeſſes, and other inſtructors, attendants, and ſervants, belong to the* prince *their* father. But, that *the care and approbation of their marriages, when grown up, belong to your* majeſty, *as king of this realm.*

This, ſir, *is our humble opinion.* But when we acquaint your majeſty that the care and approbation of the marriages of your grand-children belong to your majeſty, as king of this realm, we deſire to be underſtood, as ſpeaking of a care and approbation not *excluſive* of the *prince* their *father*. But as your majeſty's care will be always employed for the good of the royal family, and the welfare of your people; ſo it is a duty incumbent upon every member of the royal family to apply to your majeſty, and receive your royal approbation upon every occaſion of this kind; for we find that all negotiations of marriages in the royal family have been carried on by the intervention of the crown, and ſuch marriages as have been contracted without the royal conſent and approbation, have been thought contempts of the regal authority: but we find no inſtance where a marriage has been treated by the crown, for any perſon of the royal family, without the conſent of the father; and we beg leave to aſſure your majeſty, that there is no one expreſſion in any of our law-books that warrants any ſuch aſſertion.

As to the *other part of the queſtion*, in anſwer to which we cannot concur with the *other judges*; it is our duty humbly to lay before your majeſty, that in our opinion the *father* hath in all caſes a right to the *cuſtody* and *education* of his *children*, and this we take to be clear from the general rule of law.

This *right* of the *father* is ſaid in our books, to be founded *jure naturæ*, and to be annexed by *nature* to the *perſon* of the *father*. In caſe of younger children, it never was diſputed; and in regard to the eldeſt ſon, or daughter and heir, to whom lands deſcended from a collateral anceſtor, the *right* of the *father* obtained even againſt the *lord*, though his ſeigneural right to the wardſhip of his tenant during the minority prevailed againſt the *grandfather*, and all other anceſtors lineal and collateral. *Littleton*, *Coke*, and *Vaughan*, all agree that none can have the cuſtody of a man's ſon and heir apparent from the *father*; and in the common caſe of *a tenure in ſoccage*, even the *mother* has the right of guardianſhip, after the death of the *father*, preferable to the *grandfather*. From hence we take it to be the *general rule of law*, that *the guardianſhip of the children is a right common to every ſubject of this kingdom, who is a father, without exception.*

7 Co. 13.

30. E 3. 17.

Littleton. § 114 33 H 6. 55. Co Litt. 84. 84. b. 3 Co. 38. Vaugh. 180. Litt. §. 123.

Upon the beſt ſearch we have been able to make, we can find but two books written by *Engliſh* lawyers, that can poſſibly induce a contrary opinion (*Bracton* and *Fleta*). *Bracton* treating *de patria poteſtate* ſays, *Qui ex filio tuo & ejus uxore naſcitur*, i. e. *nepos tuus & neptis, æque in tua poteſtate ſunt, & pronepos & proneptis, & deinceps cæteri*; and; *in poteſtate patrum ſunt filii qui naſcuntur in juſto & legitimo matrimonio, idem in nepotibus & pronepotibus, quantum ad avos & proavos paternos*; which *Fleta* has alſo ſaid in, almoſt, *the ſame words*, and which both have taken from *Juſtinian*'s *Inſtitutes*. This ſhews it to have been a part of the *Roman law*; but it neither is, nor, as we conceive, ever was, a part of the *law of England*. It is well known that *Bracton* and *Fleta* wrote their ſeveral *Treatiſes* upon the *plan* of the *imperial laws*; and it is as well known, that thoſe laws never obtained, here, through the general averſion this nation (always zealous of its liberties) had towards them; and accordingly, wherever theſe *writers* differ from our *year-books*, and *authentick reports*, they are not allowed to be of *authority*. And as to this part of the *Roman law* in particular, which relates to the *patria poteſtas*, it is acknowledged by all, even by *Juſtinian* himſelf, that it was ſo peculiar to the *Romans*, that it never obtained among any other people whatſoever. *Jus autem poteſtatis, quod in liberos habemus, proprium eſt civium Romanorum; nulli enim ſunt homines, qui talem in liberos habeant poteſtatem, qualem nos habemus.*

Bracton. l. 1. c. 9.

ibid. §. 4.

Fleta, l. 1. c. 6.

Juſtin. l. 1. tit. 9. §. 3.

Juſtin. l. 1. tit. 9. §. 2.

But to give a more particular anſwer to theſe paſſages, which are the only ones that have the leaſt appearance of law, it is evident they cannot be made to affect the caſe of the *royal family*, by any other conſtruction than what will equally affect *every other family* in *England*. But that from theſe paſſages nothing can be concluded, to determine the extent of the *patria poteſtas* in any family here, is clear from the reaſon, on which the power of the *grandfather* among the *Romans* is founded.

Now the reaſon of the *Roman law*, why *children* ſhould not be in the power of the *father*, but of the *grandfather* excluſive of the *father*, was, becauſe the *father* himſelf was not *ſui juris*, and in *his* power, but *in patris familias ſui manet poteſtate, mancipioq*; which are the words of the LAWS of the XII *Tables*; and it was manifeſtly abſurd, that he ſhould have *others* in his *power*, who was not in his *own*.

This ſervile condition of the *ſon* to the *father*, which had ordinarily no *end*, till the *father* himſelf was pleaſed by *emancipation* to put an *end* to it, being the ſole foundation of the *grandfather*'s right to the *grand-children*, as well as to *every thing elſe* the *father* was poſſeſſed of; when this *ſtate* of the *father* ceaſed, the *power* of the *grandfather* neceſſarily ceaſed with it: and ſo it is declared in *Juſtinian's Inſtitutes*, that if the *ſon* was *emancipated*, and *ſet free* from the *power* of his *father*, the *children* begotten after ſuch *emancipation* are not in the *power* of the *grandfather*, but of the *father*.

Quod ſi poſt emancipationem conceptus fuerit, patris ſui emancipati poteſtati ſubjicitur.

Juſtin. l. 1. tit. 12. §. 9.

But not to inſiſt that by the *laws* of *England* no *father* has ſuch a *power* over his *children*, even in their minority, as the *Roman law* gave; it is undeniable, that with us *marriage* hath the nature of a true and proper *emancipation* of the perſon of the *ſon*; and by conſequence, even upon the grounds of the *Roman law*, the *grandfather* with us can have no right to the *children* of the *ſon*, but the *father* only. If therefore nothing otherwiſe appears to diſtinguiſh the caſe of the *royal family*, there can be no foundation upon which any *prerogative* can be eſtabliſhed in the *inſtance* now in *queſtion*; and we humbly apprehend that the only precedents which can be alledged to ſupport ſuch a *prerogative*, when conſidered, will not be found *ſufficient*.

The *firſt*, in the 22 *H.* 3. intitled in *Rymer*, *De Alianora filia Galfridi*, &c. is only a *declaration* under the great ſeal, that *William Talbot* had ſurrendered to king *Henry* 3. the caſtle of *Glouceſter*, & *Alianoram conſanguineam ſuam ſanamet incolumem*. What can be inferred from hence is hard to determine, any farther than that this *Alianor* was in *ward* to the *crown*, and had been committed to the care of *Talbot*, who had ſurrendered *her* and her *eſtate* ſafe again to the *king*.

378. 1 Rymer.

The other *precedent*, which is in 11 *H.* 4. is a grant of an annual ſum of 500 marks to the *prince* of *Wales* for the expence of the maintenance of *Edmund* earl of *March*, and his brother, ſo long as they ſhould remain in the *prince's* cuſtody, to whom they had been committed the *February* before. As to *this*, it appears by the hiſtory and records of thoſe times, that *Roger de Mortimer* their *father* was killed in *Ireland* 22 *R.* 2. and that their *mother* ſoon after married ſir *Edward Charlton* lord *Powis*, and died 7 *Hen.* 4. ſo that the eldeſt *ſon* was then in *ward* to the *crown*, by reaſon of his lands held of the crown, as were his lordſhips of *Wigmore* and *Clare*, *inter alia*; and his brother *Roger* was then an infant of very tender age, and under the care of the *king*, as next relation: and it appears that he died very young; in which latter caſe, we humbly conceive, that the *care* which the *king* was pleaſed to take of an *infant* and *orphan* ſo nearly related to him, will not be a *precedent* to eſtabliſh a power in the crown to diſpoſe of the *cuſtody* of a *child* while the *father* is living.

8 Rymer. 608.

Sandford's Gen. Hiſt. 226, 227.

If any ſtreſs can be laid upon *printed hiſtory*, the caſe of *Richard*, ſon to *Edward* the *Black Prince*, will be an inſtance againſt this *power* ſuppoſed to be lodged by law in the *grandfather*. He being a minor, lived with his *father* as part of his family, and his *father* appointed his governor, of which we have this relation in *Holingſhead*: that ſir *Simon Burlie*, kinſman to Dr. *Burlie*, one of the inſtructors of *Edward* the *Black Prince*, having been admitted among other young gentlemen to be ſchool-fellow with the prince, he grew in ſuch credit and favour with him, that afterwards, when his ſon *Richard* of *Bourdeaux* was born, the *prince*, for ſpecial truſt and confidence which he had in the ſaid *Simon Burlie*, committed the governance and education of his ſon *Richard* to him; and after the death of the *Black Prince*, it appears by two very remarkable inſtances in our hiſtory, that *Richard* continued with his *mother* till the death of his *grandfather* king *Edward* the third.

3 Hol. 414.

2 Brady 307. 1 Kennet 233. Stow 274. 3 Tyrrel 771. Walſingham 191.

The younger children of *Edward* 4. lived with their *mother*, whoſe wardſhip ſhe declared ſhe claimed by the advice of learned counſel, according to the relation given us by ſir *Thomas More*, afterwards lord chancellor of *England*, in his *Hiſtory of thoſe Times*; nor was it then pretended, that the *king* had any right to their *education*, or the care of their perſons; and although the *queen* was prevailed upon to part with her ſon *Richard* duke of *York*, her daughters remained in her cuſtody till ſhe herſelf was contented to ſend them to court.

Stow 445. 1 Kennet 490.

As to the *education* of their late majeſties queen *Mary* and queen *Anne*, during their minorities, it does not appear to us, that their uncle king *Charles* the ſecond appointed their governeſſes and ſervants, or any one perſon that attended them; and we are not enough acquainted with the circumſtances of the duke of *Glouceſter*'s caſe to make the proper remarks, but it ſeems to have been by agreement with the *king*: and *we* humbly conceive, that the *motion* in *parliament*, 13 *December* 1699. for an *addreſs* to the *king* to remove the then biſhop of *Saliſbury* * from being his *preceptor*, can be of no weight in this matter, ſince it paſſed in the *negative*.

It is poſſible that ſomething may be inferred in favour of this *prerogative*, from that *article* of the *treaty*, ſaid to be made by king *James* the *firſt* concerning the *match* with *Spain*, which related to the *nurture* and *education* of the children of that *marriage*. It is not to the *preſent queſtion* to conſider, whether there ever was ſuch a *treaty* as is related by *Ruſhworth* or not. It is certain, that it is not to be found upon *record*, the proper *evidence* of all *publick treaties*. The *articles* of the *treaty* are ſaid in *Ruſhworth* to be ſtiled by the cardinals, *propoſitions* for the right *augmentation* and *weal* of the *Roman Catholick religion.* And, in truth, almoſt *every* article is ſo *derogatory* to the *ſupremacy* of the *crown*, and the *ſtatutes* made for the *eſtabliſhment* and *ſecurity* of the *church of England*, that it could have carried no ſort of authority with it *in point of law*, even though it had appeared, in a regular manner, under the great ſeal, and not from the reports of hiſtorians only. Nor can the *oath* ſaid to be taken by prince *Charles*, while in *Spain*, to intercede with his *father*, that the ten years of the *education* of the *children* which ſhould be *born* of this *marriage* with the *Infanta*, *accorded* in *one* of the *articles* of this *treaty*, might be lengthened to the term of twelve years, as the *prince* deſired, be looked upon as a *precedent* to determine what the *law* of *England* is. The *right* to the *care* and *education* of the *children* of that *marriage*, had it taken effect, was not then in *diſpute*: and had it been ſo, nothing can be concluded from the voluntary engagement of the *prince*, in favour of a *marriage* ſo much deſired by

1 Ruſhw. 86.

1 Ruſhw. 85

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* *Gilbert Burnet*, D. D.

himſelf, as well as by his *father*, wherein the *queſtion* of this *right* was never the *ſubject* of *debate*.

17 Rymer 676. There was indeed an *article* in the *treaty* with *France*, upon the *marriage* of king *Charles* the *firſt* with princeſs *Henrietta Maria*, whereby it was agreed that the *children* of that *marriage* ſhould be brought up with their *mother* till their age of thirteen; but it is evident, that *treaty* was made with king *Charles* the *firſt*, after his acceſſion to the crown, and not with king *James* his *father*. King *James*, it is true, ſent over the earls of *Carliſle* and *Holland* to treat of that *match*; but the treaty was not concluded till after his death, and then by *powers* from king *Charles* the *firſt*, whoſe *ſtipulations* for the *education* of his *own* children could need no aſſiſtance from his *prerogative*. 17 Rymer 679.

Thus have *we* humbly laid before your *majeſty*, what *we* have to offer in relation to the *books* and *precedents* that have fallen under our conſideration upon this head, which *we* cannot think *ſufficient* to infer a *prerogative* in your majeſty, as *king* of this realm, in the *care* and *education* of your majeſty's *grand-children*, during the life, and without the conſent of their *father*; a *prerogative*, as *we* humbly apprehend, hitherto *unknown* to the *laws* of *England*.

All which is moſt humbly ſubmitted to your majeſty's great wiſdom.

Ro. Price.
R. Eyre.

Theſe opinions of the judges his majeſty was pleaſed ſome time after to communicate to his privy council in manner following.

At the Court at Kenſington, *the 1ſt of* July, 1718.

PRESENT,

The king's moſt excellent majeſty in council.

HIS majeſty was this day pleaſed to communicate to the lords of his moſt honourable privy council, that his royal pleaſure had ſome time ſince been ſignified to his judges, by the late lord chancellor *Cowper*, that they ſhould give their opinion upon the queſtion juſt before mentioned.

And that his majeſty, having afterwards been informed that ſome of the counſel of his royal highneſs the prince of *Wales* expreſſed a deſire to lay before the judges ſomething relating to the queſtion aforeſaid, had further ſignified his royal pleaſure to his judges, that any one ſingle perſon, that ſhould apply to the ſaid judges for that purpoſe, ſhould be admitted to lay before them what ſuch perſon ſhould have to offer from his royal highneſs. And that the judges had returned their anſwer to the ſaid queſtion; which anſwer his majeſty was pleaſed to order to be read this day in council; and the ſame was read, whereby it appeared that the ſaid judges had taken the ſaid queſtion into conſideration, and had heard a learned ſerjeant at law, who by command of his royal highneſs had laid before them ſeveral things relating to the queſtion aforeſaid; and that ten of the judges, that is to ſay, *Thomas* lord *Parker*, now lord high chancellor of *Great-Britain*, then lord chief juſtice of the court of *King's Bench*; ſir *John Pratt*, knight, now lord chief juſtice of the ſaid court of *King's Bench*, then one of the juſtices of the ſaid court; ſir *Peter King*, knight, lord chief juſtice of the court of *Common Pleas*; ſir *Thomas Bury*, knight, lord chief baron of the court of *Exchequer*; ſir *Littleton Powys*, knight, one other of the juſtices of the court of *King's Bench*; ſir *John Blencowe*, knight, *Robert Tracey* and *Robert Dormer*, eſquires, juſtices of the ſaid court of *Common Pleas*; ſir *James Mountague*, knight, one of the barons of the court of *Exchequer*; and ſir *John Forteſcue Aland*, knight, now one of the juſtices of the court of *King's Bench*, and then one of the barons of the court of *Exchequer*, were of opinion,

'That the education and care of the perſons of his majeſty's grand-' children now in *England*, and of prince *Frederick*, eldeſt ſon of his ' royal highneſs the prince of *Wales*, when his majeſty ſhall think fit ' to cauſe him to come to *England*, and the ordering the place of their ' abode, and appointing their governors and governeſſes, and other in-' ſtructors, attendants and ſervants, and the care and approbation of ' their marriages when grown up, belong of right to his majeſty, as ' king of this realm.'

And that *Robert Price*, eſquire, one of the barons of the court of *Exchequer*, and ſir *Robert Eyre*, knight, then one of the juſtices of the aforeſaid court of *King's Bench*, and chancellor of his royal highneſs the prince of *Wales*, were of opinion,

'That the education and care of the perſons of his majeſty's grand-' children, the ordering the place of their abode, and appointing their ' governors and governeſſes, and other inſtructors, attendants and ſer-' vants, belong to the prince their father; but that, the care and appro-' bation of their marriages, when grown up, belong to his majeſty, as ' king of this realm.'——Adding, 'that in what concerned the mar-' riage they deſired to be underſtood as ſpeaking of a care and approba-' tion not excluſive of the prince their father.'

II. *The Caſe of* John Wilkes, *Eſq. on a* Habeas Corpus, Common Pleas, Eaſter *Term*, 3 Geo. III. 1763.

The following caſe is from the late Mr. Serjeant Wilſon's *Reports*, 2 Wilſ. Rep. 150. *But we have added another Report of the judgment from a book, intitled, "A Digeſt of the Law of Libels;" as on compariſon it appeared to ſupply ſome defects in the Serjeant's account. It was attempted to obtain a fuller report of the judgment than either of the two notes we lay before the reader. But we were unſucceſsful.*

The great point of the caſe, namely, whether the privilege of parliament extended to a proſecution for a ſeditious libel, *was the chief inducement to our inſerting it.*

Mr. Serjeant Wilſon's Report.

A member of parliament diſcharged, without bail, being committed for writing a ſeditious libel.

ON *Saturday April* 30, 1763, in the morning the defendant *Wilkes* was arreſted by two of the king's meſſengers, by virtue of a warrant from the ſecretary of ſtate; the * TENOR of which warrant is in the words following: " George Montague Dunk, *earl of* Halifax, *viſcount* " Sunbury *and baron* Halifax, *one of the lords of his majeſty's* " *moſt honourable privy council, lieutenant general of his majeſty's* " *forces, and principal ſecretary of ſtate: Theſe are in his majeſty's name to* " *authorize and require you (taking a conſtable to your aſſiſtance) to make* " *ſtrict and diligent ſearch for the authors, printers and publiſhers of a ſeditious and treaſonable paper, intitled,* The North Briton, Number " XLV, Saturday April 23, 1763. *printed for* G. Kearſly *in* " Ludgate-ſtreet, London, *and them, or any of them, having found, to* " *apprehend and ſeize, together with their papers, and to bring in ſafe cuſtody* " *before me, to be examined concerning the premiſſes, and further dealt with* " *according to law: and in the due execution thereof, all mayors, ſheriffs,* " *juſtices of the peace, conſtables, and all other his majeſty's officers civil and* " *military, and loving ſubjects whom it may concern, are to be aiding and* " *aſſiſting to you, as there ſhall be occaſion; and for ſo doing this ſhall be* " *your warrant. Given at* St. James's *the twenty-ſixth day of* April, *in* " *the third year of his majeſty's reign.*

Dunk Halifax.

" To *Nathan Carrington*, *John Money*, *James Watſon*,
" and *Robert Blackmore*, four of his majeſty's meſ-
" ſengers in ordinary.

The ſame morning, a copy of the above warrant having been obtained from the meſſengers, who then had Mr. *Wilkes* in their *own* cuſtody, and an *affidavit* being made of the truth of ſuch copy, and that Mr *Wilkes* was *then* in cuſtody of two of the above meſſengers at his houſe in *Great George-Street* in *Weſtminſter*, the ſame were produced in the court of *Common Pleas* the ſame 30th day of *April* at twelve o'clock at noon, or a few minutes before or after that hour; whereupon, at the ſame time, it was moved by my learned brother *Glynn*, that a writ of *habeas corpus* might be allowed to iſſue *inſtantly*, returnable *forthwith*. The lord chief juſtice *Pratt* was pleaſed to ſay, that *this* was a moſt extraordinary warrant; and the court ordered an *habeas corpus* to be iſſued inſtantly, returnable forthwith. It being now about one o'clock, the rule of court for the iſſuing the *habeas corpus* could not poſſibly be drawn up and entered, nor could the writ be made out, ſigned and paſſed under the ſeal of the court before four or five o'clock in the afternoon: and although it was certainly known by the officers under the crown, particularly by Mr. *Webb*, then ſolicitor to the Treaſury, that this writ had been ordered to iſſue by the court between twelve and one o'clock, while Mr. *Wilkes* was in the cuſtody of the meſſengers at his houſe in *Great George-ſtreet*, yet, before the coming of the writ to the meſſengers, (the ſame afternoon about five o'clock) Mr. *Wilkes* was haſtily (I had almoſt ſaid in contempt of the king's high court) committed to the *Tower* of *London*.

Mr. *Wilkes*'s ſolicitor, and one of his counſel, ſoon after they heard of ſuch commitment, went to the *Tower* in order to conſult and adviſe with him, but were denied admittance to him; major *Rainsford* informing them, that he had received orders from the * ſecretary of ſtate not to admit any perſon whatſoever to ſpeak with, or ſee Mr. *Wilkes*; and further informed them, that he had juſt before refuſed the right honourable earl *Temple* ſuch admittance, *ut audivi*.

* Ld. Halifax.

On *Sunday May* the firſt, the ſame gentlemen went again to the *Tower*, between the hours of twelve and one, on the ſame occaſion, but were again denied admittance to ſee or ſpeak with Mr. *Wilkes*; and ſoon afterwards, ſeveral noblemen and gentlemen of the firſt diſtinction were refuſed admittance to ſee or ſpeak to Mr. *Wilkes*, and particularly his own brother was refuſed, *ut audivi*.

After ſuch denial, Mr. *Wilkes*'s ſolicitor demanded of major *Rainsford* a copy of the warrant of commitment of Mr. *Wilkes* to the *Tower*, which was readily granted by the major, the tenor whereof is in the words following: " Charles *earl of* Egremont *and* George Dunk *earl of* Halifax, *lords* " *of his majeſty's moſt honourable privy council, and principal ſecretaries of ſtate:* " *Theſe are in his majeſty's name to authorize and require you to receive into*

“ *your cuſtody the body of* John Wilkes, *Eſq. herewith ſent you, for being*
“ THE AUTHOR AND PUBLISHER OF A MOST INFAMOUS AND SEDI-
“ TIOUS LIBEL, INTITLED, THE NORTH BRITON, NUMBER XLV.
“ TENDING TO INFLAME THE MINDS AND ALIENATE THE AFFEC-
“ TIONS OF THE PEOPLE FROM HIS MAJESTY, AND TO EXCITE
“ THEM TO TRAITEROUS INSURRECTIONS AGAINST THE GOVERN-
“ MENT, AND TO KEEP HIM SAFE AND CLOSE, *until he ſhall be delivered*
“ *by due courſe of law; and for ſo doing this ſhall be your warrant. Given*
“ *at* St. James's *the* 30*th day of* April 1763, *in the third year of his ma-*
“ *jeſty's reign.*

Egremont, Dunk Halifax.

To the right honourable John *lord* Berkley *of* Stratton,
conſtable of his majeſty's Tower *of* London, *or to the*
lieutenant of the ſaid Tower, *or his deputy.*

Mr. *Webb*, ſolicitor to the Treaſury, being preſent in major *Rainſford*'s room when the copy of the ſaid warrant of commitment was granted, Mr. *Wilkes*'s counſel and ſolicitor applied to Mr. *Webb* for admittance to Mr. *Wilkes*; whereupon (it is true) Mr. *Webb* deſired the *major* to allow ſuch admittance, and ſaid he would be anſwerable, and indemnify the *major:* but the *major*, with the true ſpirit of an excellent officer, anſwered, “ *he would not, or he could not diſobey orders.*” Mr. *Webb* replied and ſaid, he imagined, or he believed, there muſt have been ſome miſtake in the orders, and that if either of the ſecretaries of ſtate were in town, he would apply and endeavour to obtain the deſired admittance; and that if he could ſucceed therein, he would ſend or bring an order for that purpoſe in the afternoon of the ſame *Sunday*, *May* the firſt; whereupon Mr. *Wilkes*'s counſel and ſolicitor departed from the *Tower* for ſome hours, and between the hours of eight and nine in the evening of the ſame day, returned again to the *Tower*, and applied for admittance to Mr. *Wilkes*; but the *major* not having received any orders or meſſage from either of the ſecretaries of ſtate, or from Mr. *Webb*, refuſed admittance, as he had done before, *ut audivi.*

On *Monday* the ſecond day of *May*, at the ſitting of the court of *Common Pleas* in the morning, the meſſengers returned the writ of *habeas corpus* which had iſſued and been delivered to them on the thirtieth of *April* in the afternoon, after Mr. *Wilkes* was out of their cuſtody, and committed to the *Tower* as above; the tenor of which return indorſed on the ſame writ returns thus, *viz.* “ In obedience to the within com-
“ mand, we humbly certify, to his majeſty's juſtices of the court of
“ *Common Pleas* at *Weſtminſter*, that at the time of the coming of this
“ writ to us, the within named *John Wilkes* was not, nor at any time
“ ſince hath been in our cuſtody, or in the cuſtody of either of us; ſigned
“ by two of the meſſengers to whom the writ was directed.”

Upon reading the writ and the return thereof, it was moved by the king's ſerjeant, that the ſame might be affiled of record.

To which ſerjeant *Glynn* for Mr. *Wilkes* objected, and inſiſted that the return was too general in this particular caſe, (although it might be a good return in another caſe not circumſtanced like the preſent) for that it clearly appeared to the court by ſufficient evidence, *viz.* the affidavit and warrant of arreſt and ſeizure of Mr. *Wilkes*, upon which the writ was founded and granted laſt *Saturday* at noon, that Mr. *Wilkes* was *then* in the cuſtody of the meſſengers, and therefore they ought to have returned and certified to the court in *what manner*, *when and by what authority he was taken out of their cuſtody*, *and what was become of his body.*

Some of the king's ſerjeants replied, that all the precedents of returns of writs of *habeas corpus* in the *Crown-Office*, where the party therein named was not in the cuſtody of the meſſengers (to whom the writ was directed) at the time of the coming of the writ, were like the *return* in the preſent caſe; which aſſertion, at firſt, ſeemed to have weight with the *lord chief juſtice and two others of the judges*, who thereupon thought the return well enough; but Mr. Juſtice *Gould* was pleaſed to ſay he much doubted, whether the precedents in the *Crown-Office* of *returns* to writs of *habeas corpus* were like the preſent *return*, as had been aſſerted by the king's ſerjeants; and ſaid if the precedents were not ſo, he ſhould be of opinion, that this was an inſufficient return, becauſe he thought, from what appears in evidence in the caſe, the court has a right to know what is become of the king's ſubject Mr. *Wilkes*, ſince he was in the meſſengers cuſtody laſt *Saturday* at noon; whereupon (*hæſitante curia*) the writ and return were not permitted to be affiled of record upon this motion; and precedents were ordered to be looked into, and the matter of the *return* was ordered to be debated at another day; but I never heard that it was.

In the caſe of Sir William Morris who had a ha.cor. for his wife, the return was like the preſent. The like in Holmes's caſe for his wife. B. R. about Michaelmas term 1765.

Afterwards the ſame *Monday*, *May* 2, a motion was made to the court grounded upon a copy of the aforeſaid warrant of commitment of Mr. *Wilkes* to the *Tower*, and an affidavit of the truth thereof, for another *habeas corpus* to be directed to the conſtable, *&c.* of the *Tower* of *London*, which was granted returnable *without delay.*

Tueſday, *May* 3. At the ſitting of the court (which was crowded to ſuch a degree as I never ſaw it before) in the morning Mr. *Wilkes* was brought to the bar, and ſat among the ſerjeants (next to the reporter on his left hand,) when the lieutenant of the *Tower* returned upon this ſecond writ of *habeas corpus* the warrant of commitment of Mr. *Wilkes* to the *Tower* by the two ſecretaries of ſtate (before ſet forth); which being read, ſerjeant *Glynn* moved the court that Mr. *Wilkes* might be diſcharged out of cuſtody without bail, and grounded his motion on three points, two whereof were objections to the legality of the warrant of commitment (the reader will obſerve that the general *warrant* of *arreſt and ſeiſure* was not now before the court, and therefore the legality of *that* could not *now* be debated); the third point was, that Mr. *Wilkes* was a member of parliament, and therefore was privileged from being arreſted for any crime except *treaſon*, *felony*, and *breach of the peace*; and that ſuppoſing him the author of the preſent ſuppoſed libel (which he abſolutely denies) it is only a miſdemeanor, and none of the three abovementioned crimes and miſdemeanors.

The firſt objection taken to the warrant of commitment was, that it doth not appear to the court that Mr. *Wilkes* was charged by any evidence or information upon oath before the ſecretaries of ſtate, that he was the author or publiſher of the *North Briton*, *number* XLV. that, for any thing that appeared to the court to the contrary, the ſecretaries of ſtate committed Mr. *Wilkes* to the *Tower*, upon their own mere imagination or ſuſpicion that he was the author and publiſher of this ſuppoſed libel.

The ſecond objection taken to the warrant of commitment was, that it was too general, and doth not ſet forth ſufficient, ſubſtantial matter whereupon the court can judge whether the *North-Briton*, *number* XLV. (ſuppoſing Mr. *Wilkes* the author and publiſher thereof) is a moſt infamous and ſeditious libel, tending to inflame the minds and alienate the affections of the people from his majeſty, and to excite them to traitorous inſurrections againſt the government; that the warrant not having ſet forth the *North Briton*, *number* XLV. or ſuch parts thereof as the ſecretaries of ſtate deemed infamous, ſeditious, *&c.* the court cannot judge whether any ſuch paper ever exiſted, it not being before them; or if it does exiſt, whether it be an infamous libel or not.

See 2 Jones 13 Buſhel's caſe.
2 Inſt. 55 a.
Bacon, Abr. title Commitment E.

In the third place, ſuppoſing the warrant of commitment to be good; yet that Mr. *Wilkes being a member of parliament* (which was admitted by the king's counſel) is privileged from arreſts in all caſes except *treaſon*, *felony*, *and actual breach of the peace*, therefore ought to be diſcharged without bail. That libels may, and often do tend to the breach of the peace was admitted, and therefore the court of *King's Bench* frequently grants informations againſt the authors, printers and publiſhers thereof; but this is never done but upon affidavits laid before the court aſcertaining the ſaid authors, printers or publiſhers: for ſurely that matter which only tends to a breach of the peace, cannot with any propriety be ſaid to be an actual breach of the peace; and it was ſaid that it is univerſally agreed, a libel is not an actual breach of the peace; therefore it was inſiſted for Mr. *Wilkes*, that upon this point alone (although the others ſhould be over-ruled) he ought to be diſcharged from his impriſonment in the *Tower*, without bail.

Mr. Serjeant *Hewitt* for the crown, in anſwer to the firſt objection ſaid, that it was not neceſſary to ſet forth the evidence or information upon which the warrant of commitment was made, in the warrant; but as to the ſecond objection, he admitted that it muſt appear upon the face of ſuch warrant for what particular *ſpecies* of a crime or miſdemeanor the party was committed, according to the caſe of the *King* v. *Roe and Kendall*, 1 *Salk.* 345. 5 *Mod.* 78. and that in the preſent caſe, if the commitment had been for writing and publiſhing a libel *generally*, without ſpecifying the nature and tendency thereof, it would have been *ill*; but here it is ſaid to be “ for being the author and publiſher of a moſt infamous and
“ ſeditious libel, tending to inflame the minds and alienate the affections
“ of the people from his majeſty, and to excite them to traitorous in-
“ ſurrections againſt the government.” This he thought was a ſufficient ſpecification of the nature of the libel, and of the miſdemeanor ſuppoſed to be committed by Mr. *Wilkes* againſt the government; but he ſaid he would not be underſtood to affirm that the paper called the *North-Briton*, *number* XLV. (which was not before the court) was a libel; that he had found no caſe upon a libel like this, and therefore could not ſay *what* was a ſufficient and preciſe certainty in a warrant of commitment for a libel; but he thought it not neceſſary to ſet forth the whole, or any part thereof, in the warrant.

As to the third objection of privilege, ſerjeant *Hewitt* admitted that Mr. *Wilkes* was a member of parliament, and could not legally be arreſted but for *treaſon*, *felony*, *or breach of the peace.* He cited *Hob.* 215. *Hick's* caſe, to ſhew that a libel tends to the breach of the peace; but whether the preſumed libel in the preſent caſe was a breach of the peace or not, he would not take upon himſelf to ſay; nor would he ſay that the arreſting Mr. *Wilkes* in the preſent caſe was *not a breach of privilege of the houſe of commons.*

Serjeants *Whitaker*, *Nares* and *Davy*, for the king, ſpoke to the like effect; but none of them affirmed, that the writing or publiſhing a libel was an actual breach of the peace (as I underſtood), or that the arreſt of Mr. *Wilkes* in the preſent caſe, was not a breach of privilege of parliament; and (I think) they all declined ſaying any thing more about the privilege of parliament, than what ſerjeant *Hewitt* had ſaid before. When the king's ſerjeants had concluded, Mr. *Wilkes* made the following ſpeech to the court.

“ *My Lord! I am happy to appear before your lordſhip and this court, where*
“ *liberty is ſo ſure of finding protection and ſupport, and where the law* (*the*
“ *principle and end of which is the preſervation of liberty*) *is ſo perfectly un-*
“ *derſtood. Liberty, my lord, hath been the governing principle of every action*
“ *of my life; and actuated by it, I always have endeavoured to ſerve my gra-*
“ *cious ſovereign and his family, knowing his government to be founded upon*
“ *it; but as it has been his misfortune to have employed miniſters who have*
“ *endeavoured to caſt the odium and contempt ariſing from their own terrible*
“ *and corrupt meaſures on the ſacred perſon of their ſovereign and benefactor,*
“ *ſo mine has been the daring taſk to reſcue the royal perſon from ill-placed*
“ *imputations, and fix them on the miniſters, who alone ought to bear the blame*
“ *and the puniſhment due to their unconſtitutional proceedings. For the proof*
“ *of my zeal and affection to my ſovereign I have been impriſoned, ſent to the*
“ Tower, *and treated with a rigour yet unpractiſed even on* Scottiſh
“ *rebels. But however theſe may ſtrive to deſtroy me, whatever perſecu-*
“ *tion they are now meditating againſt me, yet to the world I ſhall proclaim,*
“ *that offers of the moſt advantageous and lucrative kind have been made to*
“ *ſeduce me to their party, and no means left untried to win me to their con-*
“ *nections. Now, as their attempts to corrupt me have failed, they aim at in-*
“ *timidating me by perſecution. But as it has pleaſed God to give me virtue*
“ *to reſiſt their bribes, ſo I doubt not but he will give me ſpirit to ſurmount*
“ *their threats in a manner becoming an* Engliſhman *who would ſuffer the*

“ *ſevereſt trials rather than aſſociate with men who are enemies to the liberty* “ *of this country. Their bribes I rejected, their menaces I defy; and I think* “ *this is the moſt fortunate event of my life, when I appear before your lord-* “ *ſhip and this court, where innocence is ſure of protection, and liberty can* “ *never want friends and guardians.*”

Then the court took time to conſider, and appointed *Friday* following to give their opinion, and ordered Mr. *Wilkes* to be remanded to the *Tower*, and to be brought up again to the bar on *Friday* the ſixth of *May*; and upon that day, Mr. *Wilkes* being again at the bar, the lord chief juſtice delivered the opinion of the whole court.

LORD CHIEF JUSTICE PRATT, after ſtating the warrant of commitment, ſaid, there are *two* objections taken to the legality of this warrant, and a *third* matter inſiſted on for the defendant, is privilege of parliament.

The firſt objection is, that it does not appear to the court that Mr. *Wilkes* was charged by any evidence before the ſecretaries of ſtate, that he was the author or publiſher of the *North Briton, number* XLV. In anſwer to this, we are all of opinion, that it is not neceſſary to ſtate in the warrant that Mr. *Wilkes* was charged by any evidence before the ſecretaries of ſtate, and that this objection has no weight. Whether a juſtice of peace can *ex officio*, without any evidence or information, iſſue a warrant for apprehending for a crime, is a different queſtion. If a crime be done in his ſight, he may commit the criminal upon the ſpot; but where he is not preſent, he ought not to commit upon diſcretion. Suppoſe a magiſtrate hath notice, or a particular knowledge that a perſon has been guilty of an offence, yet I do not think it is a ſufficient ground for him to commit the criminal; but in that caſe he is rather a witneſs than a magiſtrate, and ought to make oath of the fact before ſome other magiſtrate, who ſhould thereupon act the official part, by granting a warrant to apprehend the offender; it being more fit that the accuſer ſhould appear as a witneſs, than act as a magiſtrate. But that is not the queſtion upon this warrant. The queſtion here is, whether it is an eſſential part of the warrant, that the information, evidence or grounds of the charge before the ſecretaries of ſtate ſhould be ſet forth in the warrant? And we think it is not. *Tho. Rudyard's* caſe, 2 *Vent.* 22. cannot be applied to this caſe; for in the caſe of a conviction it is otherwiſe. It was ſaid that a charge by witneſs was the ground of a warrant; but we think it not requiſite to ſet out more than the offence, and the particular ſpecies of it. It may be objected, if this be good, every man's liberty will be in the power of a juſtice of peace. But *Hale*, *Coke* and *Hawkins*, take no notice that a charge is neceſſary to be ſet out in the warrant. In the caſe of the *ſeven biſhops*, their counſel did not take this objection, which no doubt but they would have done, if they had thought there had been any weight in it. I do not rely upon the determination of the judges who then preſided in the *King's Bench*. I have been attended with many precedents of warrants returned into the *King's Bench*; they are almoſt univerſally like this; and in ſir *William Wyndham*'s caſe, 1 *Stra*. 2, 3. this very point before us is determined. And *Hawkins*, in his 2 *Pl. Coron.* 120. *ſect.* 17. ſays, “ It is ſafe to ſet forth that the party is charged “ upon oath; *but this is not neceſſary*; for it hath been reſolved, that a “ commitment for treaſon, or for ſuſpicion of it, without ſetting forth “ any particular accuſation, or ground of ſuſpicion, is good;” and cites ſir *William Wyndham*'s caſe, *Trin.* 2 *Geo. Dalt. cap.* 121. *Cromp.* 233 *b.*

The ſecond objection is, that the libel ought to be ſet forth in the warrant *in hæc verba*, or at leaſt ſo much thereof as the ſecretaries of ſtate deemed infamous, ſeditious, *&c.* that the court may judge whether any ſuch paper ever exiſted; or if it does exiſt, whether it be an infamous and ſeditious libel, or not. But we are all of a contrary opinion. A warrant of commitment for felony muſt contain the *ſpecies* of felony briefly, “ as for felony for the death of *J. S.* or for burglary in “ breaking the houſe of *J. S. &c.* and the reaſon is, becauſe it may “ appear to the judges upon the return of an *habeas corpus*, whether it “ be felony or not.” The magiſtrate forms his judgment upon the writing, whether it be an infamous and ſeditious libel or not at his peril; and perhaps the paper itſelf may not contain the whole of the libel; *inuendo's* may be neceſſary to make the whole out. There is no other word in the law but *libel* whereby to expreſs the true idea of an infamous writing. We underſtand the nature of a libel as well as a *ſpecies* of felony. It is ſaid the libel ought to be ſtated, becauſe the court cannot judge whether it is a libel or not without it; but that is matter for the *judge and jury* to determine at the trial. If the paper was here, I ſhould be afraid to read it. We might perhaps be able to determine *that it was a libel*, but we could not judge *that it was not a libel*, becauſe of *inuendo's*, *&c.* It may be ſaid, that without ſeeing the libel we are not able to fix the *quantum* of the bail; but in anſwer to this, the nature of the offence is known by us. It is ſaid to be an infamous and ſeditious libel, *&c.* it is ſuch a miſdemeanor as we ſhould require good bail for, (moderation to be obſerved) and ſuch as the party may be able to procure.

The third matter inſiſted upon for Mr. *Wilkes* is, that he is a member of parliament, (which has been admitted by the king's ſerjeants) and intitled to privilege to be free from arreſts in all caſes except *treaſon, felony, and actual breach of the peace*, and therefore ought to be diſcharged from impriſonment without bail; and we are all of opinion that he is intitled to that privilege, and muſt be diſcharged without bail. In the caſe of the ſeven biſhops, the court took notice of the privilege of parliament, and thought the biſhops would have been intitled to it, if they had not judged them to have been guilty of a *breach of the peace*; for three of them, *Wright*, *Holloway*, and *Allybone*, deemed a ſeditious libel to be an actual breach of the peace, and therefore they were ouſted of their privilege moſt unjuſtly. If Mr. *Wilkes* had been deſcribed as a member of parliament in the return, we muſt have taken notice of the law of privilege of parliament, otherwiſe the members would be without remedy, where they are wrongfully arreſted againſt the law of parliament. We are bound to take notice of their privileges, as being part of the law of the land. 4 *Inſt.* 25. ſays, the privilege of parliament holds unleſs it be in three caſes, *viz. treaſon, felony, and the peace:* theſe are the words of *Coke*. In the trial of the ſeven biſhops, the word *peace* in this caſe of privilege is explained to mean where ſurety of the peace is required. Privilege of parliament holds in informations for the king, unleſs in the caſes before excepted. The caſe of an information againſt lord *Tankerville* for bribery, 4 *Annæ*, (*a*) was within the privilege of parliament. See the reſolution of lords and commons, *anno* 1675. We are all of opinion that a libel is not a breach of the peace. It tends to the breach of the peace, and that is the utmoſt, 1 *Lev.* 139. But that which only tends to the breach of the peace cannot be a breach of it. Suppoſe a libel be a breach of the peace, yet I think it cannot exclude privilege; becauſe I cannot find that a libeller is bound to find *ſurety of the peace*, in any book whatever, nor ever was, in any caſe, except one, *viz.* the caſe of the ſeven biſhops, where three judges ſaid, that *ſurety of the peace* was required in the caſe *of a libel*. Judge *Powell*, the only honeſt man of the four judges, diſſented; and I am bold to be of his opinion, and to ſay, that caſe is not law. But it ſhews the miſerable condition of the ſtate at that time. Upon the whole, it is abſurd to require ſurety of the peace or bail in the caſe of a libeller, and therefore Mr. *Wilkes* muſt be diſcharged from his impriſonment; whereupon there was a loud *huzza* in *Weſtminſter-hall*. He was diſcharged accordingly.

(*a*) This muſt be a miſtake of the reporter; for lord *Tankerville*'s caſe was in 1758. See Journ. Dom. Proc. 6 *June* in that year.——Editor.

Lord chief juſtice Pratt's *argument on delivering the judgment of the court, from the book intitled, ‘ A Digeſt of the Law of Libels.’*

WHEN this return was read, my brother *Glynn*, counſel for Mr. *Wilkes*, made two objections to it; and though thoſe ſhould fail him, he inſiſted that Mr. *Wilkes*, from the nature of his particular ſtation and character, as being a member of the houſe of commons, was intitled to privilege of parliament, and ought for that reaſon alone to be diſcharged from his preſent impriſonment. To begin with the objections. The firſt was, that it did not appear by the warrant that Mr. *Wilkes* ſtood charged upon any evidence with being the author of the libel deſcribed in the warrant. The true queſtion ariſing upon this objection is, whether ſtating the evidence be eſſential to the validity of the warrant. And upon this point we are all clearly of opinion that the warrant is good. We conſider the ſecretaries in the light of common juſtices of the peace: they no more than any common juſtices can iſſue warrants merely *ex officio*, or for offences within their private knowlege, being in thoſe caſes rather witneſſes than magiſtrates. But though this be admitted, it will not affect the preſent queſtion. The preſent queſtion is, whether the ſtating the evidence be eſſential to the validity of the warrant? No authority has been cited by the defendant's counſel to ſhew it. *Rudyard*'s caſe in 2 *Ventr.* 22. was indeed referred to; but upon examining that caſe, it does not apply. The commitment there was a commitment in execution, and therefore it was neceſſary in that caſe to ſtate the evidence. It was urged farther, that the ground of the juſtices juriſdiction reſted in the charge by witneſſes; and if it was otherwiſe, every man's liberty would be in the power of the juſtices. The objection deſerves an anſwer; and if it had not been determined before, I ſhould have thought it very weighty and alarming: but it has been ſettled. Before I mention the caſe where it was ſolemnly adjudged, I would take notice, that neither my lord *Coke*, lord *Hale*, or Mr. *Hawkins*, all of them very able writers upon the crown law, have conſidered ſuch a charge as is contended for to be eſſential. In the trial of the ſeven biſhops, though they were committed upon a ſimilar warrant, their counſel did not take the ſame objection. In referring to that great caſe, I am not to be underſtood as intending to give any weight to the determination of the judges who ſat upon the bench, in that cauſe. I rely only on the ſilence of the defendants counſel, who were all of them lovers of liberty, and the greateſt lawyers of that age. We have ſeen precedents of commitments returned upon *habeas corpus's* into the *King's-Bench*, where the warrants have been all in the ſame form, and no ſuch objection taken; but the very point was determined in the caſe of ſir *W. Wyndham*, 3 *Vin. Abr.* 530, 535. *Stra.* 2. who was committed for high treaſon generally, and not on the charge of any body ſtated in the commitment. 2 *Hawk. Pl. Cr.* 120. *chap.* 17. *ſect.* 17. refers to the caſe of ſir *W. Wyndham*, and ſays it is ſafer to ſet forth that the party is charged upon oath, but that is not neceſſary. Thus ſtands this point on authorities.—The other objection was, that the libel itſelf ought to have been ſet forth *in hæc verba*; but upon that point too, we are all of opinion that the warrant is good. It was urged, that the ſpecific cauſe of detention ought to be ſtated with certainty; and therefore if a man be committed for felony, the warrant muſt briefly mention the ſpecies of the felony. Now the ſpecies of every offence muſt be collected by the magiſtrate out of the evidence; but he is not bound to ſet forth the evidence: he is anſwerable only for the inference he deduces from it. As to a libel, the evidence is partly internal and partly external. The paper itſelf may not be compleat and concluſive evidence; for it may be dark and unintelligible without the *inuendo's*, which are the external evidence. There is no other name but that of libel applicable to the offence of libelling; and we know the offence ſpecifically by that name, as we know the offences of horſe-ſtealing, forgery, *&c.* by the names which the law has annexed to them. But two reaſons were urged why the law ought to be ſtated. Firſt, it was ſaid, that without it the court cannot judge whether it be a libel or not. The anſwer is, that the court ought not in this proceeding to give any judgment of that ſort, as it would tend to prejudication, to take away the office of a jury, and to create an improper influence. The other reaſon was, that unleſs the libel be ſtated, the court cannot be able to determine on the quantity of bail. I anſwer, that regard to the nature of the offence is the only neceſſary rule in bailing. As to the offence of a libel, it is an high miſdemeanor, and good bail (having regard to the quality of the offender) ſhould be required. But if the libel itſelf was ſtated, we could have no other meaſure of bailing than this. Beſides, there has been no caſe ſhewn to warrant this reaſon, and it was not urged in the caſe of the ſeven biſhops. But then it remains to be conſidered, whether Mr. *Wilkes* ought not to be diſcharged. The king's counſel have thought fit to admit, that he was a member of the houſe of commons, and we are bound to take notice of it. In the caſe of the ſeven biſhops, the court took notice of their privilege from their deſcription in the warrant. In the preſent caſe, there is no ſuit depending. Here no writ of privilege can therefore iſſue, no plea of privilege can be received. It reſts, and muſt reſt on the admiſſion of the counſel for the crown: it is fairly before us upon that admiſſion, and we are bound to determine it. In lord *Coke* 4 *Inſt.* 24, 25. after ſhewing that privilege of parliament is conuſable at common law, he ſays, that privilege generally holds, unleſs it be in three caſes, *viz.* treaſon, felony, and the peace. We have not been able to have recourſe to the original record, but in *Cotton*'s *Abridgement*, *fol.* 596. you will find my lord *Coke* was right. The caſe I would refer to is that of *William Lake*, 9th of *Hen.* 6. who being a member's ſervant, and taken in execution for debt, was delivered by the privilege of the *houſe of Commons*; the book adds, (and for that purpoſe I refer to it) wherein is to be noted, that there is no cauſe to arreſt any ſuch man, but for treaſon, felony, and the peace. In the trial of the ſeven biſhops, the words 'the peace' are explained to mean 'ſurety of the peace.' In the caſe of *the King* v. ſir *Thomas Culpepper*, reported in 12 *Mod.* 108. Lord *Holt* ſays, that whereas it is ſaid in our books, that privilege of parliament was not allowable in treaſon, felony, or breach of the peace, it muſt be intended where ſurety of the peace is deſired, that it ſhall not protect a man againſt a *ſupplicavit*, but it holds as well in caſe of indictment, information for breach of the peace, as in caſe of actions. In the caſe of lord *Tankerville* a few years ago, which though not reported in any law book, is upon record in parliament, it was held, that bribery, being only a *conſtructive*, and not an *actual* breach of the peace, ſhould not ouſt him of his privilege. There is no difference between the two houſes of parliament in reſpect of privilege. The ſtatutes of 12 & 13 *Wil.* 3. *c.* 3. and 2 & 3 *An. c.* 18. ſpeak of the privilege of parliament in reference not to one houſe in particular, but to both houſes. What then is the preſent caſe? Mr. *Wilkes*, a member of the houſe of commons, is committed for being the author and publiſher of an infamous and ſeditious libel. Is a libel *ipſo facto* in itſelf an actual breach of the peace? Mr. *Dalton* in his *Juſtice of the Peace, fol.* 289. defines a libel as a thing *tending* to the breach of the peace. In ſir *Baptiſt Hicks*'s caſe, *Hob.* 224. it is called a *provocation* to a breach of the peace. In *Lev.* 139. *The King* v. *Summers*, it was held to be an offence conuſable before juſtices, becauſe it *tended* to a breach of the peace. In *Hawk. Pl. Cor.* 193. *chap.* 73. *ſect.* 3. it is called a thing directly *tending* to a breach of the public peace. Now, that that which *tends* only to the breach of the peace, is not an *actual* breach of it, is too plain a propoſition to admit of argument. But if it was admitted that a libel was a breach of the peace, ſtill privilege cannot be excluded, unleſs it requires ſurety of the peace; and there has been no precedent but that of the ſeven biſhops cited to ſhew that ſureties of the peace are requirable from a libeller; and as to the opinion of the three judges in that caſe, it only ſerves to ſhew the miſerable ſtate of juſtice in thoſe days. *Allybone*, one of the three, was a rigid and profeſſed *(a)* Papiſt; *Wright* and *Holloway*, I am much afraid, were placed there for doing jobs; and *Powell*, the only honeſt man upon the bench, gave no opinion at all. Perhaps it implies an abſurdity to demand ſureties of the peace from a libeller. However, what was done in the caſe of the ſeven biſhops, I am bold to deny was law.

Upon the whole, though it ſhould be admitted, that ſureties of the peace are requirable from Mr. *Wilkes*, ſtill his privilege of parliament will not be taken away till ſureties have been demanded and refuſed. Let him be diſcharged.

[*This judgment for privilege of parliament in the caſe of libel, was taken into conſideration by both houſes at their firſt meeting afterwards. The diſcuſſion ended in a joint vote, by which it was reſolved,* "*that the privilege of parliament doth not extend to the caſe of writing and publiſhing ſeditious libels, nor ought to be allowed to obſtruct the ordinary courſe of the laws in the ſpeedy and effectual proſecution of ſo heinous and dangerous an offence.*" Almon's Deb. Comm. *for* 1763. *This reſolution was not carried without a very ſtrong conteſt. Of the debates on this occaſion, no regular account has been yet publiſhed. But the* Annual Regiſter *for* 1763, *gives a general view of the chief topicks on each ſide; and the proteſt made againſt the reſolution in the houſe of lords, contains a maſterly and ſpirited argument againſt thus narrowing the privilege of parliament. This proteſt will appear by the following extract from the journal of the lords.*]

Extract from the Journal of the Lords.

Die Martis, 29 *Novembris*, 1763.

THE order of the day for reſuming the adjourned conſideration of the report of the conference with the commons of *Friday* laſt being read;

The third reſolution of the commons was read, as follows:

'Reſolved, by the commons in parliament aſſembled,

'That privilege of parliament does not extend to the caſe of writing and publiſhing ſeditious libels, nor ought to be allowed to obſtruct the ordinary courſe of the laws, in the ſpeedy and effectual proſecution of ſo heinous and dangerous an offence.'

And it being moved to agree with the commons in the ſaid reſolution;

The ſame was objected to. After long debate thereupon,

The queſtion was put, whether to agree with the commons in the ſaid reſolution?

It was reſolved in the affirmative.

Diſſentient,

Becauſe we cannot hear without the utmoſt concern and aſtoniſhment, a doctrine advanced now, for the firſt time, in this houſe, which we apprehend to be new, dangerous, and unwarrantable, *viz.* that the perſonal privilege of both houſes of parliament has never held, and ought not to hold, in the caſe of any criminal proſecution whatſoever; by which, all the records of parliament, all hiſtory, all the authorities of the graveſt and ſobereſt judges, are entirely reſcinded; and the fundamental principles of the conſtitution, with regard to the independence of parliament, torn up and buried under the ruins of our moſt eſtabliſhed rights.

We are at a loſs to conceive, with what view ſuch a ſacrifice ſhould be propoſed, unleſs to amplify, in effect, the juriſdiction of the inferior, by annihilating the ancient immunities of this ſuperior court.

The very queſtion itſelf, propoſed to us from the commons, and now agreed to by the lords, from the letter and ſpirit of it, contradicts this aſſertion; for, whilſt it only narrows privilege in criminal matters, it eſtabliſhes the principle. The law of privilege, touching impriſonment of the perſons of lords of parliament, as ſtated by the two ſtanding orders, declares generally, that no lord of parliament, ſitting the parliament, or within the uſual times of privilege of parliament, is to be impriſoned or reſtrained, without ſentence or order of the houſe, unleſs it be for treaſon or felony, or for refuſing to give ſecurity for the peace, and refuſal to pay obedience to a writ of *habeas corpus*.

The firſt of theſe orders was made after long conſideration, upon a diſpute with the king, when the precedents of both houſes had been fully inſpected, commented upon, reported, and entered in the journals, and after the king's counſel had been heard. It was made in ſober times, and by a houſe of peers, not only loyal, but devoted to the crown; and it was made by the unanimous conſent of all, not one diſſenting. Theſe circumſtances of ſolemnity, deliberation, and unanimity, are ſo ſingular and extraordinary, that the like are ſcarce to be found in any inſtance among the records of parliament.

When the two caſes of ſurety for the peace, and *habeas corpus*, come to be well conſidered, it will be found that they both breathe the ſame ſpirit, and grow out of the ſame principle.

The offences, that call for ſurety and *habeas corpus*, are both caſes of preſent continuing violence; the proceedings in both have the ſame end, *viz.* to repreſs the force, and to diſarm the offender. The proceeding ſtops in both when that end is attained; the offence is not proſecuted or puniſhed in either; the neceſſity is equal in both, and, if privilege was allowed in either, ſo long as the neceſſity laſts, a lord of parliament would enjoy a mightier prerogative than the crown itſelf is intitled to. Laſtly, they both leave the proſecution of all miſdemeanours ſtill under privilege, and do not derogate from that great fundamental, that none ſhall be arreſted in the courſe of proſecution for any crime under treaſon and felony.

Theſe two orders compriſe the whole law of privilege, and are both of them ſtanding orders, and conſequently the fixed laws of the houſe, by which we are all bound until they are duly repealed.

The reſolution of the other houſe, now agreed to, is a direct contradiction to the rule of parliamentary privilege, laid down in the aforeſaid ſtanding orders, both in letter and ſpirit. Before the reaſons are ſtated, it will be proper to premiſe two obſervations.

Firſt, that in all caſes where ſecurity of the peace may be required, the lord cannot be committed till that ſecurity is refuſed, and conſequently the magiſtrate will be guilty of a breach of privilege, if he commits the offender without demanding that ſecurity.

Secondly, although the ſecurity ſhould be refuſed, yet, if the party is committed generally, the magiſtrate is guilty of a breach of privilege, becauſe the party refuſing ought only to be committed till he has found ſureties; whereas, by general commitment, he is held faſt, even though he ſhould give ſureties, and can only be diſcharged by giving bail for his appearance.

This being premiſed, the firſt objection is to the generality of this reſolution, which, as it is penned, denies the privilege to the ſuppoſed libeller, not only where he refuſes to give ſureties, but likewiſe throughout the whole proſecution, from the beginning to the end; ſo that, although he ſhould ſubmit to be bound, he may, notwithſtanding, be afterwards arreſted, tried, convicted, and puniſhed, ſitting the parliament, and without leave of the houſe, wherein the law of privilege is fundamentally miſunderſtood, by which no commitment whatſoever is tolerated, but that only which is made upon the refuſal of the ſureties, or in the other excepted caſes of treaſon or felony, and the *habeas corpus*.

If privilege will not hold throughout in the caſe of a ſeditious libel, it

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(a) Burn. Hiſt. O. T. 745. 3 *Mod.* 239.

muſt be becauſe that offence is ſuch a breach of the peace, for which ſureties may be demanded; and if it be ſo, it will readily be admitted, that the caſe comes within the exception, ‘ provided always, that ſureties have been refuſed, and that the party is committed only till he ſhall give ſureties.’

But firſt, this offence is not a breach of the peace; it does not fall within any definition of a breach of the peace, given by any of the good writers upon that ſubject; all which breaches, from menace to actual wounding, either alone or with a multitude, are deſcribed to be acts of violence againſt the perſons, goods, or poſſeſſions, putting the ſubject in fear by blows, threats or geſtures. Nor is this caſe of the libeller ever enumerated in any of theſe writers among the breaches of peace; on the contrary, it is always deſcribed as an act tending to excite, provoke, or produce, breaches of the peace; and although a ſecretary of ſtate may be pleaſed to add the enflaming epithets of treaſonable, traiterous, or ſeditious, to a particular paper, yet no words are ſtrong enough to alter the nature of things. To ſay then, that a libel, poſſibly productive of ſuch a conſequence, is the very conſequence ſo produced, is, in other words, to declare, that the cauſe and the effect are the ſame thing.

But, ſecondly, if a libel could poſſibly, by any abuſe of language, or has any where been called, inadvertently, a breach of the peace, there is not the leaſt colour to ſay, that the libeller can be bound to give ſureties for the peace, for the following reaſons:

Becauſe none can be ſo bound, unleſs he be taken in the actual commitment of a breach of the peace; ſtriking, or putting ſome one or more of his majeſty’s ſubjects in fear:

Becauſe there is no authority, or even ambiguous hint, in any lawbook, that he may be ſo bound:

Becauſe no libeller, in fact, was ever ſo bound:

Becauſe no crown lawyer, in the moſt deſpotic times, ever inſiſted he ſhould be ſo bound, even in days when the preſs ſwarmed with the moſt invenomed and virulent libels, and when the proſecutions raged with ſuch uncommon fury againſt this ſpecies of offenders; when the law of libels was ranſacked every term; when loſs of ears, perpetual impriſonment, baniſhment, and fines of ten and twenty thouſand pounds, were the common judgments in the Star-chamber; and when the crown had aſſumed an uncontroulable authority over the preſs.

Thirdly, this reſolution does not only infringe the privilege of parliament, but points to the reſtraint of the perſonal liberty of every common ſubject in theſe realms, ſeeing that it does, in effect, affirm, that all men, without exception, may be bound to the peace for this offence.

By this doctrine every man’s liberty, privileged as well as unprivileged, is ſurrendered into the hands of a ſecretary of ſtate. He is by this means impowered, in the firſt inſtance, to pronounce the paper to be a ſeditious libel; a matter of ſuch difficulty, that ſome have pretended, it is too high to be intruſted to a ſpecial jury of the firſt rank and condition: he is to underſtand, and decide by himſelf, the meaning of every inuendo: he is to determine the tendency thereof, and brand it with his own epithets: he is to adjudge the party guilty, and make him author or publiſher, as he ſees good: and laſtly, he is to give ſentence by committing the party. All theſe authorities are given to one ſingle magiſtrate, unaſſiſted by counſel, evidence, or jury, in a caſe where the law ſays, no action will lie againſt him, becauſe he acts in the capacity of a judge.

From what has been obſerved, it appears to us, that the exception of a ſeditious libel from privilege is neither founded on uſage or written precedents, and therefore this reſolution is of the firſt impreſſion; nay, it is not only a new law, narrowing the known and ancient rule, but it is likewiſe a law *ex poſt facto*, *pendente lite*, *et ex parte*, now firſt declared to meet with the circumſtances of a particular caſe; and it muſt be further conſidered, that this houſe is thus called upon to give a ſanction to the determinations of the other, who have not condeſcended to confer with us upon this point till they had prejudged it themſelves.

This method of relaxing the rule of privilege, caſe by caſe, is pregnant with this farther inconvenience, that it renders the rule precarious and uncertain. Who can foretel where the houſe will ſtop, when they have, by one infringement of their own ſtanding orders, made a precedent, whereon future infringements may, with equal reaſon, be founded? How ſhall the ſubject be able to proceed with ſafety in this perilous buſineſs? How can the judges decide on theſe or the like queſtions, if privilege is no longer to be found in records and journals, and ſtanding orders? Upon any occaſion privilege may be enlarged, and no court will venture for the future, without trembling, either to recognize or to deny it.

We manifeſtly ſee this effect of excluding, by a general reſolution, one bailable offence from privilege to-day, that it will be a precedent for doing ſo by another, upon ſome future occaſion, till, inſtead of privilege holding in every caſe not excepted, it will, at laſt, come to hold in none but ſuch as are expreſsly ſaved.

When the caſe of the *habeas corpus* is relied upon, as a precedent to enforce the declaration, the argument only ſhews, that the miſchief aforementioned has taken place already, ſince one alteration, though a very juſt one, not at all applicable to the preſent queſtion, is produced to juſtify another that is unwarrantable.

But it is ſtrongly objected, that if privilege be allowed in this caſe, a lord of parliament might endanger the conſtitution by a continual attack of ſucceſſive libels; and if ſuch a perſon ſhould be ſuffered to eſcape, under the ſhelter of privilege, with perpetual impunity, all government would be overturned; and therefore it is inexpedient to allow the privilege now, when the time of privilege, by prorogations, is continued for ever, without an interval.

This objection ſhall be anſwered in two ways. Firſt, if inexpediency is to deſtroy perſonal privilege in this caſe of a ſeditious libel, it is at leaſt as inexpedient, that other great miſdemeanors ſhould ſtand under the like protection of privilege; neither is it expedient, that the ſmaller offences ſhould be exempt from a proſecution in the perſon of a lord of parliament; ſo that if this argument of inexpediency is to prevail, it muſt prevail throughout, and ſubvert the whole law of privilege in criminal matters; in which method of reaſoning there is this fault, that the argument proves too much.

If this inconvenience be indeed grievous, the fault is not in the law of privilege, but in the change of times, and in the management of prorogations by the ſervants of the crown, which are ſo contrived, as not to leave an hour open for juſtice. Let the objection nevertheleſs be allowed in its utmoſt extent, and then compare the inexpediency of not immediately proſecuting on one ſide, with the inexpediency of ſtripping the parliament of all protection from privilege on the other. Unhappy as the option is, the public would rather wiſh to ſee the proſecution for crimes ſuſpended, than the parliament totally unprivileged; although, notwithſtanding this pretended inconvenience is ſo warmly magnified on the preſent occaſion, we are not appriſed that any ſuch inconvenience has been felt, though the privilege has been enjoyed time immemorial.

But the ſecond and beſt anſwer, becauſe it removes all pretence of grievance, is this, that this houſe, upon complaint made, has the power (which it will exert in favour of juſtice) to deliver up the offender to proſecution.

It is a diſhonourable and an undeſerved imputation upon the lords, to ſuppoſe, even in argument, that they would nouriſh an impious criminal in their boſoms, againſt the call of offended juſtice, and the demand of their country.

It is true, however, and it is hoped, that this houſe will always ſee (as every magiſtrate ought that does not betray his truſt) that their member is properly charged; but when that ground is once laid, they would be aſhamed to protect the offender one moment. Surely this truſt (which has never yet been abuſed) is not too great to be repoſed in the high court of parliament! While it is lodged there, the public juſtice is in ſafe hands, and the privilege untouched; whereas, on the contrary, if for the ſake of coming at the criminal at once, without this application to the houſe, perſonal privilege is taken away, not only the offender, but the whole parliament, at the ſame time, is delivered up to the crown.

It is not to be conceived, that our anceſtors, when they framed the law of privilege, would have left the caſe of a ſeditious libel (as it is called) the only unprivileged miſdemeanor. Whatever elſe they had given up to the crown, they would have guarded the caſe of ſuppoſed libels above all others with privilege, as being moſt likely to be abuſed by outrageous and vindictive proſecutions.

But this great privilege had a much deeper reach. It was wiſely planned, and hath hitherto, through all times, been reſolutely maintained.

It was not made to ſcreen criminals, but to preſerve the very being and life of parliament; for when our anceſtors conſidered, that the law had lodged the great powers of arreſt, indictment, and information, in the crown, they ſaw the parliament would be undone, if, during the time of privilege, the royal proceſs ſhould be admitted in any miſdemeanour whatſoever. Therefore they excepted none. Where the abuſe of power would be fatal, the power ought never to be given; becauſe redreſs comes too late.

A parliament under perpetual terror of impriſonment can neither be free, nor bold, nor honeſt; and if this privilege was once removed, the moſt important queſtion might be irrecoverably loſt, or carried by a ſudden irruption of meſſengers, let looſe againſt the members half an hour before the debate.

Laſtly, as it has already been obſerved, the caſe of ſuppoſed libels is, of all others, the moſt dangerous and alarming to be left open to proſecution during the time of privilege.

If the ſeverity of the law touching libels, as it hath ſometimes been laid down, be duly weighed, it muſt ſtrike both houſes of parliament with terror and diſmay.

The repetition of a libel, the delivery of it unread to another, is ſaid to be a publication; nay, the bare poſſeſſion of it has been deemed criminal, unleſs it is immediately deſtroyed, or carried to a magiſtrate.

Every lord of parliament then, who hath done this, who is falſely accuſed, nay, who is, though without any information, named in the ſecretary of ſtate’s warrant, has loſt his privilege by this reſolution, and lies at the mercy of that great enemy to learning and liberty, the meſſenger of the preſs.

For theſe and many other forcible reaſons, we hold it highly unbecoming the dignity, gravity, and wiſdom of the houſe of peers, as well as their juſtice, thus judicially to explain away and diminiſh the privilege of their perſons, founded in the wiſdom of ages, declared with preciſion in our ſtanding orders, ſo repeatedly confirmed, and hitherto preſerved inviolable by the ſpirit of our anceſtors, called to it only by the other houſe, on a particular occaſion, and to ſerve a particular purpoſe, *ex poſt facto*, *ex parte*, *et pendente lite* in the courts below.

Temple,
Bolton,
Grafton,
Cornwallis,
Portland,
Briſtol,
Devonſhire,
Scarborough,
Dacre,

Abergavenny,
Fred. Litch. Cov.
Aſhburnham,
Forteſcue,
Grantham,
Walpole,
Ponſonby,
Folkeſtone.

No. III. *Proceedings on Error in an Action of falſe Impriſonment by* Dryden Leach, *againſt* John Money, James Watſon, *and* Robert Blackmore, *three King's Meſſengers,* King's-Bench, Eaſter *Term,* 5 G. III. *and* Michaelmas *Term,* 6 Geo. III. 1765.

[*Theſe proceedings, though in the caſe of a civil action, fully come within the idea of a ſtate trial. They grew out of the proſecutions for the printing and publiſhing No. 45. of the political paper called* The North-Briton, *and involve the diſcuſſion of ſeveral points relative to matters of the moſt public nature, namely, the magiſterial powers claimed as incident to the office of ſecretary of ſtate, the ſeizure of papers, and the legality of general warrants. The caſe is entirely taken from ſir* James Burrow's *report. See* 3 Burr. 1692 *and* 1742. Eaſter *term*, Friday 17 May, 1765.]

Eaſter Term, 5 Geo. III.

SOON after the court ſat, the lord chief juſtice *Pratt* came *perſonally* into court, to confeſs *(ore tenus)* his *ſeal* put to a *bill of exceptions* in this caſe; purſuant to the requiſition of the following writ, *viz.*

'*George* the third, *&c.*—To our truſty and well-beloved *Charles Pratt*, knight, our chief juſtice of the bench, greeting.---Whereas we have lately been informed that in the record and proceſs, and alſo in giving of judgment in a plaint which was in our court before you and your aſſociates, our juſtices of the ſaid bench, by our writ, between *Dryden Leach,* and *John Money*, *James Watſon*, and *Robert Blackmore*, in a plea of treſpaſs, aſſault, and impriſonment, manifeſt error hath intervened, to the great damage of the ſaid *John James* and *Robert*; which ſaid record and proceſs, for the error aforeſaid, we have cauſed to be brought into our court before us; and now, on the behalf of the ſaid *John James* and *Robert*, we are informed, in our ſaid court before us, that at the trial of the iſſue firſt joined between the ſaid parties in the plea aforeſaid, the counſel, learned in the law, of the ſaid *John James* and *Robert* alledged on their behalf certain exceptions to the opinion then declared and given by you; and that the ſaid exceptions were then and there written in a certain bill, to which you put your ſeal, at the requeſt of the ſaid *John James* and *Robert*, according to the form of the ſtatute in ſuch caſe made and provided; and the ſaid *John James* and *Robert* have brought into our court before us the ſaid bill, with your ſeal put to the ſame, as it is ſaid; whereupon the ſaid *John James* and *Robert* have beſought us to do what further ſhould ſeem meet to be done in this behalf, according to the form of the ſaid ſtatute; and foraſmuch as by the ſaid ſtatute it is ordained, that in ſuch caſe the juſtice whoſe ſeal ſhould be put to ſuch exception be commanded to *appear* before us at a certain day, to *confeſs* or *deny* his ſeal; therefore we command you that you perſonally appear before us, on the morrow of the aſcenſion of our Lord, whereſoever we ſhall then be in *England, to confeſs or deny the ſeal* ſo put to the ſaid bill of exceptions as aforeſaid to be your ſeal, according to the form and effect of the ſaid ſtatute; and that you bring with you, at the ſame time, this writ. Witneſs *William* lord *Mansfield*, at *Weſtminſter*, the 24th day of *April*, in the fifth year of our reign.'

N. B. The bill of exceptions, ſealed by lord chief juſtice *Pratt*, had been previouſly brought into this court, and was now in the hands of Mr. *Owen*, as ſecondary of the office of pleas; and all the proceedings, down to and including the abovementioned writ, were entered upon the rolls of this court.

The lord chief juſtice *Pratt* being now come into this court, purſuant to the command contained in the ſaid writ, delivered it to the lord chief juſtice of this court; Mr. *Owen*, at the ſame time, delivering the *original bill of exceptions* into lord *Mansfield*'s hand. Whereupon lord *Mansfield*, ſhewing to lord chief juſtice *Pratt* the ſeal thereto affixed, aſked him, 'Whether that was his lordſhip's ſeal, or not.' To which queſtion his lordſhip anſwering in the affirmative, lord *Mansfield* redelivered the bill of exceptions to Mr. *Owen*; at the ſame time delivering to him the abovementioned writ, with orders 'that it ſhould be filed.'

> Note --There was *no written return* to this writ; but Mr. *Owen* propoſes to indorſe upon it---'Sir *Charles Pratt,* knight, the chief juſtice within named, perſonally appeared in the court of the lord the king, before the king himſelf, *&c.* on the day within written; and confeſſeth that the ſeal put to the bill of exceptions within mentioned *is* his ſeal.'

Mich. Term, 6 Geo. III. *Roll* 60.

ERRORS having been aſſigned upon the *bill of exceptions* mentioned above, they now came on to be argued.

This was an action of treſpaſs † brought in the court of *Common Pleas* by *Dryden Leach*, againſt three king's meſſengers, *John Money*, *James Watſon*, and *Robert Blackmore*, for breaking and entering the plaintiff's houſe, and impriſoning him, without any lawful or probable cauſe; to the plaintiff's damage of 2000l.

The defendants below pleaded two pleas. The firſt was the general iſſue, 'Not guilty:' on which iſſue was joined.

The other plea (pleaded by leave of the court) was a ſpecial juſtification, as to the breaking and entering of the plaintiff's dwelling-houſe, and ſtaying and continuing therein for ſix hours, and making the aſſault upon him, and ſeizing, taking, and impriſoning him, and keeping and detaining him in priſon for four days: as to all which, they ſay, That before the commitment of the ſuppoſed treſpaſs, *viz.* on 19th *April* 1763, the king made a ſpeech from the throne, *&c.* in which ſpeech was contained the following declaration, *&c. &c.* That on the 23d *April* 1763, a certain ſeditious and ſcandalous libel or compoſition, intitled, 'The *North Briton*, No. 45.' was unlawfully and *ſeditiouſly* compoſed, printed and publiſhed, concerning the king and his ſaid ſpeech; in which libel were contained, *&c. &c. &c.* That the earl of *Halifax* was then one of the privy council, and one of his majeſty's principal ſecretaries of ſtate; and that information was given to him of the ſaid publication of the aforeſaid libel; and the ſaid libel was then ſhewn and produced to the ſaid earl; and he thereupon in due manner iſſued his warrant in writing under his hand and ſeal, directed to *Nathan Carrington* and theſe three defendants, who were then four of his majeſty's meſſengers in ordinary; by which warrant, the ſaid earl did in his majeſty's name authorize and require them, taking a conſtable to their aſſiſtance, to make ſtrict and diligent *ſearch for the ſaid authors, printers and publiſhers* of the aforeſaid ſeditious libel, intitled, 'The *North Briton*, No. 45, *April* the 23d, 1763;' and *them or any of them having found*, to *apprehend and ſeize*, together with their *papers*, and to *bring in ſafe cuſtody before the ſaid earl*, to be *examined* concerning the premiſſes, and to be further dealt with according to law: in the due execution whereof, all mayors, ſheriffs, juſtices of the peace, conſtables, and all others his ſaid majeſty's meſſengers, officers civil and military, and loving ſubjects whom it might concern, were to be aiding and aſſiſting to them the ſaid *Nathan Carrington*, *John Money*, *James Watſon*, and *Robert Blackmore*, as there ſhould be occaſion. They further ſay, that for forty-four weeks and upwards before the iſſuing of the ſaid warrant, certain weekly compoſitions, intitled, 'The *North Briton*,' and reſpectively numbered in a progreſſive order, had been printed and publiſhed on *Saturday* in every week; and that the ſaid ſeditious libel, intitled, 'The *North Briton*, No. 45. *Saturday April* the 23d, 1763,' was *one* of the ſaid weekly compoſitions. They ſay that the plaintiff followed and exerciſed the art and buſineſs of a *printer*; and did in fact *print* and cauſe to be printed *one* of the ſaid weekly compoſitions, intitled, 'The *North Briton*;' to wit, the *North Briton*, No. 26. and that after the iſſuing of the aforeſaid warrant, and before the committing of the ſaid ſuppoſed treſpaſs, *to wit*, on the 27th of *April*, 1763, *Information was given* to them the defendants, 'that the ſaid *Dryden Leach* and his ſervants *were the printers* of the aforeſaid ſeditious libel, intitled, 'The *North Briton* No. 45. *Saturday*, *April* the 23d, 1763.' Wherefore the defendants, being his majeſty's meſſengers in ordinary as aforeſaid, took to their aſſiſtance a certain conſtable, *to wit*, one *Thomas Freeman*, who was then a conſtable of the pariſh of *St. Margaret*, *Weſtminſter*, in the county of *Middleſex*, to aid them in the execution of the aforeſaid warrant; and, together with the ſaid conſtable, entered into the aforeſaid dwelling-houſe of the ſaid *Dryden Leach*, in which the ſaid *Dryden Leach* carried on his aforeſaid buſineſs of a printer, the door thereof being then open, to ſearch for the printers of the ſaid ſeditious libel, in order to carry them before the ſaid earl of *Halifax*, to be examined concerning the ſame: and thereupon, the ſaid defendants, together with the conſtable aforeſaid, did then and there *find*, within the ſame houſe, a *newly-printed* copy of *one* of the ſaid weekly compoſitions, intitled, 'The *North Briton*,' and alſo an *unfiniſhed copy* of *part of another* of the ſaid compoſitions then alſo *newly printed*, and which ſaid newly-printed copies were part of a *new edition*, which the ſaid *Dryden Leach* and his ſervants were then and there *reprinting*, of the aforeſaid weekly compoſitions. Whereupon the defendants, together with the conſtable abovenamed, did gently lay their hands on the ſaid *Dryden Leach*, and ſeized and took him into their cuſtody, in order to bring him before the ſaid earl of *Halifax*, to be examined concerning the ſaid ſeditious libel; and in ſo ſearching for the printers of the ſeditious libel, and ſeizing and taking the ſaid *Dryden* as aforeſaid, did then and there neceſſarily ſtay and continue in the ſaid houſe of the ſaid *Dryden* for the ſpace of ſix hours, part of the time in the declaration mentioned. And becauſe the ſaid earl of *Halifax* was, during all the ſaid ſpace of four days, part of the aforeſaid five days in the ſaid declaration mentioned, employed in other buſineſs belonging to his ſaid office of ſecretary of ſtate, ſo that the ſaid *Dryden Leach* could not then, or during the ſaid four days be brought before the ſaid earl for the purpoſe aforeſaid, they the ſaid defendants, together with the conſtable aforeſaid, did keep and detain the ſaid *Dryden Leach* in their cuſtody for the ſaid ſpace of four days, part of the ſaid time in the declaration mentioned, in order to carry him before the ſaid earl of *Halifax* for the purpoſe aforeſaid. They further ſay, that at the end of the aforeſaid four days, and not before, upon the examination of the ſaid *Dryden Leach* and certain other perſons who were then and there examined concerning the premiſſes, it appeared to the ſaid earl of *Halifax*, ‘ that the ſaid *Dryden Leach* did *not* print the ſaid ſeditious libel intitled “ The *North Briton*, No. 45. *Saturday April* the 23d, 1763:” and thereupon, the ſaid defendants, by the command of the ſaid earl of *Halifax*, did then and there *releaſe* the ſaid *Dryden Leach* out of their cuſtody, and diſcharged and ſet him free from that impriſonment. Which are the ſame breaking and entering of the aforeſaid dwelling-houſe of the ſaid *Dryden Leach*, in the declaration mentioned, in which, *&c.* and ſtaying and continuing therein for the ſpace of ſix hours, part of the time in the ſame declaration mentioned; and alſo as to the making of the aforeſaid aſſault upon the ſaid *Dryden Leach*, and ſeizing, taking and impriſoning of the ſaid *Dryden Leach*, and detaining him in priſon for the ſpace of four days, part of the ſaid time in the ſaid declaration mentioned, above ſuppoſed to have been done by the defendants, whereof the ſaid *Dryden* hath above complained againſt them. And this they are ready to verify. Wherefore they pray judgment, if the ſaid *Dryden* ought to have or maintain his aforeſaid action thereof againſt them, *&c.*

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† See the 549th and 559th rolls of C.B. of Mich. term, 4 G. 3. and below at large.

The plaintiff replied, as to the ſaid plea in bar as to the breaking and entering the dwelling-houſe, and ſtaying and continuing there ſix hours (part of the time in the declaration mentioned), and alſo as to the making of the aſſault upon him, and ſeizing, taking and impriſoning of him, and keeping and detaining him in priſon for four days (part of the time in the declaration mentioned); that the defendants, of *their own wrong* and *without the cauſe* by them in their plea alledged, broke and entered his dwelling-houſe, and ſtaid and continued therein for ſix hours, and made an aſſault upon him, and ſeized, took and impriſoned him, and kept and detained him in priſon for the four days in the plea mentioned (part of the time in the declaration mentioned), in manner and form as he has above complained againſt them. And upon this iſſue was joined.

The cauſe came on to be tried before lord chief juſtice *Pratt*, on the 10th of *December* 1763, at *Guildhall:* and the jury found a verdict for the plaintiff upon both iſſues; and gave him damages 400*l.* beſides his coſts and charges, *&c.* On the 16th of *June* 1764, judgment was ſigned for the plaintiff, for 400*l.* damages, and 51*l.* 16*s.* 8*d.* coſts.

At the trial, a bill of exceptions was tendered and received; which ſtated the iſſues, the coming on to trial, *&c.* and the evidence, and deſcribed a printed paper, intitled, ‘ The *North Briton*, No. 45.’ and the information given thereof to the ſecretary of ſtate, and his warrant to the defendants below, together with another king's meſſenger, *Nathan Carrington*; and what Mr. *Carrington* had been told of Mr. *Leach*'s being the printer of it; and their thereupon entering his houſe, and finding ſome of the other numbers of the ſame paper newly printed by him; and their thereupon taking him into cuſtody, in order to carry him before the earl of *Halifax*, one of his majeſty's principal ſecretaries of ſtate; and that he, appearing *not* to be either author, printer or publiſher of the ſaid paper, called, ‘ The *North Briton*, No. 45,’ was diſcharged by them, by the earl's order, without being ever carried before him. They ſay, that their evidence intitled them to the benefit of the ſtatute of 24 *George* 2. *c.* 44. Though it was denied by the counſel for the plaintiff *Leach*, that either they or the ſecretary of ſtate himſelf were *within* that ſtatute, or thoſe of 7 *Jac.* 1. *c.* 5. or 21 *Jac.* 1. *c.* 12. (the former of which, being only temporary, was made perpetual by the latter, and by which liberty is given to *juſtices of peace* and all others acting under *their* command ‘ to *plead the general iſſue*, and give the ſpecial matter in evidence.’)

That the chief juſtice of the *Common Pleas* was of opinion, ‘ that their evidence was *not* ſufficient to bar the plaintiff of his action:’ whereas, the bill of exceptions inſiſts ‘ that it *was*.’

This bill of exceptions being ſealed, and the ſeal acknowledged, as is beforementioned, the defendants below aſſign errors: and a joinder in error was put in by the plaintiff *Leach*.

The aſſignment of errors was to the following effect: (It may be ſeen at large, in the 60th roll of *Eaſter* term, 5 *Geo.* 3. *B. R.*)

The defendants come, on *Wedneſday* next after fifteen days of *Eaſter*, 4 *Geo.* 3. before our lord the king at *Weſtminſter*, and ſay, That at the trial, their counſel propoſed *exceptions* to the opinion of the lord chief juſtice *Pratt*; which exceptions were written in a bill, and ſealed by the chief juſtice: which bill of exceptions the defendants now bring into this court, and pray a writ to the chief juſtice, to confeſs or deny his ſeal; which writ is granted to them, returnable on the morrow of the aſcenſion. At which day, before our lord the king at *Weſtminſter*, come the defendants in their proper perſon, and the ſaid chief juſtice of the *Common Pleas* likewiſe in his proper perſon, and acknowledges his ſeal put to the ſaid bill of exceptions. [The form and ceremony of his doing this may be ſeen in the preceding page] Then they ſet out the bill of exceptions, *verbatim*, ‘ Be it remembered, *&c.*’ It recites all the proceedings particularly and minutely, from the very beginning to the end, concluding with the verdict of the jury: which it would be tedious to repeat, as they have been already ſufficiently ſpecified. (They are entered upon the rolls 549 and 550 of the court of *Common Pleas*, in *Michaelmas* term, 4 *Geo.* 3.) The defendants (now become plaintiffs in error) then alledge, (in their ſaid bill of exceptions) that upon the trial, the counſel for the plaintiff *Leach*, in order to prove the defendants guilty of the treſpaſs, gave in evidence, ‘ that on the 29th of *April* 1763, the defendants entered the plaintiff's dwelling-houſe, ſearched it, and continued in it four hours; ſeized and took *Leach* into their cuſtody againſt his will and conſent; and kept and detained him in their cuſtody againſt his will and conſent for four days:’ which was all the treſpaſs, aſſault and impriſonment, committed by the defendants, or any of them. Whereupon their counſel, in order to bar the ſaid action, and to acquit them thereof under the general iſſue above pleaded, gave in evidence and proved, ‘ That before the committing of the treſpaſs, the king made a ſpeech from the throne, *&c.* containing the ſeveral expreſſions ſtated in the ſecond plea of the defendants; and that afterwards and before the ſuppoſed treſpaſs, a paper, intitled, The *North Briton*, No. 45. *&c.* was printed and publiſhed; and that the ſame contained the ſeveral matters ſet forth in their ſaid ſecond plea:’ and it was proved on their behalf, ‘ that the earl of *Halifax* was, all that time, one of his majeſty's principal ſecretaries of ſtate, and one of the privy council; and that information was given to him of the ſaid publication of the abovementioned paper; and the ſame was then ſhewn to him; and that thereupon the ſaid earl iſſued his warrant in writing, under his hand and ſeal, directed to *Nathan Carrington* and the defendants, who were then four of his majeſty's meſſengers in ordinary.’ And their counſel then produced and gave in evidence the *warrant* aforeſaid, which was in the words and figures following, that is to ſay, ‘ *George Montagu Dunk*, earl of *Halifax*, viſcount *Sunbury*, and baron *Halifax*, one of the lords of his majeſty's moſt honourable privy council, lieutenant-general of his majeſty's forces, and principal ſecretary of ſtate, *&c.*—Theſe are in his majeſty's name to authorize and require you, taking a conſtable to your aſſiſtance, to make ſtrict and diligent *ſearch for* the *authors*, *printers* and *publiſhers* of a ſeditious and treaſonable paper, intitled, The *North Briton*, No. 45. *Saturday April* 23, 1763, printed for *G. Kearſly* in *Ludgate Street*, *London*; and them or any of them *having found*, to *apprehend and ſeize*, *together with their papers*, and to bring in ſafe cuſtody before me, to be examined concerning the premiſſes, and further dealt with according to law. In the due execution whereof, all mayors, ſheriffs, juſtices of the peace, conſtables, and all others his majeſty's officers civil and military, and loving ſubjects whom it may concern, are to be aiding and aſſiſting to you, as there ſhall be occaſion. And for your ſo doing, this ſhall be your warrant. Given at *St. James's*, the 26th day of *April* 1763, in the third year of his majeſty's reign. *Dunk Halifax.* To *Nathan Carrington*, *John Money*, *James Watſon*, and *Robert Blackmore*, four of his majeſty's meſſengers in ordinary.’ And it was farther proved on behalf of the ſaid defendants, ‘ that ſeveral of the *like warrants* had been granted, at different times, from the time of the Revolution to the preſent time, by the principal ſecretaries of ſtate, and had been executed by the meſſengers in ordinary for the time being; and that the paper in the ſaid warrant deſcribed was the ſaid paper ſo printed and publiſhed as aforeſaid; and that the warrant aforeſaid, before the committing of the ſuppoſed treſpaſs, *to wit*, on the 26th day of *April* aforeſaid, in the year of our Lord 1763, was delivered to the defendants, to be executed;’ and ‘ that they were then three of his majeſty's meſſengers in ordinary, and ſtill are ſo.’ It was alſo proved, on their behalf, that ‘ for forty weeks and upwards next before the iſſuing of the aforeſaid warrant, certain weekly compoſitions, intitled, ‘ The *North Briton*,’ had been printed and publiſhed on *Saturday* on every week; and that the aforeſaid paper, intitled, ‘ The *North Briton*, No. 45, *Saturday April* 23, 1763,’ deſcribed in the ſaid warrant, being one of the ſaid weekly compoſitions, was printed and publiſhed before the iſſuing of the ſaid warrant, *to wit*, on the 23d day of *April* 1763; and that after the iſſuing of the abovementioned warrant, and before the committing of the ſaid ſuppoſed treſpaſs, *to wit*, on the 28th day of *April*, in the year aforeſaid, the defendants were *informed* by *Nathan Carrington*, one other of the meſſengers in the ſaid warrant named, and one of the perſons to whom the ſaid warrant was directed, that from the information he had received, he was of opinion, that the ſaid *Dryden Leach*, who then and long before was, and ſtill is a printer in the city of *London* aforeſaid, was the printer of the ſaid weekly compoſitions, intitled, ‘ The *North Briton*;’ for that he the ſaid *Carrington* had been *informed* that one Mr. *Wilkes*, a perſon ſuppoſed to be the author of the ſaid weekly compoſitions, had been ſeen frequently to go into the ſaid Mr. *Leach*'s houſe; and that an old printer, whoſe name he the ſaid *Carrington* did not mention to the defendants, had *told him*, that the ſaid Mr. *Leach* was the printer of the ſaid compoſitions; and that *thereupon* the defendants took to their aſſiſtance a conſtable, and with the conſtable entered *Leach*'s dwelling-houſe (the door being open) to ſearch for the ſaid *Leach* and his books and papers; and to bring him, together with his books and papers, in ſafe cuſtody, before the ſaid earl of *Halifax*, to be examined concerning the premiſſes, and to be further dealt with according to law; and upon that occaſion did ſearch the ſaid houſe, and neceſſarily continued therein for the ſaid ſpace four hours.’ And it was further given in evidence and proved, on the part of the ſaid defendants, ‘ That upon that ſearch, the defendants did find *Leach* in the ſaid houſe, and did alſo then *find a newly-printed ſheet*, containing a copy of one of the ſaid weekly compoſitions, intitled, ‘ The *North Briton*, No. 1.’ and part of a copy of another of the ſaid weekly compoſitions, intitled, ‘ The *North Briton*, No. 2.’ which ſheet was printed by the ſaid *Dryden Leach*.’ And it was further proved, ‘ that the ſaid *Dryden Leach* did alſo print one of the ſaid weekly compoſitions, intitled, ‘ The *North Briton*, No. 26.’ And the defendants, with the aſſiſtance of the conſtable, did ſeize and take into their cuſtody the ſaid *Dryden Leach*, in order to bring him in ſafe cuſtody before the ſaid earl of *Halifax*, to be examined concerning the premiſſes; and on that occaſion did keep and detain him in their cuſtody for the ſpace of four days; at the end of which time, it appearing by the examinations of divers perſons then taken, touching the author, printer and publiſher of the ſaid paper, that the ſaid *Dryden Leach* was *not* the author, printer or publiſher thereof, the defendants, by the command of the ſaid earl of *Halifax*, *releaſed and diſcharged* him from that impriſonment: but the ſaid *Dryden Leach* was *never carried before or examined by the ſaid earl of* Halifax. And that the entering the houſe of the ſaid *Dryden Leach*, and ſearching the ſame, and taking into and detaining in their cuſtody him the ſaid *Dryden Leach* in the manner and on the occaſion herein before ſtated, were the *whole* of the treſpaſs, aſſault and impriſonment, committed by the ſaid defendants, or any of them.' But it was proved on the part of the ſaid *Dryden Leach*, 'that he was *not* the *author*, *printer*, or *publiſher* of the ſaid paper, intitled, 'The *North Briton*, No. 45.' in the ſaid warrant mentioned, nor of any *other* numbers of the ſaid weekly compoſitions, except as before ſtated.' Whereupon the counſel for the defendants inſiſted before the ſaid chief juſtice, that the ſaid ſeveral matters ſo produced and given in evidence on their part as aforeſaid, were *ſufficient*, and *ought to be admitted and allowed* as *deciſive evidence* to intitle them to the benefit of the ſtatute of 24 *Geo.* 2. intitled, 'An act for rendering juſtices of the peace more ſafe in the execution of their office, and for indemnifying conſtables and others acting in obedience to their warrants;' and that therefore the ſaid *Dryden Leach* ought to be barred of his aforeſaid action, and the ſaid defendants acquitted thereof. And thereupon the ſaid defendants, by their counſel aforeſaid, did then and there pray of the ſaid chief juſtice to admit and allow the ſaid matters and proof ſo produced and given in evidence for the ſaid defendants as aforeſaid, to be *concluſive evidence* to intitle the ſaid defendants to the benefit of the ſtatute aforeſaid, and to bar the ſaid *Dryden Leach* of his action aforeſaid. But to this, the counſel for the plaintiff then and there inſiſted before the chief juſtice, that the matters and evidence aforeſaid ſo produced and proved on the part of the defendants as aforeſaid, were *not* ſufficient, nor ought to be admitted or allowed to intitle the ſaid defendants to the benefit of the ſtatute aforeſaid, or to bar the ſaid *Dryden Leach* of his aforeſaid action; and that neither the ſaid defendants, or any of them, nor the ſaid earl of *Halifax*, were or was *within the words or meaning* of the ſtatute made in the *ſeventh* year of his late majeſty king *James* the firſt, intitled, 'An act for eaſe in pleading againſt troubleſome and contentious ſuits proſecuted againſt juſtices of the peace, mayors, conſtables, and certain other his majeſty's officers, for the lawful execution of their office;' nor of the ſtatute made in the *twenty-firſt* year of the reign of the *ſame late king*, intitled, 'An act to enlarge and make perpetual the act made for eaſe in pleading againſt troubleſome and contentious ſuits, proſecuted againſt juſtices of the peace, mayors, conſtables, and certain other his majeſty's officers, for the lawful execution of their office, made in the ſeventh year of his majeſty's moſt happy reign;' nor of the ſaid ſtatute made in the *twenty-fourth* year of the reign of his late majeſty king *George* the ſecond; nor in any wiſe intitled to the benefit of any of thoſe ſtatutes. And the counſel for the ſaid *Dryden Leach* further inſiſted, that the ſeizure and impriſonment of the ſaid *Dryden Leach* were not made and done *in obedience to the ſaid warrant*; nor had the ſaid defendants, or any of them, in that behalf, *any authority thereby*. And the ſaid *chief juſtice* did then and there declare and deliver his *opinion* to the jury aforeſaid, 'That the ſaid ſeveral matters ſo produced and proved on the part of the defendants were *not*, upon the whole caſe, ſufficient to bar the ſaid *Dryden Leach* of his aforeſaid action againſt them;' and, *with that opinion*, left the ſame to the ſaid jury. Whereupon the ſaid counſel for the ſaid defendants did then and there, on behalf of the ſaid defendants, *except* to the aforeſaid opinion of the ſaid chief juſtice; and inſiſted on the ſaid ſeveral matters and proofs as an *abſolute bar* to the aforeſaid action, by virtue of the laſt mentioned ſtatute. And inaſmuch as the ſaid ſeveral matters ſo produced and given in evidence on the part of the ſaid defendants, and by their counſel aforeſaid objected and inſiſted on as a bar to the action aforeſaid, *do not appear by the record* of the verdict aforeſaid, the ſaid counſel for the aforeſaid defendants did then and there *propoſe their aforeſaid exception* to the opinion of the ſaid chief juſtice, and *requeſted* the ſaid chief juſtice to *put his ſeal* to this bill of exception, containing the ſaid ſeveral matters ſo produced and given in evidence on the part of the ſaid defendants as aforeſaid, according to the form of the ſtatute in ſuch caſe made and provided: and thereupon the aforeſaid chief juſtice, at the requeſt of the ſaid counſel for the abovenamed defendants, *did put his ſeal* to this bill of exception, purſuant to the aforeſaid ſtatute in ſuch caſe made and provided, on the tenth day of *December* aforeſaid, in the ſaid fourth year of the reign of his ſaid preſent majeſty.

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And hereupon the ſaid *John Money*, *James Watſon*, and *Robert Blackmore* ſay, that in the record and proceedings aforeſaid, and alſo in the matters recited and contained in the ſaid bill of exceptions, and alſo in giving the verdict upon the ſaid iſſue between the parties aforeſaid firſt above joined, and alſo in giving the judgment aforeſaid, there is manifeſt error, in this, that the ſaid chief juſtice, before whom, &c. at and upon the trial of the ſaid iſſue between the parties aforeſaid firſt above joined, did declare and deliver his opinion to the jury aforeſaid, 'That the ſaid ſeveral matters mentioned in the ſaid bill of exceptions, and ſo as aforeſaid produced and proved on the part of the ſaid *John Money*, *James Watſon*, and *Robert Blackmore*, were *not*, upon the whole of the caſe, ſufficient to bar the ſaid *Dryden Leach* of his action aforeſaid againſt them;' and, *with that opinion*, left the ſame to the jury. There is alſo error in this, that by the record aforeſaid it appears, that the *verdict* aforeſaid was given upon the ſaid iſſue firſt above joined, *for* the ſaid *Dryden Leach*, *againſt* them the ſaid *John Money*, *James Watſon*, and *Robert Blackmore*: whereas, by the law of the land, the verdict on that iſſue *ought* to have been given *for* the ſaid *John Money*, *James Watſon*, and *Robert Blackmore*, *againſt* the ſaid *Dryden Leach*. There is alſo error in this, that it appears by the record aforeſaid, that *judgment* in form aforeſaid was given *for* the ſaid *Dryden Leach*, *againſt them* the ſaid *John Money*, *James Watſon*, and *Robert Blackmore*: whereas, by the law of the land, the *judgment* aforeſaid *ought* to have been given *for them* the ſaid *John Money*, *James Watſon*, and *Robert Blackmore*, againſt the ſaid *Dryden Leach*. And the ſaid *John Money*, *James Watſon*, and *Robert Blackmore*, pray that the judgment aforeſaid, for the errors aforeſaid, and others in the record and proceedings aforeſaid, may be reverſed, annulled, and altogether had for nothing; and that they may be reſtored to all which they have loſt by occaſion of the judgment aforeſaid, &c.

And hereupon, the ſaid *Dryden Leach*, in his proper perſon, voluntarily comes here into court, and prays leave to rejoin to the errors aforeſaid, before our lord the king, until on the morrow of the *Holy Trinity*, whereſoever, &c. and he hath it, &c. The ſame day is given to the ſaid *J. M. J. W.* and *R. B.* At which day come the parties aforeſaid in their proper perſons: and the ſaid *Dryden Leach* ſays, 'that there is *not*, either in the record and proceedings aforeſaid, or in the matters recited and contained in the ſaid bill of exceptions, or in giving the verdict aforeſaid, or in the judgment aforeſaid, any error;' and prays that the court here may proceed to the examination as well of the record and proceedings, as of the matters aforeſaid above aſſigned for error; and that the judgment aforeſaid may be affirmed in all things.

This caſe was firſt argued on *Tueſday* the 18th of *June* laſt, by Mr. Solicitor General *De Grey* for the plaintiffs in error; and by Mr. *Dunning* for the defendant in error.

Mr. *De Grey* divided his argument into three points.

1*ſt*, The defendants had a right to plead the general iſſue, and to give the ſpecial matter in evidence, under 7 *Jac.* 1. *c.* 5. Or, in other words, lord *Halifax*, the ſecretary of ſtate, *was a juſtice of peace*, within the intention of that act.

2*dly*, The evidence was ſufficient to intitle the defendants to a verdict. Which will take in both the validity of the *warrant* itſelf, *and the manner of executing it.*

3*dly*, They were alſo intitled to a verdict within the meaning of 24 *Geo.* 2. *c.* 44. the plaintiff *not having obſerved the terms required by it.*

Firſt point—*Before* the ſtatute of 7 *Jac. c.* 5. a matter of ſpecial juſtification could not be given in evidence by a juſtice of peace, upon the general iſſue pleaded by him.

The queſtion is—*Who* were *meant*, in that act of parliament, by *juſtices of the peace.*

Some perſons were, from ancient times, ſo, *by office*; ſome are ſo by ſpecial commiſſion; ſome, by corporation-charters; ſome, by tenure; ſome, by preſcription.

In the time of *Edward* the third, other perſons were authorized to act within particular diſtricts.

But the great officers of ſtate had the juriſdiction, as *incident* to their offices. So had, in *ſome* degree, coroners and other inferior officers.

The *ſecretaries of ſtate* muſt have had it as incident to an office, ſo anciently as to be coæval with the crown itſelf.

A ſtatute in *Edward* the firſt's reign ſays, * 'Deſouth le *Petit Seale*, ne iſſera deſormes nul briefe que touche lè common ley.' And lord *Coke*, in his comment upon it, in his 2 *Inſt.* 556. calls it the *Signettum*, the king's ſignet, which at the making of that ſtatute the king had; and ſays—'This ſeale is ever in the cuſtody of the principal ſecretary: and there be four clerks of the ſignet attending on him.'

This ſeal is as ancient as the crown; and the officer that keeps it, as ancient as the ſeal itſelf: and he is an officer well known, and recognized by many acts of parliament; and the king's warrants are counterſigned by him.

In caſes of *treaſon*, and of *felony*, the courts of law recognize his authority: and there is equal reaſon for it, in caſes of *miſdemeanour*; which equally affect government, and diſturb the public peace.

A *ſeditious libel* is an offence againſt government and the public peace; and effectually undermines government.

A ſecretary of ſtate is a centinel for the public peace: it is his duty to prevent the violation of it, and to bring the offenders to juſtice; and it is neceſſary that he ſhould be inveſted with this power, in order to enable him to execute this his duty.

The caſe of *Rex* v. *Kendal and Roe*, 1 *Salk.* 347†. has ſettled this point, as to treaſon: for it was there holden, 'that ſecretaries of ſtate might commit for ſuſpicion of treaſon, as conſervators of the peace did at common law; and that it was *incident* to the office, as it is to the office of juſtices of peace, who do it *ratione officij.*' And the commitment to a *meſſenger* was there holden good.

In the caſe of the *Queen* v. *Derby B. R.* 1709. 10 *Ann.* ‡ for publiſhing a ſcandalous and ſeditious libel called *The Obſervator*---the two points abovementioned were admitted by Mr. *Lechmere*, who was counſel for the defendant. He agreed, the power of a ſecretary of ſtate to commit for treaſon or felony; and that a meſſenger was a proper officer. And in that caſe, the court held the warrant good and legal.

In the caſe of *Rex* v. *Earbury*, *M.* 7 *G.* 2. 1733, who was arreſted and committed by warrant from a ſecretary of ſtate; and his papers ſeized, which he applied to have reſtored; lord *Hardwicke* held, that they could not be reſtored, in a ſummary way, on motion. The warrant there was, 'to ſearch for the papers, and to bring the author before the ſecretary of ſtate.'

The ſtatute of 1 *E.* 3. enacts, 'for the better keeping, and maintenance of the peace, good men and lawful ſhall in every county be aſſigned to keep the peace.' So, 4 *E.* 3. *c.* 2.

The 18 *E.* 3. *ſtat.* 2. *c.* 2. is the firſt ſtatute that gives the judicature of hearing and determining: 34 *E.* 3. *c.* 5. enlarges their powers. The 2 *H.* 5. *c.* 4. ‖ *calls* them by the expreſs name of '*Juſtices* of the peace.' Their commiſſion impowers them to keep the peace; and alſo contains a *diſtinct* clauſe 'to hear and determine.'

Therefore, the *old conſervators* of the peace *ſtill remain.* They have alſo power to hear and determine as juſtices. They are wardens of the peace too, by their commiſſion, as well as by common law: and they may likewiſe by the common law, without any ſpecial commiſſion or warrant, uſe force to ſuppreſs rebels. For which laſt aſſertion, he cited *Kelyng* 76.

* V. Artic. ſuper Chartas, 28 E. 1. c. 6.

† V. 5 Mod. 78. S. C. and State Trials, Vol. 4. p. 854. and Comberb. 343. Holt 144. Skinner 596. and 12. Mod. 82.

‡ Forteſcue's Rep. 140.

‖ V. Stat. 1. c. 4 § 2. and Stat. 2. c. 1.

The ſtatute of 7 *Jac.* 1. *c.* 5. (about pleading the general iſſue), means to protect *all* that act as conſervators, or wardens, or juſtices of the peace, as well as thoſe that act under ſpecial *commiſſions.*

The act of 2 *Ph.* and *M. c.* 18. (relating to corporation-juſtices) calls them '*Commiſſioners* for the conſervation of the peace.' *Juſtice* of peace is not a ſtrict technical name: they may be called *Cuſtodes pacis.* In 2 *Rol. Abr.* 95. Title, *Juſtices de Peace,* it is ſaid, 'That an indictment taken before them, naming them *Cuſtodes pacis,* and not *Juſtices* of the peace (as the ſtatute names them) is a good indictment: for it is all one.' It is not material *how* the appointment is made. The ſtatutes mean to include *all* conſervators of the peace: they may *all* now plead the general iſſue, and give the ſpecial matter in evidence. The act of 7 *Jac.* 1. *c.* 5. does not indeed extend to any juſtices ſitting *in ſeſſions:* it only extends to them in their *ſingle* juriſdiction.

The ſtatute of 11 *H.* 6. *c.* 6. 'that ſuits and proceſſes before juſtices of the peace ſhall not be diſcontinued by new commiſſioners,' is no exception to this rule: neither is 2 *H.* 5. *ſtat.* 1. *c.* 4. § 2. 'that juſtices of the peace of the quorum ſhall be reſiant in their ſhire; (except lords named in the commiſſion, *&c. &c.*')

Acts of parliament ſhall be taken with *latitude,* and *extended* to caſes within the *ſame reaſon,* and calling for the *ſame remedy. Plowd.* 366. lord *Zouch*'s caſe. *Co. Litt.* 24. *b.* 10 *Co.* 101. *b. Beaufage*'s caſe. *Plowd.* 147. *Iſton* v. *Studd. Plowd.* 36. *Platt* v. *The ſheriffs of London. Bro. Parliament* 20. *Wentworth's office of executors* 67. Sir *T. Jones* 62. *Plummer* v. *Whitchcot.*

The rule about 'ſeveral particulars of an inferior nature being enumerated, excluding thoſe that are of a higher nature and not enumerated,' will not hold here. This act is not done *as* a *higher* officer; but only *as a juſtice of peace.* The biſhop of *Norwich* being named, extended to *all* biſhops: ſo the warden of the *Fleet* being named, extends to all gaolers. In *Moore* 845. *Phelps* v. *Winchcombe,* it was reſolved, 'that a deputy conſtable may, by the equity of the ſtatute of 7 *J.* 1. *c.* 5. plead the general iſſue.'

Perſons acting for preſervation of the public peace ought to be protected: and theſe old conſervators of it are more reaſonably intitled to protection, than other perſons are.

Second point---If the ſpecial matter may be given in evidence, then the queſtion will be, 'Whether this matter given in evidence would, if it had been pleaded, *amount* to a *juſtification.*'

It is objected, 'that the warrant is *not legal*; and that it was *ill executed.*'

1*ſt,* As to the *warrant* itſelf---No ſuch action has ever been brought upon theſe warrants, by perſons apprehended by virtue of them: or, at leaſt, there is none upon record.

It is ſaid, 'that this warrant is *too extenſive* in the deſcription of the perſon: and that it has been *abuſed.*'

Anſwer---The *power* is *not illegal:* and the *abuſe* of it is no objection to the warrant itſelf. Such warrants are agreeable to *long practice and uſage.*

Whatever the preſent determination may be, in point of law, it will be in the breaſt of the *legiſlature* to ſet it right.

In the *Bewdley* caſe, reported 1 *Peere Williams* 207. (*Regina* v. *Ballivos, &c. of Bewdley*) a conſtruction of an act of parliament contrary to the words of it was allowed, founded upon only ſeven years practice. In *Comberb.* 342. *The India Company* v. *Skinner*---where the warrant was granted before any default; *Holt* ſaid, 'that the *practice* having been, in caſe of taxes, to grant a conditional warrant to diſtrain, *Communis error facit jus.*'

The power of juſtices of peace 'to commit before indictment,' ſtands ſupported only by *practice and uſage.* In 6 *Mod.* 178. *Regina* v. *Tracy, Holt* Ch. J. ſays, 'Formerly, none could be taken up for a miſdemeanor, till indictment found: but now the practice all over *England* is otherwiſe.' And *per Hale,* 'That practice is become a law.' So likewiſe has uſage and practice eſtabliſhed *Aceciams, Quo minus,* new trials, *&c.*

The greateſt judges have bailed perſons taken up upon theſe warrants; and they have not been objected to, by either courts, or counſel of the greateſt eminence: whereas, if they were not legal, the perſons apprehended upon them ought to have been diſcharged. For which he cited, 1 *Hale's Hiſt. P. C.* 578. The court will not make orders upon illegal warrants: conſequently, they ſaw no objection to them. Even the greateſt friends to the Revolution have not objected to theſe warrants. From whence it muſt be inferred, that no objection lies againſt them.

On 6 *July,* 1641, in the caſe of Sir *John Elliott, &c.* the houſe of commons reſolved, that it was a breach of *privilege:* but they did not vote it *illegal.*

Lord *Hardwicke,* in *Earbury*'s caſe, only ſaid, 'He would not then determine it.'

In *treaſon,* it will ſcarce be objected to; nor in *felony.*

In Miſs *Blandy*'s caſe, her bureau was broken open: and her papers ſeized; and given in evidence.

Indecent prints or books may be ſeized by a magiſtrate: and they often have been ſo.

Evidence taken from felons or other criminals may be produced againſt them; though a criminal ſhall not be *compelled* to produce ſuch evidence *againſt himſelf.*

It is ſaid, 'that this warrant is illegal, becauſe it is *general,* to take up the author, printer, or publiſher.' But it is legal to iſſue and execute a warrant againſt a perſon unknown, but *only deſcribed.* Indeed the magiſtrate iſſues it, and the officer muſt execute it, at their *peril.* And though the warrant includes ſeizing the *papers,* yet *that* part of it has *not been executed:* and the bare inſertion of it ſhall not affect the *officer* who executed the other part of the warrant.

The facts are theſe---A warrant was directed to four meſſengers: *Carrington,* one of them, is informed, 'that *Leach* was the printer: and that the reputed author was frequently at *Leach*'s houſe.' The other three act on this information. And this information was not groundleſs: for they found a ſheet of another number, wet and juſt printed. They take him up, and carry him to lord *Halifax*'s office; who was not then at leiſure to examine him: but when he did examine him (four days after), he diſcharged him. Here *was probable cauſe* for taking him up.

A juſtice of peace having juriſdiction, may grant a proper warrant on probable cauſe: and miniſterial officers (conſtables, *&c.*) are not to be affected by the illegality of the warrant, in other parts of it. This warrant was executed honeſtly, and upon a probable cauſe.

Third point---The plaintiff's action is ſufficiently barred by 24 *G.* 2. *c.* 44. for want of obſerving the terms required by it. They neither proved *notice,* as the third ſection requires; nor made the *demand* required by the ſixth ſection.

The defendants have acted in obedience to the warrant of a magiſtrate who is a juſtice of peace within the meaning of this act; and by his order, and in his aid.

The only doubt is, 'Whether the action is brought for any thing done in *obedience* to the warrant; or not.'

The defendants have obeyed it, to the beſt of their power.

However, as they have acted *under colour* of the warrant, meaning to obey it, they are not anſwerable, although they may have erred in the execution of it. They are protected by this act, if they have acted *bona fide*; even though the warrant and the execution be illegal. They are not to judge of arduous points of law: the ſtatute means to protect them from it.

2*dly,* The previous ſtep to bringing this action was not taken; *viz.* the demanding a peruſal and copy of the warrant, and ſhewing a refuſal of it.

If there was a fault, or negligence, or miſtake in this proceeding, the fault was in the magiſtrate: there was none *in the officer* who executed it. And the requiſite ſteps have not been taken, in order to maintain the ſuit.

Therefore the plaintiff is barred of this action.

Mr. *Dunning, contra*---for Mr. *Leach,* the plaintiff below.

The firſt queſtion is, 'Whether this be a caſe within 24 *G.* 2. *c.* 44.' Which queſtion will involve the queſtion, 'Whether it be within the acts of 7 *J.* 1. *c.* 5. or 21 *J.* 1. *c.* 12.'

All theſe ſtatutes, being in *pari materia,* muſt receive the *ſame* conſtruction: and they are all unapplicable to the preſent caſe.

He then made three ſub-diviſions of his firſt queſtion: *viz.*

1*ſt,* Whether lord *Halifax,* being ſecretary of ſtate, is a conſervator or juſtice of peace, within the true intent and meaning of the act of 24 *G.* 2. *c.* 44.

2*dly,* Whether the defendants are conſtables, headboroughs, or officers, *&c.* within the intent and meaning of that act.

3*dly,* Whether this action is brought and properly purſued, within the true intent and meaning of it; and for a matter done *in obedience* to the warrant.

First point---Lord *Halifax* is *not* a *juſtice of peace* within 24 *G.* 2. He is not ſo by *commiſſion:* he is not ſo, as *incident to his offices,* either of ſecretary of ſtate, or of privy counſellor.

1ſt.

But it has been ſaid, 'He is a *conſervator* of the peace; and therefore within the meaning of the act.'

I deny the principle, and alſo the concluſion. I admit the caſe of *Rex* v. *Kendal and Roe*; though the reaſons of it do not appear: but I ſubmit to the authority of it, 'That a ſecretary of ſtate has a power to commit for high treaſon.'

Serjeant *Hawkins*'s reaſons do not ſupport his aſſertion: and I deny that a ſecretary of ſtate is a *conſervator of the peace.* He has only a power of committing for *high treaſon,* as conſervators of the peace had in *other* caſes: and *Kendal* and *Roe*'s caſe carries it no farther. The court never meant to reſolve any thing further.

All the crown-writers are ſilent on this ſubject of a ſecretary of ſtate's having *this* juriſdiction. None of them even hint that a ſecretary of ſtate is a *conſervator of the peace. Staundford, Fitz-Herbert, Lambard, &c.* ſay no ſuch thing.

* *Lambard* gives the *liſt* of thoſe officers who are conſervators of the peace: but there is no mention therein, of ſecretaries of ſtate. Serjeant † *Hawkins* copies the ſame liſt, *without adding* ſecretaries of ſtate.

* V. Lib. 1. c. 3.

† Lib. 2. c. 8. § 2.

There is no proof or pretence that the conſervatorſhip of the peace is *incident to their office:* nor is there any *uſage,* to ſupport ſuch a notion. Their claim of a power to grant ſuch warrants as the preſent one, is not pretended to be older than the *Revolution.*

If they were juſtices of the peace, or conſervators of the peace, they would be *bound* to execute the powers given to juſtices, or reſiding in conſtables; and they would be ſubject to the control of this court.

The offices are different in creation, conſtitution, and execution.

The very language of the warrant ſhews that the ſecretary of ſtate did *not* conſider himſelf as a juſtice, conſervator, or conſtable.

This ſtatute is *not to be extended* beyond the letter of it: it is not within the maxims or reaſons of extenſion of acts of parliament.

It is neceſſary to conſider the former ſtatutes of 7 *J.* 1. *c.* 5. and 21 *J.* 1. *c.* 12. (Both of which he rehearſed and obſerved upon).

In theſe, there is no mention of ſecretaries of ſtate: nor is there any reaſon to add others not there enumerated; the rather, as the enumeration begins with perſons inferior to ſecretaries of ſtate. Neither is there any ground to imagine that the legiſlature *intended* to include ſecretaries of ſtate within their proviſion. The preamble ſhews rather the contrary. The line drawn between thoſe enumerated and thoſe omitted, ſhews the ſame thing. The perſons intended to be protected, are perſons *bound* to act, and acting for the public good, *without reward*; not great officers with great ſalaries, who are not lawyers and are not bound to act.

The perſons introduced by the ſecond act (church-wardens, ſwornmen, overſeers, *&c.*) are perſons within the miſchief of the former: yet even *they* were *not virtually* included in the former, and are therefore particularly named in the latter.

This latter explanatory act omits, nevertheleſs, to name ſecretaries of ſtate. But conſtables are within the letter: and it extends to *no* others. And he referred to 4 *Inſt.* 175, and the two marginal notes there; one on 7 *J. c.* 5. and the other, on 21 *J. c.* 12.

From all which premiſſes he argued, that theſe acts of *Jac.* 1. are *not* to be extended beyond the letter: and *if* they were, yet there is no reaſon to extend them to ſecretaries of ſtate, as *not being* within the ſame inconvenience.

No more reaſon is there to extend that of 24 *G.* 2. *c.* 44. *If* the legiſlature had ſo intended, they would *not have confined* it to *juſtices of the peace*, a ſpecies of magiſtrates well known and underſtood in our law.

So much for the noble *lord.*

2dly. As to the *meſſengers---They* do not fall within the words or meaning of the act of 7 *J.* 1. *c.* 5. which is confined to *officers*, who are perſons known in our law, and *bound* to execute the warrant of a juſtice of peace; an office of burthen, not of profit; and incapable to diſtinguiſh the preciſe limits of a juriſdiction.

There is no reſpect in the caſe of *the king's meſſengers* in ordinary; who are perſons *unknown* in our law, and *mere volunteers* in executing warrants of juſtices.

The words, '*other officers, &c.*' mean borſholders, *&c.* officers of the *ſame* ſort as conſtables and tithingmen; *not* king's meſſengers. *Theſe* perſons cannot be conſidered as aiding and aſſiſting the conſtables. The warrant and the fact are quite the reverſe: the conſtables are directed to aſſiſt *them.* They do not act under the command of a juſtice of peace, or in his aſſiſtance.

This warrant is not under the hand and ſeal of a juſtice of peace. Therefore the act does *not* protect the defendants.

3dly. Nor is the act done *in obedience to this warrant.* The warrant was 'to apprehend the author, printer, or publiſher:' but they have executed it upon a perſon who was *not* the author, printer, or publiſher. Conſequently, as they have not acted *under* it, they can't be protected *by* it.

It is ſaid, 'that a *deſcription* is *equivalent to naming* the perſons; and 'that here is a ſufficient deſcription.'

But the deſcription of an *offence* is no deſcription of the *perſon offending:* and this is only a deſcription of the *offence.*

The *obedience to the warrant* is the *condition* of the protection which the act gives to the officer. Therefore, the condition failing, the protection does not take place.

Here is *no probable cauſe*, nor any reaſon for juſtifying the officer *under a probable cauſe.* It is not like the caſes of apprehending *traitors* or *felons.* Here is only information from one of their own body, 'that the author 'of the paper had been ſeen going into *Leach*'s houſe; and that *Leach* 'was the printer of the compoſition *in general*;' not of this particular paper.

But though neither this hearſay-information was in itſelf *true*; nor would the conſequence follow, if it had been true; yet they thereupon arreſt and impriſon an *innocent* man. Therefore *theſe* men themſelves are to anſwer for doing this: *not* the perſon who *iſſued* the warrant. The warrant did not command nor authorize them to do what they have done. It is neceſſary for them to ſhew an acting *in obedience to the warrant*; otherwiſe they are *not* within the protection of the act. In proof of which, he cited two caſes; one by the name of * *Lawſon* v. *Clark*; and the other a *Norwich* caſe, where a bailiff had executed the warrant out of the proper juriſdiction.

* Or *Dawſon.* qu.

Upon theſe authorities, upon the reaſon of the thing, and upon the words of the act, the officer is *not* intitled to the protection of the act; nor needs the juſtice be made a party, but where the officer acts *in obedience* to the warrant: acting *under colour* of it only, is not ſufficient.

Beſides, the party apprehended was *not carried before* lord *Halifax*, or *dealt with* according to law. Surely, *this* was the act of the *officer*; not of the perſon who ſigned the warrant. And *no reaſon* is given, ſtated, pretended, or even exiſted, *why* this matter was ſo tranſacted. Therefore there was *no* probable cauſe or reaſon whereupon to ground a juſtification of this their conduct.

So that, even *allowing* the ſecretary of ſtate to be a juſtice of peace, and the officers to be conſtables; *yet* the action lies againſt the plaintiffs in error, who have acted in this unjuſtifiable manner.

It appears therefore, that even *if* they had a defence upon the *merits*, they *have not properly pleaded it.* However, in fact they had *no* defence upon the *merits:* the plaintiff *Leach* was neither author, printer, nor publiſher of the paper; nor at all within the deſcription of the warrant.

But the warrant itſelf is *illegal.* It is againſt the author, printer, and publiſher of the paper, *generally,* without naming or deſcribing them; and not founded on any charge upon oath: it is alſo, 'to ſeize his papers;' that is, *all* his papers.

No *juſtice of peace* has power to iſſue *ſuch* a warrant. Therefore lord *Halifax* could not do it as a *juſtice of peace.* Nor is there any pretence of *uſage* to ſupport ſuch a claim of doing it *as ſecretary of ſtate*, further back than the *Revolution.*

It lies upon *them*, to *prove* their claim, and to *ſhew* their authority.

The practice of a *particular magiſtrate* cannot control the law. *Communis error* is not, in *this* caſe, ſufficient to make law. It is the duty, and it is therefore, doubtleſs, the *inclination* of the court, to ſtop the miſchief, as ſoon as it is complained of to them.

If '*author*, *printer*, and *publiſher*,' without naming any particular perſon, be ſufficient in ſuch a warrant as this is; it would be equally ſo, to iſſue a warrant generally, 'to take up *the robber* or murderer of ſuch a one.' This is no deſcription of the *perſon*; but only of the *offence:* it is making the *officer* to be judge of the matter, in the place of the perſon who *iſſues* the warrant. Such a power would be extremely miſchievous, and might be productive of great oppreſſion.

To ranſack private ſtudies in order to *ſearch* for evidence, and even *without* a previous charge on oath, is contrary to *natural juſtice*, as well as to the liberty of the ſubject: and it is as *uſeleſs* as it is cruel, in the caſe of *libels*; becauſe it is the *publication* only that makes the *crime* of a libel.

To ſearch a man's private papers *ad libitum*, and even *without accuſation*, is an infringement of the natural rights of mankind. And *this* is a warrant, to 'ſeize *all a man's papers*,' without any particular relation even to the crime they would *ſuppoſe* him chargeable with.

No caſe of this ſort has ever undergone *judicial* diſcuſſion and determination. And as the court does not interpoſe in caſes not objected to, no arguments can be drawn from ſuch as paſſed *ſub ſilentio*, or were never *objected to.*

All the writers upon the crown-law ſay, 'that there muſt be an *accu*'*ſation*; that the perſon to be apprehended muſt be *named*; and that the 'officer is *not* to be left to arreſt whom *he thinks fit.*' For which, he vouched *Hale's Hiſt. P. C.* 1ſt part, *p.* 580 and 586. and *Hawkins's P. C.* Book 2. c. 13. § 10. p. 81 and 82.

Here, it is left to the *officer*, to take up *any* perſon whom *he himſelf* ſuſpects.

Lord chief juſtice *Scroggs* was *impeached* for iſſuing ſuch warrants as this is.

Therefore he prayed judgment for the defendant in error.

Mr. Solicitor General *De Grey*, in reply, on behalf of the plaintiffs in error.

A ſecretary of ſtate is an *officer by preſcription*; and his office muſt be *as ancient* as the office of the perſon *to whom* he is ſecretary: for he is and always has been an officer *neceſſary* to the crown; and the conſtitution always required the ſupport of this office. And as this power to commit for *treaſon* depends upon *preſcriptive right and the nature of his office*; ſo likewiſe it does, in *all* caſes of preſerving the *public peace.*

In the caſe of *Kendal* and *Roe*, the power, in *treaſon*, was acknowledged. In *Darby*'s caſe, it was recognized, in *felony* In *Earbury*'s caſe, (where the warrant was general, as this is,) he was *continued* on his recognizance. A ſecretary of ſtate has theſe powers, upon the foundation of *preſcription*; not on our law-books: and he has, equally, the *power* in him; whether he does or does not *exert* it in *low* and *common* inſtances. I ſuppoſe he is *as compellable* to act, as a *conſervator* of the peace formerly was, *before* the acts of parliament which give power to *juſtices* of peace.

Charter-juſtices can ſcarce be called *commiſſion*-juſtices: and yet theſe ſtatutes extend to them.

A 'juſtice of the peace' means a *conſervator*, a *warden* of the peace. Therefore there was no need to name *ſecretaries of ſtate*, in the acts of parliament: they were included, *without* naming them particularly.

The marginal note in lord *Coke* is no authority. However, theſe officers *are* named in the text, 'and certain others his majeſty's officers.'

This action is brought for what was done in obedience to the warrant; which the officer was *obliged* to execute, in the beſt manner he could.

If there is any fault, it is in the *magiſtrate:* he ſhould have deſcribed the offender with greater certainty. If the executing officer acts to the *beſt of his ability*; he is juſtified, and acts *in obedience* to his warrant.

Here the officers *did ſo:* they were reaſonably ſatisfied, 'that *Leach was* the printer.' And on ſearch, this *probable* cauſe was *encreaſed* to a higher degree: for, they found another freſh ſheet of the *ſame* work, juſt printed off, and wet. They *detained* him *on occaſion* of his being to be carried before lord *Halifax*, to be examined. The officers have nothing to do with his examination: that was the affair of lord *Halifax*; and if he diſcharged the perſons apprehended and brought before him, *without* examination, it was the better for them.

In *Vaughan* 111. *Stiles* v. *Sir Richard Coxe and others*,—it was determined, that the defendants ſhould have the benefit of the act; becauſe they acted by *colour* of the warrant.

As to the warrant itſelf—it is objected, 'that there is *no charge* upon 'oath.' But there was no occaſion, he ſaid, for it: and to that purpoſe, he cited the *Queen* v. *Darby* [v. *Forteſcue* 141.] *Rex* v. *Earbury*, *Mich.* 7 *G.* 2. and 1 *Hale H. P. C.* 582. where it is laid down, that ''tis convenient, though *not always neceſſary*, to take an information upon 'oath of the perſon that deſires the warrant.'

It is objected, 'that this warrant is *not authorized by any length of uſage.*'

But the uſage, as here ſtated, *is ſufficient:* and it muſt be taken to be coeval with the office. The bill of exceptions indeed only takes it up from the *Revolution*; aſſerting that it has been ſo ever ſince *that* time: but the *facts* go up to the Reſtoration; and none of a *different* form were produced, prior to the Revolution.

As to *ſeizing papers*—it is difficult indeed to draw the exact line. But it is certainly neceſſary, in *ſome* degree: and no inſtance is produced, of ſuch warrants having ever been *abuſed* as inſtruments of oppreſſion.

He concluded, upon the whole, that the plaintiff had no right to bring his action.

Lord *Mansfield*—I ſuppoſe, this is intended to be argued again. However, I will ſay ſomething, at preſent, upon it.

A bill of exceptions ſuppoſes the evidence *true*; and queſtions the *competency* or *propriety* of it.

'Whether there was *a probable cauſe* or ground of ſuſpicion,' was a matter for the *jury* to determine: *that* is not *now* before the court. So— 'Whether the defendants detained the plaintiff an *unreaſonable* time.'

But if it had been found to have been a reaſonable time; yet it would be no juſtification to the defendants; becauſe it is ſtated, 'that *this* man 'was neither author, printer, or publiſher:' and *if* he was *not*, then they have taken up a man who was *not* the ſubject of the warrant.

The

Queſtion. The three material queſtions are—1ſt. ‘ Whether a *ſecretary* ‘ *of ſtate* acting as a conſervator of the peace by the *common* ‘ law, is to be conſtrued *within the ſtatutes of James* the firſt, and of the ‘ late king.’

The protection of the officers, *if* they have acted in obedience to the warrant, is *conſequential*, in caſe a ſecretary of ſtate *is* within theſe ſtatutes.

2d Queſtion. As to the arreſt being made *in obedience* to the warrant, or only under *colour* of it and without authority from it—*this* queſtion depends upon the *conſtruction* of the warrant; whether it muſt not be conſtrued to mean ‘ *ſuch* perſons as are under a *violent ſuſpicion* of ‘ being guilty of the charge;’ (for they cannot be *concluſively* conſidered as guilty, till *after trial and conviction.)* The warrant itſelf imports only *ſuſpicion*; for, it ſays,—‘ to be brought before me, and examined, and ‘ dealt with according to law:’ and this ſuſpicion muſt eventually depend upon *future* trial. Therefore the warrant does not ſeem to me, to mean *concluſive* guilt; but *only* violent *ſuſpicion.* If the perſon apprehended ſhould be tried and *acquitted*, it would ſhew ‘ that he was not guilty;’ yet there might be ſufficient cauſe of ſuſpicion.

Mr. *Dunning* ſays, very rightly, that ‘ to bring a perſon within 24 *G.* 2. ‘ the act muſt be done in *obedience* to the warrant.’

3d. Queſtion. The laſt point is, ‘ whether this *general* warrant be ‘ *good.*’—

One part of it may be laid out of the caſe: for, as to what relates to the *ſeizing his papers*, *that* part of it was *never executed*; and therefore it is out of the caſe.

It is not material to determine, ‘ whether the warrant be good or bad;’ except in the event of the caſe being *within* 7 *J.* 1. but *not within* 24. *G.* 2.

At preſent—as to the validity of the warrant, upon the ſingle objection of the *incertainty of the perſon*, being *neither named* nor *deſcribed*—the *common* law, in many caſes, gives authority to arreſt *without* warrant; more eſpecially, where taken in the very act: and there are many caſes where particular *acts of parliament* have given authority to apprehend, under general warrants; as in the caſe of writs of aſſiſtance, or warrants to take up looſe, idle, and diſorderly people. But here, it is not contended, that the *common law* gave the officer authority to apprehend; nor that there is any *act of parliament* which warrants *this* caſe.

Therefore it muſt ſtand upon *principles* of *common* law.

It is not fit, that the receiving or judging of the information ſhould be left to the diſcretion of the *officer.* The *magiſtrate* ought to judge; and ſhould *give certain directions* to the officer. This is ſo, upon reaſon and convenience.

Then as to *authorities---Hale* and all others hold ſuch an uncertain warrant *void:* and there is *no* caſe or book to the contrary.

It is ſaid, ‘ that the uſage has been ſo; and that many ſuch *have been* ‘ iſſued, ſince the Revolution, down to this time.’

But a *uſage*, to grow into law, ought to be a *general* uſage, *communiter uſitata et approbata*; and which, after a long continuance, it would be miſchievous to overturn.

This is only the uſage of a *particular office*, and *contrary* to the uſage of all *other* juſtices and conſervators of the peace.

There is the *leſs* reaſon for regarding this uſage; becauſe the form of the warrant probably took its riſe from a poſitive ſtatute; and the former precedents were inadvertently followed, after that law was expired.

Mr. Juſtice *Wilmot* declared, that he had no doubt, nor ever had, upon theſe warrants: he thought them *illegal* and *void.*

Neither had the two other judges, Mr. Juſtice *Yates*, and Mr. Juſtice *Aſton*, any doubt (upon this firſt argument) of the *illegality* of them: for *no degree of antiquity* can give ſanction to a uſage *bad in itſelf.* And they eſteemed this uſage to be ſo. They were clear and unanimous in opinion, that this warrant was *illegal* and *bad.*

Lord *Mansfield*---Let it ſtand over for further argument.

The caſe ſtanding in the paper, on *Friday* the 8th of *November*, 1765, for farther argument---

Mr. *Yorke*, attorney-general, was now to have argued on behalf of the plaintiffs in error; and begun to enter into his argument: but when he came to mention the two caſes cited by Mr. *Dunning*, both of which were determined before lord *Mansfield*, upon 24 *G.* 2. *c.* 44 one of them at *Norwich*, ſummer aſſizes, 1761; (where damages were given); the other * of them, on a warrant under the vagrant act of 17 *G.* 2. (where his lordſhip held, ‘ that the defendant ought ‘ to ſhew that the officer had acted *in obedience* to the warrant;’ and he did ſo;) he ſeemed to intimate that this objection ‘ of their not having done ſo, in the preſent caſe,’ was too great a difficulty for him to encounter; and therefore reſted the matter where it was, without proceeding any further in his argument.

† Dawſon or Lawſon, v. Clarke. V. ante.

Lord *Mansfield* remembered both theſe caſes; and ſaid, He ſtill continued of the ſame opinion.

Where the juſtice cannot be liable, the officer is not within the protection of the act. The caſe in *Middleſex* concludes exactly to the preſent caſe. For, here the warrant is to take up the *author*, *printer*, or *publiſher*; but they took up a perſon who was neither *author*, *printer*, nor *publiſher*: ſo, *that* caſe was a warrant ‘ to take up a *diſorderly* woman;’ and the defendant took up a woman who was not ſo.

And he held the ſame opinion now, he ſaid, as he did before, in the caſe at *Norwich.*

This makes an end of the caſe: for, this is a *previous* queſtion; and the *foundation* of the defence fails.

The conſequence is, that the judgment muſt be affirmed.

The other judges aſſenting, the rule of the court was, ‘ that the judg‘ment be affirmed.’

JUDGMENT AFFIRMED.

[*Thus this caſe went off, without any judicial deciſion on any of the chief points which were raiſed in it. The only point profeſſed to be regularly adjudged was, that the warrant in queſtion had not been purſued. Whether a ſecretary of ſtate is a conſervator of the peace* ex officio, *and as ſuch within the equity of the ſtatutes in favour of juſtices of the peace; whether he has power to commit for any offence under high treaſon; whether a* ſingle *privy counſellor has a right to commit in any caſe; whether a warrant for the ſeizure of papers could not be juſtified in the caſe of a ſeditious libel; and whether a general warrant, neither naming the offender, nor otherwiſe deſcribing him, except by relation to the offence committed, could be maintained at common law; all theſe important queſtions were left unadjudged. However, enough was ſaid by the court on the laſt of them to evince, that all the four judges thought general warrants to ſeize the perſon univerſally illegal, except where the granting of them was ſpecially authorized by act of parliament; and from the attorney-general's readineſs in yielding another point to avoid a deciſion of that concerning the legality of general warrants, it may be conjectured, that he deſpaired of being able to ſupport them. How ſuch warrants and the ſeizure of papers in the caſe of ſeditious libels were both finally condemned by a declaratory reſolution of the houſe of commons, will be explained in a note at the end of the caſe on the* ſeizure *of* papers, *which is the next in this collection.*]

No. IV. *The Caſe of* Seizure *of* Papers, *being an Action of Treſpaſs by* John Entick, *Clerk, againſt* Nathan Carrington *and three others Meſſengers in ordinary to the King, Court of* Common-Pleas, Michaelmas Term, 6 Geo. III. 1765.

[This caſe is given with the above-mentioned title; becauſe the chief point adjudged was, that a warrant to ſearch for and ſeize the papers of the accuſed, in the caſe of a ſeditious libel, is contrary to law. But this was not the only queſtion in the caſe. All the other intereſting ſubjects, which were diſcuſſed in the immediately preceding caſe, except the queſtion of general warrants, were alſo argued in the following one; and moſt of them ſeem to have received a judicial opinion from the court.

The ſtate of the caſe, with the arguments of the counſel, is taken from Mr. Serjeant Wilſon's Reports, 2 Wilſ. 275. *But inſtead of his ſhort note of the judgment of the court, the editor has the pleaſing ſatisfaction to preſent to the reader the judgment itſelf at length, as delivered by the lord chief juſtice of the Common-Pleas from written notes. It was not without ſome difficulty, that the copy of this judgment was obtained by the editor. He has reaſon to believe, that the original, moſt excellent and moſt valuable as its contents are, was not deemed worthy of preſervation by its author, but was actually committed to the flames. Fortunately, the editor remembered to have formerly ſeen a copy of the judgment in the hands of a friend; aud upon application to him, it was immediately obtained, with liberty to the editor to make uſe of it at his diſcretion. Before, however, he preſumed to conſult his own wiſhes in the uſe, the editor took care to convince himſelf, both that the copy was authentick, and that the introduction of it into this collection would not give offence. Indeed, as to the authenticity of the judgment, except in ſome trifling inaccuracies, the probable effect of careleſs tranſcribing, a firſt reading left the editor's mind without a doubt on the ſubject. But it was a reſpectful delicacy due to the noble lord, by whom the judgment was delivered, not to publiſh it, without firſt endeavouring to know, whether ſuch a ſtep was likely to be diſpleaſing to his lordſhip; and though from the want of any authority from him, the editor expoſes himſelf to ſome riſque of diſapprobation, yet his precautions to guard againſt it, with the diſintereſtedneſs of his motives, will, he is confident, if ever it ſhould become neceſſary to explain the circumſtances to his lordſhip, be received as a very adequate apology for the liberty thus hazarded.]*

Treſpaſs for breaking and entring plaintiff's houſe, &c.

IN treſpaſs; the plaintiff declares that the defendants on the 11th day of *November* in the year of our lord 1762, at *Weſtminſter* in *Middleſex*, with force and arms broke and entred the dwelling-houſe of the plaintiff in the pariſh of *St. Dunſtan Stepney*, and continued there four hours without his conſent and againſt his will, and all that time diſturbed him in the peaceable poſſeſſion thereof, and broke open the doors to the rooms, the locks, iron bars, *&c.* thereto affixed, and broke open the boxes, cheſts, drawers, *&c.* of the plaintiff in his houſe, and broke the locks thereto affixed, and ſearched and examined all the rooms, *&c.* in his dwelling-houſe, and all the boxes, *&c.* ſo broke open, and read over, pried into and examined all the private papers, books, *&c.* of the plaintiff there found, whereby the ſecret affairs, *&c.* of the plaintiff became wrongfully diſcovered and made public; and took and carried away 100 printed charts, 100 printed pamphlets, *&c. &c.* of the plaintiff there found, and other 100 charts, *&c. &c.* took and carried away, to the damage of the plaintiff 2000*l.*

Special juſtification under a warrant of the ſecretary of ſtate.

The defendants plead 1ſt, not guilty to the whole declaration, whereupon iſſue is joined. 2dly, as to the breaking and entring the dwelling-houſe, and continuing four hours, and all that time diſturbing him in the poſſeſſion thereof, and breaking open the doors to the rooms, and breaking open the boxes, cheſts, drawers, *&c.* of the plaintiff in his houſe, and the ſearching and examining all the rooms, *&c.* in his dwelling-houſe, and all the boxes, *&c.* ſo broke open, and reading over, prying into, and examining the private papers, books, *&c.* of the plaintiff there found, and taking and carrying away the goods and chattels in the declaration firſt mentioned there found, and alſo as to taking and carrying away the goods and chattels in the declaration laſt mentioned, the defendants ſay, the plaintiff ought not to have his action againſt them, becauſe they ſay, that before the ſuppoſed treſpaſs, on the 6th of *November* 1762, and before, until, and all the time of the ſuppoſed treſpaſs, the earl of *Halifax* was, and yet is one of the lords of the king's privy council, and one of his principal ſecretaries of ſtate, and that the earl before the treſpaſs on the 6th of *November* 1762, made his warrant under his hand and ſeal directed to the defendants, by which the earl did in the king's name authorize and require the defendants, *taking a conſtable to their aſſiſtance*, to make ſtrict and diligent ſearch for the plaintiff, mentioned in the ſaid warrant to be the author, or one concerned in the writing of ſeveral weekly very ſeditious papers, intitled, "*The Monitor* or *Britiſh Freeholder, number* 357, 358, 360, 373, 376, 378 and 380, *London*, printed for *J. Wilſon* and *J. Fell* in *Pater Noſter Row*," containing groſs and ſcandalous reflections and invectives upon his majeſty's government, and upon both houſes of parliament, and him the plaintiff having found, to ſeize and apprehend and bring together with his books and papers in ſafe cuſtody before the earl of *Halifax* to be examined concerning the premiſſes, and further dealt with according to law; in the due execution whereof all mayors, ſheriffs, juſtices of the peace, conſtables, and all other his majeſty's officers civil and military, and loving ſubjects, whom it might concern, were to be aiding and aſſiſting to them the defendants, as there ſhould be occaſion. And the defendants further ſay, that afterwards and before the treſpaſs on the ſame day and year, the warrant was delivered to them to be executed, and thereupon they on the ſame day and year in the declaration, in the day time about 11 o'clock, being the ſaid time when, *&c.* by virtue and for the execution of the ſaid warrant entred the plaintiff's dwelling-houſe, the outer door thereof being then open, to ſearch for and ſeize the plaintiff and his books and papers in order to bring him and them before the earl of *Halifax*, according to the warrant; and the defendants did then and there find the plaintiff, and ſeiſed and apprehended him, and did ſearch for his books and papers in his houſe, and did neceſſarily ſearch and examine the rooms therein, and alſo his boxes, cheſts, *&c.* there, in order to find and ſeize his books and papers, and to bring them along with the plaintiff before the ſaid earl, according to the warrant; and upon the ſaid ſearch did then in the ſaid houſe find and ſeize the goods and chattels of the plaintiff in the declaration, and on the ſame day did carry the ſaid books and papers to a houſe at *Weſtminſter*, where the ſaid earl then and long before tranſacted the buſineſs of his office, and delivered the ſame to *Lovel Stanhope*, eſq; who then was and yet is an aſſiſtant to the earl in his office of ſecretary of ſtate, to be examined, and who was then authorized to receive the ſame from them for that purpoſe, as it was lawful for them to do; and the plaintiff afterwards (to wit) on the 17th of *November* in the ſaid year was diſcharged out of their cuſtody; and in ſearching for the books and papers of the plaintiff the defendants did neceſſarily read over, pry into, and examine the ſaid private papers, books, *&c.* of the plaintiff in the declaration mentioned then found in his houſe; and becauſe at the ſaid time when, *&c.* the ſaid doors in the ſaid houſe leading to the rooms therein, and the ſaid boxes, cheſts, *&c.* were ſhut and faſtened ſo that the defendants could not ſearch and examine the ſaid rooms, boxes, cheſts, *&c.* they, for the neceſſary ſearching and examining the ſame, did then neceſſarily break and force open the ſaid doors, boxes, cheſts, *&c.* as it was lawful for them to do; and on the ſaid occaſion the defendants neceſſarily ſtayed in the houſe of the plaintiff for the ſaid four hours, and unavoidably during that time diſturbed him in the poſſeſſion thereof, they the defendants doing as little damage to the plaintiff as they poſſibly could, which are the ſame breaking and entring the houſe of the plaintiff, *&c.* (and ſo repeat the treſpaſs covered by this plea) whereof the plaintiff above complains; and this, *&c.* wherefore they pray judgment, *&c.*

Replication de injuria ſua propria.

The plaintiff replies to the plea of juſtification above, that (as to the treſpaſs thereby covered) he by any thing alledged by the defendants therein ought not to be barred from having his action againſt them, becauſe he ſays, that the defendants at the pariſh of *Stepney*, of *their own wrong*, and without the cauſe by them in that plea alledged, broke and entered the houſe of the plaintiff, *&c. &c.* in manner and form as the plaintiff hath complained above; and this he prays may be inquired of by the country; and the defendants do ſo likewiſe.—There is another plea of juſtification like the firſt, with this difference only; that in the laſt plea it is alledged, the plaintiff and his papers, *&c.* were carried before lord *Halifax*, but in the firſt, it is before *Lovel Stanhope*, his aſſiſtant or law clerk; and the like replication of *de injura ſua propria abſq; tali cauſa*, whereupon a third iſſue is joined.

This cauſe was tried at *Weſtminſter-hall* before the lord chief juſtice, when the jury found a ſpecial verdict to the following purport.

Special verdict.

The jurors upon their oath ſay, as to the iſſue firſt joined (upon the plea not guilty to the whole treſpaſs in the declaration) that *as to the coming with force and arms, and alſo the treſpaſs in declaration, except the breaking and entering the dwelling-houſe of the plaintiff, and continuing therein for the ſpace of four hours, and all that time diſturbing him in the poſſeſſion thereof, and ſearching ſeveral rooms therein, and in one bureau, one writing deſk, and ſeveral drawers of the plaintiff* *in his houſe, and reading over and examining ſeveral of his papers there, and ſeizing, taking and carrying away ſome of his books and papers there found, in the declaration complained of, the ſaid defendants are not guilty.* As to breaking and entring the dwelling-houſe, *&c.* *(above excepted)* the jurors on their oath ſay, that at the time of making the following information, and before and until and at the time of granting the warrant hereafter mentioned, and from thence hitherto, the earl of *Halifax* was, and ſtill is one of the lords of the king's privy council, and one of his principal ſecretaries of ſtate, and that before the time in the declaration, *viz.* on the 11th of *October* 1762, at *St. James's Weſtminſter*, one *Jonathan Scott of London*, bookſeller and publiſher, came before *Edward Weſton*, eſq; an aſſiſtant to the ſaid earl, and a juſtice of peace for the city and liberty of *Weſtminſter*, and there made and gave information in writing to and before the ſaid *Edward Weſton* againſt the ſaid *John Entick* and others, the tenor of which information now produced and given in evidence to the jurors followeth in theſe words and figures, to wit, 'The voluntary information of *J. Scott*. In the year 1755, I propoſed ſetting up a paper, and mentioned it to *Dr. Shebbeare*, and in a few days one *Arthur Beardmore* an attorney at law ſent for me, hearing of my intention, and deſired I would mention it to Dr. *Shebbeare*, that he *Beardmore* and ſome others of his friends had an intention of ſetting up a paper in the city. *Shebbeare* met *Beardmore*, and *myſelf* and *Entick* (the plaintiff) at the *Horn* tavern, and agreed upon the ſetting up the paper by the name of the *Monitor*, and that Dr. *Shebbeare* and Mr. *Entick* ſhould have 200*l.* a-year each. Dr. *Shebbeare* put into *Beardmore*'s and *Entick*'s hands ſome papers, but before the papers appeared *Beardmore* ſent them back to me *(Scott)*. *Shebbeare* inſiſted on having the proportion of his ſalary paid him; he had 50*l.* which I *(Scott)* fetched from *Vere* and *Aſgill*'s by their note, which *Beardmore* gave him; Dr. *Shebbeare* upon this was quite left out, and the monies have been continued to *Beardmore* and *Entick* ever ſince, by ſubſcription, as I ſuppoſed, raiſed I know not by whom: it has been continued in theſe hands ever ſince. *Shebbeare*, *Beardmore* and *Entick* all told me that the late *Alderman Beckford* countenanced the paper: they agreed with me that the profits of the paper, paying all charges belonging to it, ſhould be allowed me. In the paper of the 22 *May*, called *Sejanus*, I apprehend the character of *Sejanus* meant *lord Bute:* the original manuſcript was in the hand-writing of *David Meredith*, Mr. *Beardmore*'s clerk. I before received the manuſcript for ſeveral years till very lately from the ſaid hands, and do believe that they continue ſtill to write it. *Jona. Scott*, *S. James's* 11*th October* 1762.'

Scott's information before a juſtice of peace.

The above information was given voluntarily before me, and ſigned in my preſence by *Jona. Scott*. *J. Weſton.*

And the jurors further ſay, that on the 6th of *November* 1762, the ſaid information was ſhewn to the earl of *H.* and thereupon the earl did then make and iſſue his warrant directed to the defendants, then and ſtill being the king's meſſengers, and duly ſworn to that office, for apprehending the plaintiff, *&c.* the tenor of which warrant produced in evidence to the jurors, follows in theſe words and figures: '*George Montagu Dunk*, earl of *Halifax*, viſcount *Sunbury*, and baron *Halifax*, one of the lords of his majeſty's honourable privy council, lieutenant general of his majeſty's forces, lord lieutenant general and general governor of the kingdom of *Ireland*, and principal ſecretary of ſtate, *&c*: theſe are in his majeſty's name to authorize and require you, *taking a conſtable to your aſſiſtance*, to make ſtrict and diligent ſearch for *John Entick*, the author, or one concerned in writing of ſeveral weekly very ſeditious papers, intitled the *Monitor*, or *Britiſh Freeholder*, No. 357, 358, 360, 373, 376, 378, 379, and 380, *London*, printed for *J. Wilſon* and *J. Fell* in *Pater Noſter Row*, which contain groſs and ſcandalous reflections and invectives upon his majeſty's government, and upon both houſes of parliament; and him, having found, you are to ſeize and apprehend, and to bring, together with his books and papers, in ſafe cuſtody before me to be examined concerning the premiſſes, and further dealt with according to law; in the due execution whereof all mayors, ſheriffs, juſtices of the peace, conſtables, and other his majeſty's officers civil and military, and loving ſubjects whom it may concern, are to be aiding and aſſiſting to you as there ſhall be occaſion; and for ſo doing this ſhall be your warrant. Given at *St. James's* the 6th day of *November* 1762, in the third year of his majeſty's reign, *Dunk Halifax*. To *Nathan Carrington*, *James Watſon*, *Thomas Ardran* and *Robert Blackmore*, four of his majeſty's meſſengers in ordinary.' And the jurors further ſay, the earl cauſed this warrant to be delivered to the defendants to be executed. And that the defendants afterwards on the 11th of *November* 1762, at 11 o'clock in the day time, by virtue and for execution of the warrant, *but without any conſtable taken by them to their aſſiſtance*, entered the houſe of the plaintiff, the outer door thereof being open, and the plaintiff being therein, to ſearch for and ſeize the plaintiff and his books and papers, in order to bring him and them before the earl, according to the warrant; and the defendants did then find the plaintiff there, and did ſeize and apprehend him, and did there ſearch for his books and papers in ſeveral rooms and in the houſe, and in one bureau, one writing deſk, and ſeveral drawers of the plaintiff there in order to find and ſeize the ſame, and bring them along with the plaintiff before the earl according to the warrant, and did then find and ſeize there ſome of the books and papers of the plaintiff, and peruſed and read over ſeveral other of his papers which they found in the houſe, and choſe to read, and that they neceſſarily continued there in the execution of the warrant four hours, and diſturbed the plaintiff in his houſe, and then took him and his ſaid books and papers from thence, and forthwith gave notice at the office of the ſaid ſecretary of ſtate in *Weſtminſter* unto *Lovel Stanhope*, eſq; then before, and ſtill being an aſſiſtant to the earl in the examinations of perſons, books and papers ſeized by virtue of warrants iſſued by ſecretaries of ſtate, and alſo then and ſtill being a juſtice of peace for the city and liberty of *Weſtminſter* and county of *Middleſex*, of their having ſeized the plaintiff, his books and papers, and of their having them ready to be examined, and they then and there at the inſtance of the ſaid *Lovel Stanhope* delivered the ſaid books and papers to him. And the jurors further ſay, that, on the 13th of *April* in the firſt year of the king, his majeſty, by his letters patent under the great ſeal, gave and granted to the ſaid *Lovel Stanhope* the office of law-clerk to the ſecretaries of ſtate. And the king did thereby ordain, conſtitute and appoint the law-clerk to attend the offices of his ſecretaries of ſtate, in order to take the depoſitions of all ſuch perſons whom it may be neceſſary to examine upon affairs which might concern the public, *&c.* (and then the verdict ſets out the letters patent to the law-clerk in *hæc verba*) as by the letters patent produced in evidence to the jurors appears. And the jurors further ſay, that *Lovel Stanhope*, by virtue of the ſaid letters patent long before the time when, *&c.* on the 13th of *April* in the firſt year of the king was, and ever ſince hath been and ſtill is law-clerk to the king's ſecretaries of ſtate, and hath executed that office all the time. And the jurors further ſay, that at different times from the time of the Revolution to this preſent time, the like warrants with *that* iſſued againſt the plaintiff, have been frequently granted by the ſecretaries of ſtate, and executed by the meſſengers in ordinary for the time being, and that each of the defendants did reſpectively take at the time of being appointed meſſengers, the uſual oath, that he would be a true ſervant to the king, *&c.* in the place of a meſſenger in ordinary, *&c.* And the jurors further ſay, that no demand was ever made or left at the uſual place of abode of the defendants, or any of them, by the plaintiff, or his attorney or agent in writing of the peruſal and copy of the ſaid warrant, ſo iſſued againſt the plaintiff as aforeſaid, neither did the plaintiff commence or bring his ſaid action againſt the defendants, or any of them, within ſix calendar months next after the ſeveral acts aforeſaid, and each of them were and was done and committed by them as aforeſaid; but whether, upon the whole matter as aforeſaid by the jurors found, the ſaid defendants are guilty of the treſpaſs herein before particularly ſpecified *in breaking and entering the houſe of the plaintiff in the declaration mentioned, and continuing there for four hours, and all that time diſturbing the plaintiff in the poſſeſſion thereof, and ſearching ſeveral rooms therein, and one bureau, one writing deſk, and ſeveral drawers of the plaintiff in his houſe, and reading over and examining ſeveral of his papers there, and ſeizing, taking and carrying away ſome of his books and papers there found*; or the ſaid plaintiff ought to maintain his ſaid action againſt them; the jurors are altogether ignorant, and pray the advice of the court thereupon. And if upon the whole matter aforeſaid by the jurors found, it ſhall ſeem to the court that the defendants are guilty of the ſaid treſpaſs, and that the plaintiff ought to maintain his action againſt them, the jurors ſay upon their ſaid oath, that the defendants are guilty of the ſaid treſpaſs in manner and form as the plaintiff hath thereof complained againſt them; and they aſſeſs the damages of the plaintiff by occaſion thereof, beſides his coſts and charges by him about his ſuit in this behalf laid out to 300*l.* and for thoſe coſts and charges, to 40*s.* But if upon the whole matter by the jurors found, it ſhall ſeem to the court that the ſaid defendants are not guilty of the ſaid treſpaſs; or that the plaintiff ought not maintain his action againſt them; then the jurors do ſay upon their oath that the defendants are not guilty of the ſaid treſpaſs in manner and form as the plaintiff hath thereof complained againſt them.

The ſecretary of ſtate's warrant to ſeize plaintiff and his books and papers,

delivered to the defendants to be executed, who on 11th of Nov. 1762, did execute the ſame without a conſtable,

and carried the books, &c. to Lovel Stanhope, the law clerk, who is appointed to that office by the king's letters patent, and is a juſtice of peace.

That the like warrants have iſſued ſince the Revolution.

That no demand was made by plaintiff of a copy of the warrant, nor did plaintiff bring his action within ſix months after the facts done by defendants.

Special verdict concludes in the common form.

Damages 300l.

And as to the laſt iſſue on the ſecond ſpecial juſtification, the jury found for the plaintiff, that the defendants in their own wrong broke and entred, and did the treſpaſs, as the plaintiff in his replication has alledged.

The laſt iſſue found for plaintiff.

This ſpecial verdict was twice ſolemnly argued at the bar; in *Eaſter Term* laſt by ſerjeant *Leigh* for the plaintiff, and *Burland*, one of the king's ſerjeants, for the defendants; and in this preſent term by ſerjeant *Glynn* for the plaintiff, and *Nares*, one of the king's ſerjeants, for the defendants.

Counſel for the plaintiff. At the trial of this cauſe the defendants relied upon two defences; 1ſt, That a ſecretary of ſtate as a juſtice or conſervator of the peace, and theſe meſſengers acting under his warrant, are within the ſtatute of the 24th of *Geo.* II. *c.* 44. which enacts, (among other things) that 'no action ſhall be brought againſt any conſtable *or other officer*, *or any perſon* acting by his order and in his aid, for any thing done in obedience to the warrant of a juſtice, until demand hath been made or left at the uſual place of his abode by the party, or by his attorney in writing ſigned by the party, demanding the ſame, of the peruſal and copy of ſuch warrant, and the ſame hath been refuſed or neglected for ſix days after ſuch demand,' and that no demand was ever made by the plaintiff of a peruſal or copy of the warrant in this caſe, according to that ſtatute, and therefore he ſhall not have this action againſt the defendants, who are merely miniſterial officers acting under the ſecretary of ſtate, who is a juſtice and conſervator of the peace. 2dly, That the warrant under which the defendants acted, is a legal warrant, and that they well can juſtify what they have done by virtue thereof, for that at many different times from the time of the Revolution till this time, the like warrants with *that* iſſued againſt the plaintiff in this caſe have been granted by ſecretaries of ſtate, and executed by the meſſengers in ordinary for the time being.

Eaſter term, 5 Geo. 3.

1. It is moſt clear and manifeſt upon this verdict, that the earl of *Halifax* acted as ſecretary of ſtate when he granted the warrant, and not merely as a juſtice of the peace, and therefore cannot be within the ſtatute 24 *Geo.* II. *c.* 44. neither would he be within the ſtatute if he was a conſervator of the peace, ſuch perſon not being once named therein; and there is no book in the law whatever, that ranks a ſecretary of ſtate *quaſi ſecretary*, among the conſervators of the peace. *Lambert*, *Coke*, *Hawkins*, lord *Hale*, *&c.* *&c.* none of them take

As to the firſt.

take any notice of a ſecretary of ſtate being a conſervator of the peace, and until of late days he was no more indeed than a mere clerk. A conſervator of the peace had no more power than a conſtable has now, who is a conſervator of the peace at common law. At the time of making this ſtatute, a juſtice of peace, conſtable, headborough and other officers of the peace, borſholders and tithingmen, as well as ſecretary of ſtate, conſervator of the peace, and meſſenger in ordinary, were all very well known; and if it had been the intent of the ſtatute, that a ſecretary of ſtate, conſervator of the peace, and meſſenger in ordinary, ſhould have been within the ſtatute, it would have mentioned all or ſome of them; and it not having done ſo, they cannot be within it. A meſſenger certainly cannot be within it, who is nothing more than a mere porter, and lord *Halifax*'s footmen might as well be ſaid to be officers within the ſtatute as theſe defendants. Beſides, the verdict finds that theſe defendants executed the warrant *without taking a conſtable to their aſſiſtance*. This diſobedience will not only take them out of the protection of the ſtatute, (if they had been within it), but will alſo diſable them to juſtify what they have done, by any plea whatever. The office of theſe defendants is a place of conſiderable profit, and as unlike that of a conſtable or tithingman as can be, which is an office of burthen and expence, and which he is bound to execute in perſon, and cannot ſubſtitute another in his room, though he may call perſons to aſſiſt him. 1 *Hale's P. C.* 581. This warrant is more like a warrant to ſearch for ſtolen goods and to
4 Inſt. 176. ſeize them, than any other kind of warrant, which ought to be directed to conſtables and other publick officers which the law takes notice of. 2 *Hale's P. C.* 149, 150. How much more neceſſary in the preſent caſe was it to take a conſtable to the defendants aſſiſtance. The defendants have alſo diſobeyed the warrant in another matter: being commanded to bring the plaintiff, and his books and papers before lord *Halifax*, they carried him and them before *Lovel Stanhope*, the law-clerk; and though he is a juſtice of the peace, that avails nothing; for no ſingle juſtice of peace ever claimed a right to iſſue ſuch a warrant as this, nor did he act therein as a juſtice of peace, but as the law-clerk to lord *Halifax*. The information was made before juſtice *Weſton*. The ſecretary of ſtate in this caſe never ſaw the accuſer nor accuſed. It ſeems to have been below his dignity. The names of the officers introduced here are not to be found in the law-books, from the firſt Year-book to the preſent time.

As to the ſecond. 2. A power to iſſue ſuch a warrant as this is contrary to the genius of the law of *England*; and even if they had found what they ſearched for, they could not have juſtified under it. But they did not find what they ſearched for, nor does it appear that the plaintiff was the author of any of the ſuppoſed ſeditious papers mentioned in the warrant; ſo that it now appears that this enormous treſpaſs and violent proceeding has been done upon meer ſurmiſe. But the verdict ſays, ſuch warrants have been granted by ſecretaries of ſtate ever ſince the Revolution. If they have, it is high time to put an end to them; for if they are held to be legal, the liberty of this country is at an end. It is the publiſhing of a libel which is the crime, and not the having it locked up in a private drawer in a man's ſtudy. But if having it in one's cuſtody was the crime, no power can lawfully break into a man's houſe and ſtudy to ſearch for evidence againſt him. This would be worſe than the *Spaniſh* inquiſition; for ranſacking a man's ſecret drawers and boxes, to come at evidence againſt him, is like racking his body to come at his ſecret thoughts. The warrant is to ſeize all the plaintiff's books and papers without exception, and carry them before lord *Halifax*. What? Has a ſecretary of ſtate a right to ſee all a man's private letters of correſpondence, family concerns, trade and buſineſs? This would be monſtrous indeed! And if it were lawful, no man could endure to live in this country. In the caſe of a ſearch-warrant for ſtolen goods, it is never granted, but upon the ſtrongeſt evidence that a felony has been committed, and that the goods are ſecreted in ſuch a houſe; and it is to ſeize ſuch goods as were ſtolen, not all the goods in the houſe; but if ſtolen goods are not found there, all who entred with the warrant are treſpaſſers. However frequently theſe warrants have been granted ſince the Revolution, that will not make them lawful; for if they were unreaſonable or unlawful when firſt granted, no uſage or continuance can make them good. Even cuſtoms, which have been uſed time out of mind, have been often adjudged void, as being unreaſonable, contrary to common right, or purely againſt law, if upon conſidering their nature and quality they ſhall be found injurious to a multitude, and prejudicial to the commonwealth, and to have their commencement (for the moſt part) through the oppreſſion and extortion of lords and great men. *Davis* 32. *b.* Theſe warrants are not by cuſtom; they go no farther back than eighty years; and moſt amazing it is they have never before this time been oppoſed or controverted, conſidering the great men that have preſided in the *King's Bench* ſince that time. But it was reſerved for the honour of this court, which has ever been the protector of the liberty and property of the ſubject, to demoliſh this monſter of oppreſſion, and to tear into rags this remnant of Star-Chamber tyranny.

Counſel for the defendants. I am not at all alarmed, if this power is eſtabliſhed to be in the ſecretaries of ſtate. It has been uſed in the beſt of times, often ſince the Revolution. I ſhall argue, firſt, That the ſecretary of ſtate has power to grant theſe warrants; and if I cannot maintain this, I muſt, ſecondly, ſhew that by the ſtatute 24 *Geo.* II. *c.* 24. this action does not lie againſt the defendants the meſſengers. 1. A ſecretary of ſtate has the ſame power to commit for treaſon as a juſtice of peace. *Kendall* and *Roe*, *Skin.* 596. 1 *Salk.* 346. S. C. 1 lord *Raym.* 65. 5 *Mod.* 78. S. C. ſir *William Wyndham* was committed by *James Stanhope*, ſecretary of ſtate, to the *Tower* for high treaſon the 7th of *October* 1715. See the caſe 1 *Stra.* 2. And ſerjeant *Hawkins* ſays, it is certain that the privy council, or any one or two of them, or a *ſecretary of ſtate*, may lawfully commit perſons for treaſon, and *for other offences againſt the ſtate*, as in all ages they have done. 2 *Hawk. P. C.* 117. *ſect.* 4. 1 *Leon.* 70, 71. *Carth*, 291. 2 *Leon.* 175. If it is clear that a ſecretary of ſtate may commit for treaſon and *other offences againſt the ſtate*, he certainly may commit for a ſeditious libel againſt the government; for there can hardly be a greater offence againſt the ſtate, except actual treaſon. A ſecretary of ſtate is within the *habeas corpus* act. But a power to commit without a power to iſſue his warrant to ſeize the offender and the libel would be nothing; ſo it muſt be concluded that he has the ſame power upon information to iſſue a warrant to ſearch for and ſeize a ſeditious libel, and its author and publiſher, as a juſtice of peace has for granting a warrant to ſearch for ſtolen goods, upon an information that a theft has been committed, and that the goods are concealed in ſuch a place; in which caſe the conſtables and officers aſſiſting him in the ſearch, may break open doors, boxes, *&c.* to come at ſuch ſtolen goods. Suppoſing the practice of granting warrants to ſearch for libels againſt the ſtate be admitted to be an evil in particular caſes, yet to let ſuch libellers eſcape, who endeavour to raiſe rebellion, is a greater evil, and may be compared to the reaſoning of Mr. Juſtice *Foſter* in the caſe of preſſing, 159, where he ſays, 'that war is a great evil, but it is choſen to avoid a greater. 'The practice of preſſing is one of the miſchiefs war brings with it; 'but it is a maxim in law and good policy too, that all private miſchiefs 'muſt be born with patience, for preventing a national calamity, *&c.*'

2. Suppoſing there is a defect of juriſdiction in the ſecretary of ſtate, yet the defendants are within the *Stat.* 24 *Geo.* II. *c.* 44. and though not within the words, yet they are within the reaſon of it. That it is not unuſual in acts of parliament to comprehend by conſtruction a *generality*, where expreſs mention is made only of a *particular*. The ſtatute of *Circumſpecte agatis* concerning the biſhop of *Norwich* extends to all biſhops. *Fitz. Prohibition* 3. and 2 *Inſt.* on this ſtatute. 25 *Ed.* III. *c.* enables the incumbent to plead in *quare impedit*, to the king's ſuit. This alſo extends to the ſuits of all perſons. 38 *E.* III. 31. The act 1 *Ric.* II. ordains that the warden of the *Fleet* ſhall not permit priſoners in execution to go out of priſon by bail or baſton, yet it is adjudged that this act extends to all gaolers. *Plowd. Com.* caſe of *Platt* 35. *b.* The *ſtat. de donis conditionalibus* extends to all other limitations in tail not there particularly mentioned, and the like conſtruction has been put upon ſeveral other ſtatutes. *Tho. Jones* 62. The *ſtat.* 7 *Jac.* I. *c.* 5. the word *conſtable* therein extends to a deputy conſtable. *Moor* 845. Theſe meſſengers in ordinary have always been conſidered as officers of the ſecretary of ſtate, and a commitment may be to their cuſtody, as in ſir *W. Wyndham*'s caſe. A juſtice of peace may make a conſtable *pro hac vice* to execute a warrant, who would be within the *ſtat.* 24 *Geo.* II. So if theſe defendants are not conſtables, yet as *officers* they have power to execute a warrant of a juſtice of peace. A conſtable may, but cannot be compelled to execute a warrant out of his juriſdiction. Officers acting under colour of office, though doing an illegal act, are within this ſtatute. *Vaugh.* 113. So that no demand having ever been made of the warrant, nor any action commenced within ſix months, the plaintiff has no right of action. It was ſaid, that a conſervator of the peace had no more power than a conſtable has now. I anſwer, they had power to bind over at common law, but a conſtable has not. *Dalton*, *cap.* 1.

Counſel for the plaintiff, in reply. It is ſaid, this has been done in the beſt of times ever ſince the Revolution. The concluſion from thence is, that it is the more inexcuſable, becauſe done in the beſt of times, in an æra when the common law (which had been trampled under the foot of arbitrary power) was revived. We do not deny but the ſecretary of ſtate hath power to commit for treaſon and other offences againſt the ſtate; but that is not the preſent caſe, which is breaking into the houſe of a ſubject, breaking into his drawers and boxes, ranſacking all the rooms in his houſe, and prying into all his private affairs. But it is ſaid, if the ſecretary of ſtate has power to commit, he has power to ſearch, *&c.* as in the caſe of ſtolen goods. This is a falſe conſequence, and it might as well be ſaid he has a power to torture. As to ſtolen goods, if the officers find none, have they a right to take away a man's goods which were not ſtolen? Preſſing is ſaid to be a dangerous power, and yet it has been allowed for the benefit of the ſtate. But that is only the argument and opinion of a ſingle judge, from ancient hiſtory and records, in times when the lower part of the ſubjects were little better than ſlaves to their lords and great men, and has not been allowed to be lawful without an act of parliament ſince the time of the Revolution. The *ſtat.* 24 *Geo.* II. has been compared to ancient ſtatutes, naming particular perſons and diſtricts, which have been conſtrued to extend to many others not named therein; and ſo the defendants, though no ſuch officers are mentioned, by like reaſon, are within the ſtatute of 24 *Geo.* II. But the law knows no ſuch officers as meſſengers in ordinary to the king. It is ſaid the *habeas corpus* act extends to commitments by ſecretaries of ſtate, though they are not mentioned therein. True, but that ſtatute was made to protect the innocent againſt illegal and arbitrary power. It is ſaid, the ſecretary of ſtate is a juſtice of peace, and the meſſengers are his officers. Why then did the warrant direct them to take a conſtable to their aſſiſtance, if they were themſelves the proper officers? It ſeems to admit they were not the proper officers. If a man be made an officer for a ſpecial purpoſe to arreſt another, he muſt ſhew his authority; and if he refuſes, it is not murder to kill him. But a conſtable or other known officer in the law need not ſhew his warrant.

Lord chief juſtice. I ſhall not give any opinion at preſent, becauſe this caſe, which is of the utmoſt conſequence to the public, is to be argued again. I ſhall only juſt mention a matter which has ſlipt the ſagacity of the counſel on both ſides, that it may be taken notice of upon the next argument. Suppoſe a warrant which is againſt law be granted, ſuch as no juſtice of peace, or other magiſtrate high or low whomſoever, has power to iſſue, whether that magiſtrate or juſtice who grants ſuch warrant, or the officer who executes it, are within the *ſtat.* 24 *Geo.* II. *c.* 44. To put one caſe (among an hundred that might happen): ſuppoſe a juſtice of peace iſſues a warrant to ſearch a houſe for ſtolen goods, and directs it to four of his ſervants, who ſearch and find no ſtolen goods, but ſeize all the books and papers of the owners of the houſe, whether in ſuch a caſe would the juſtice of peace, his officers or ſervants, be within the *ſtat.* 24 *Geo.* II.? I deſire that every point of this caſe may be argued to the bottom, for I ſhall think myſelf bound, when I come to give judgment, to give my opinion upon every point in the caſe.

Mich. 6 Geo. 3. *Counſel for the plaintiff* on the ſecond argument. If the ſecretary of ſtate, or a privy councellor, juſtice of peace, or other magiſtrate whatever, have no legal power to grant the warrant in the preſent caſe, it will follow, that the magiſtrate uſurping ſuch an illegal power, can never be conſtrued to be within the meaning or reaſon of the ſtatute of 24 *Geo.* II. *c.* 44. which was made to protect juſtices of the peace, *&c.* where they made blunders, or erred in judgment in caſes within their juriſdiction, and not to give them arbitrary power to iſſue warrants totally illegal from beginning to end, and in caſes wherein they had no juriſdiction at all. If any ſuch power in a ſecretary of ſtate, or a privy councellor, had ever exiſted, it would appear from our law-books. All the ancient books are ſilent on this head. *Lambert* never once mentions a ſecretary of ſtate. Neither he nor a privy councellor, were ever conſidered as magiſtrates. In all the arguments touching the Star-Chamber, and petition of right, nothing of this power was ever dreamt of. State-commitments anciently were either *per mandatum regis* in perſon, or by warrant of ſeveral of the privy councellors in the plural number. The king has this power in a particular mode, *viz.* by the advice of his privy council, who are to be anſwerable to the people if wrong is done. He has no other way but in council to ſignify his mandate. In the caſe of the ſeven biſhops, this matter was inſiſted upon at the bar, when the court preſumed the commitment of them was by the advice of the privy council; but that a ſingle privy councellor had this power, was not contended for by the crown-lawers then. This court will require it to be ſhewn that there have been ancient commitments of this ſort. Neither the ſecretary of ſtate, or a privy councellor, ever claimed a right to adminiſter an oath, but they employ a perſon as a law-clerk, who is a juſtice of peace, to adminiſter oaths, and take recognizances. Sir *Barth. Shower*, in *Kendall* and *Roe*'s caſe, inſiſted they never had ſuch power. It would be a ſoleciſm in our law to ſay, there is a perſon who has power to commit, and has not power to examine on oath, and bail the party. Therefore whoever has power to commit, has power to bail. It was a queſtion formerly, whether a conſtable as an ancient conſervator of the peace ſhould take a recognizance or bond. In the time of queen *Elizabeth* there was a caſe wherein ſome of the judges were of one opinion and ſome of another. A ſecretary of ſtate was ſo inconſiderable formerly, that he is not mentioned in the ſtatute of *ſcandalum magnatum.* His office was thought of no great importance. He takes no oath of office as ſecretary of ſtate, gives no kind of ſecurity for the exerciſe of ſuch judicial power as he now uſurps. If this was an ancient power, it muſt have been annexed to his office anciently; it cannot be now given to him by the king. The king cannot make two chief juſtices of the *Common-Pleas*; nor could the king put the great ſeal in commiſſion before an act of parliament was made for that purpoſe. There was only one ſecretary of ſtate formerly: there are now two appointed by the king. If they have this power of magiſtracy, it ſhould ſeem to require ſome law to be made to give that power to two ſecretaries of ſtate which was formerly in one only. As to commitments *per mandatum regis*, ſee *Staunf. Pl. Coron.* 72. 4 *Inſt. c.* 5. court of Star-Chamber. Admitting they have power to commit in high treaſon, it will not follow they have power to commit for a miſdemeanor. It is of neceſſity that they can commit in high treaſon, which requires immediate interpoſition for the benefit of the public. In the caſe of commitment by *Walſingham* ſecretary of ſtate, 1 *Leon.* 71. it was returned on the *habeas corpus* at laſt, that the party was committed *ex ſententia & mandato totius concilii privati dominæ reginæ.* Becauſe he found he had not that power of himſelf, he had recourſe to the whole privy council's power, ſo that this caſe is rather for the plaintiff. Commitment by the high commiſſion court of *York* was declared by parliament illegal from the beginning; ſo in the caſe of ſhip-money the parliament declared it illegal.

Counſel for the defendants on the ſecond argument. The moſt able judges and advocates, ever ſince the Revolution, ſeem to have agreed, that the ſecretaries of ſtate have this power to commit for a miſdemeanor. Secretaries of ſtate have been looked upon in a very high light for two hundred years paſt. 27 *H.* VIII. *c.* 11. Their rank and place is ſettled by 31 *H.* VIII. *c.* 10. 4 *Inſt.* 362. *c.* 77. of precedency. 4 *Inſt.* 56. *Selden*'s *Titles of Honour*, *c. officers of ſtate.* So that a ſecretary of ſtate is ſomething more than a mere clerk, as was ſaid. *Minſhew verb. Secretary.* He is *è ſecretioribus conſiliis domini regis.* Serjeant *Pengelly* moved, that ſir *William Wyndham* might be bailed. If he could not be committed by the ſecretary of ſtate for ſomething leſs than treaſon, why did he move to have him bailed? This ſeems a conceſſion that he might be committed in that caſe for ſomething leſs than treaſon. Lord *Holt* ſeems to agree that a commitment by a ſecretary of ſtate is good. *Skin.* 598. 1 Lord *Raym.* 65. There is no caſe in the books that ſays in what caſes a ſecretary of ſtate can or can not commit; by what power is it that he can commit in the caſe of treaſon, and in no other caſe? The reſolution of the houſe of commons touching the petition of right, *Selden* laſt volume, *Parliamentary Hiſtory*, *vol.* 8. *fol.* 95, 96. Secretary *Coke* told the lords, it was his duty to commit by the king's command. *Yoxley*'s caſe, *Carth.* 291. he was committed by the ſecretary of ſtate on the ſtatute of *Elizabeth* for refuſing to anſwer whether he was a *Romiſh* prieſt. *The Queen* and *Derby*, *Forteſcue's Reports*, 140. the commitment was by a ſecretary of ſtate, *Mich.* 10 *Annæ*, for a libel, and held good. (*N. Bathurſt* J. ſaid he had ſeen the *habeas corpus* and the return, and that this was a commitment by a ſecretary of ſtate). *The King* and *Earbury*, *Mich.* 7 *Geo.* II. 2 *Bernard.* 346. was a motion to diſcharge a recognizance entred into for writing a paper called *The Royal Oak.* Lord *Hardwicke* ſaid it was ſettled in *Kendall* and *Roe*'s caſe, that a ſecretary of ſtate might apprehend perſons ſuſpected of treaſonable practices; and there are a great number of precedents in the *Crown-Office* of commitments by ſecretaries of ſtate for libels againſt the government.

After time taken to conſider, lord CAMDEN, *lord chief juſtice, delivered the judgment of the court for the plaintiff, in the following words.*

This record hath ſet up two defences to the action, on both of which the defendants have relied.

The firſt ariſes from the facts diſcloſed in the ſpecial verdict; whereby the defendants put their caſe upon the ſtatute of 24 *Geo.* II. inſiſting, that they have nothing to do with the legality of the warrants, but that they ought to have been acquitted as officers within the meaning of that act.

The ſecond defence ſtands upon the legality of the warrants; for, this being a juſtification at common law, the officer is anſwerable, if the magiſtrate has no juriſdiction.

Theſe two defences have drawn ſeveral points into queſtion, upon which the public, as well as the parties, have a right to our opinion.

Under the firſt, it is incumbent upon the officers to ſhew, that they are officers within the meaning of the act of parliament, and likewiſe that they have acted in obedience to the warrant.

The queſtion, whether officers or not, involves another; whether the ſecretary of ſtate, whoſe miniſters they are, can be deemed a juſtice of the peace, or taken within the equity of the deſcription; for officers and juſtices are here co-relative terms: therefore either both muſt be comprized, or both excluded.

This queſtion leads me to an inquiry into the authority of that miniſter, as he ſtands deſcribed upon the record in two capacities, *viz.* ſecretary of ſtate and privy councellor. And ſince no ſtatute has conferred any ſuch juriſdiction as this before us, it muſt be given, if it does really exiſt, by the common law; and upon this ground he has been treated as a conſervator of the peace.

The matter thus opened, the queſtions that naturally ariſe upon the ſpecial verdict, are;

Firſt, whether in either of theſe characters, or upon any other foundation, he is a conſervator of the peace.

Secondly, admitting him to be ſo, whether he is within the equity of the 24th *Geo.* II.

Theſe points being diſpoſed of, the next in order is, whether the defendants have acted in obedience to the warrant.

In the laſt place, the great queſtion upon the juſtification will be, whether the warrant to ſeize and carry away the plaintiff's papers is lawful.

FIRST QUESTION.

The power of this miniſter, in the way wherein it has been uſually exerciſed, is pretty ſingular.

If he is conſidered in the light of a privy councellor, although every member of that board is equally intitled to it with himſelf, yet he is the only one of that body who exerts it. His power is ſo extenſive in place, that it ſpreads throughout the whole realm; yet in the object it is ſo confined, that except in libels and ſome few ſtate crimes, as they are called, the ſecretary of ſtate does not pretend to the authority of a conſtable.

To conſider him as a conſervator. He never binds to the peace, or good behaviour, which ſeems to have been the principal duty of a conſervator; at leaſt he never does it in thoſe caſes, where the law requires thoſe ſureties. But he commits in certain other caſes, where it is very doubtful, whether the conſervator had any juriſdiction whatever.

His warrants are chiefly exerted againſt libellers, whom he binds in the firſt inſtance to their good behaviour, which no other conſervator ever attempted, from the beſt intelligence that we can learn from our books.

And though he doth all theſe things, yet it ſeems agreed, that he hath no power whatſoever to adminiſter an oath or take bail.

This juriſdiction, as extraordinary as I have deſcribed it, is ſo dark and obſcure in its origin, that the counſel have not been able to form any certain opinion from whence it ſprang.

Sometimes they annex it to the office of ſecretary of ſtate, ſometimes to the quality of privy councellor; and in the laſt argument it has been derived from the king's royal prerogative to commit by his own perſonal command.

Whatever may have been the true ſource of this authority, it muſt be admitted, that at this day he is in the full legal exerciſe of it; becauſe there has been not only a clear practice of it, at leaſt ſince the Revolution, confirmed by a variety of precedents; but the authority has been recognized and confirmed by two caſes in the very point ſince that period: and therefore we have not a power to unſettle or contradict it now, even though we are perſuaded that the commencement of it was erroneous.

And yet, though the inquiry I am now upon cannot be attended with any conſequence to the public, it is nevertheleſs indiſpenſable; for I ſhall trace the power to its origin, in order to determine, whether the perſon is within the equity of the 24th *Geo.* II.

Before I argue upon that point, or even ſtate the queſtion, whether the ſecretary of ſtate be within that act, we muſt know what he is. This is no very agreeable taſk, ſince it may poſſibly tend to create, in ſome minds, a doubt upon a practice that has been quietly ſubmitted to, and which is of no moment to the liberty of the ſubject; for ſo long as the proceedings under theſe warrants are properly regulated by law, the public is very little concerned in the choice of that perſon by whom they are iſſued.

To proceed then upon the firſt queſtion, and to conſider this perſon in the capacity of a ſecretary of ſtate.

This officer is in truth the king's private ſecretary. He is keeper of the ſignet and ſeal uſed for the king's private letters, and backs the ſign manual, in tranſmitting grants to the privy ſeal. This ſeal is taken
2 Inſt. 556. notice of in the *Articuli ſuper Chartas, cap.* 6. and my lord *Coke* in his comment upon that chapter, *p.* 556. deſcribes the ſecretary as I have mentioned. He ſays he has four clerks, that ſit at his board; and that the law in ſome caſes takes notice of the ſignet; for a *ne exeat regno* may be by commandment under the privy ſeal, or under the ſignet; and in this caſe the ſubject ought to take notice of it; for it is but a ſignification of the king's commandment. If at the time my lord *Coke* wrote his third *Inſtitute* he had been acquainted with the authority that is now aſcribed to the ſecretary, he would certainly have mentioned it in this place. It was too important a branch of the office to be omitted; and his ſilence therefore is a ſtrong argument, to a man's belief at leaſt, that no ſuch power exiſted at that time. He has likewiſe taken notice of this officer in the *Prince's caſe* in the eighth Report. He is mentioned in the ſtatute of the 27th *H.* VIII. chap. 11. and in the ſtatute of the ſame king touching precedency; and it is obſervable, that he is called in theſe two ſtatutes by the ſingle name of ſecretary, without the addition, which modern times has given him, of the dignity of a ſtate-officer.

I do not know, nor do I believe, that he was anciently a member of the privy council; but if he was, he was not even in the times of *James* and *Charles* the firſt, according to my lord *Clarendon*, an officer of ſuch magnitude as he grew up to after the Reſtoration, being only employed, by this account, to make up diſpatches at the concluſion of councils, and not to govern or preſide in thoſe councils.

It is not difficult to account for the growth of this miniſter's importance. He became naturally ſignificant from the time that all the courts in *Europe* began to admit reſident ambaſſadors; for upon the eſtabliſhment of this new policy, that whole foreign correſpondence paſſed through the ſecretary's hands, who by this means grew to be an inſtructed and confidential miniſter.

This being the true deſcription of his employment, I ſee no part of it that requires the authority of a magiſtrate. The cuſtody of a ſignet can imply no ſuch thing; nay, the contrary would rather be inferred from this circumſtance; becauſe if his power to commit was inherent in his office, his warrants would naturally be ſtamped with that ſeal; and in this light the privy ſeal, one ſhould think, would have had the preference, as being higheſt in dignity and of more conſideration in law. Beſides all this, it is not in my opinion conſonant to the wiſdom or analogy of our law, to give a power to commit, without a power to examine upon oath, which to this day the ſecretary of ſtate doth not 5 Mod. 78. preſume to exerciſe. Mr. Juſtice *Rokeby*, in the caſe of *Kendall* and *Rowe*, ſays, that the one is incident to the other; and I am ſtrongly of that opinion: for how can he commit, who is not able to examine upon oath? What magiſtrate can be found, in our law, ſo defectively conſtituted? The only inſtance of this kind, that can be produced, is the practice of the houſe of commons. But this inſtance is no precedent for other caſes. The rights of that aſſembly are original and ſelf created; they are paramount to our juriſdiction, and above the reach of injunction, prohibition, or error. So that I ſtill ſay, notwithſtanding that particular caſe, there is no magiſtrate in our law ſo framed, unleſs the ſecretary of ſtate be an exception. Now Mr. Juſtice *Rokeby* and myſelf, though we agree in the principle, form our concluſions in a very different manner. He from the aſſumed power of committing, which ought firſt to have been proved, infers the incidental powers of adminiſtering an oath. I on the contrary, from the admitted incapacity to do the latter, am ſtrongly inclined to deny the former.

Again, if the ſecretary of ſtate is a common law magiſtrate, one ſhould naturally expect to find ſome account of this in our books, whereas his very name is unknown; and there cannot be a ſtronger argument againſt his authority in that light, than the unſucceſsful attempts that have been made at the bar to transform him into a conſervator. Theſe attempts have given us the trouble of looking into thoſe books that have preſerved the memory of theſe magiſtrates, who have been long ſince deceaſed and forgotten. *Fitzherbert*, *Crompton*, *Lombard*, *Dalton*, *Pulton*, and *Bacon*, have all been ſearched to ſee, if any ſuch perſon could be found amongſt the old conſervators. It is not material to repeat the whole number, and to range them in their ſeveral claſſes; but it will be ſufficient to enumerate the principal ones; becauſe they may be referred to in ſome other part of the argument.

The king is mentioned as the firſt. Then come the chancellor, the treaſurer, the high ſteward, the maſter of the rolls, the chief juſtice and the juſtices of the *King's Bench*, all the judges in their ſeveral courts, ſheriffs, coroners, conſtables; and ſome are ſaid to be conſervators by tenure, ſome by preſcription, and others by commiſſion. But no ſecretary of ſtate is to be found in the catalogue; and I do affirm, that no treatiſe, caſe, record, or ſtatute, has ever called him a conſervator, from the beginning of time down to the caſe of the king againſt *Kendall* and *Rowe*.

The firſt time, he appears in our books to be a granter of our warrants, is in 1 *Leonard* 70 and 71. 29 and 30 *Elizabeth*, where the return to a *habeas corpus* was a commitment by ſir *Francis Walſingham*, principal ſecretary, and one of the privy council. The court takes this diſtinction. Where a perſon is committed by one of the privy council, in ſuch caſe the cauſe of the commitment ſhoud be ſet down in the return; but on the contrary, where the party is committed by the whole council, there no cauſe need be alledged. The court upon this ordered the return to be amended, and then the return is a commitment by the whole council.

There is a like caſe in the 2 *Leonard* p. 175. a little prior in point of time, where the commitment is by ſir *Francis Walſingham*, one of the principal ſecretaries, *&c.* Becauſe the warden of the *Fleet* did not return for what cauſe *Helliard* was committed, the court gives him day to mend his return, or otherwiſe the priſoner ſhould be delivered. Nobody who reads this caſe can doubt, but that the *&c.* muſt be ſupplied by the addition of privy councellor, as in the other caſe.

Theſe authorities ſhew, that the judges of thoſe days knew of no ſuch committing magiſtrate as a ſecretary of ſtate. They pay no regard to that office, but treat the commitment as the act of the privy councellor only; and to ſhew farther that the privy councellor as ſuch was the only acting magiſtrate in ſtate matters, all the twelve judges two years afterwards were obliged to remonſtrate againſt the irregularities of their commitments, but take no notice of any ſuch authorities practiſed by the ſecretaries of ſtate.

In the third year of king *Charles* the firſt, when the houſe of commons ſtarted that famous diſpute, upon the right claimed by the king and the privy council to commit without ſhewing cauſe, it is natural to expect, that the ſecretary's warrant ſhould have been handled, or at leaſt named among the ſtate commitments. But there is not throughout that long and learned diſcuſſion one word ſaid about him, or his name ſo much as mentioned; and the petition of right, as well as all the proceedings that produced it, is equally ſilent upon the ſubject.

Again, when in the ſixteenth year in the ſame king's reign the *habeas corpus* was granted by act of parliament upon all 16 Cha. 1. c. 10. ſ. 8. the ſtate commitments, and where the omiſſion of one mode of committing would have been fatal to the ſubject, and fruſtrated all the remedy of that act, and where they have enumerated not only every method of committing that had been exerciſed, but every other that might probably exiſt in after times; yet the commitment by a ſecretary of ſtate is not found amongſt the number. If then he had power of his own to commit, this famous act of parliament was waſte paper, and the ſubject ſtill at the mercy of the crown, without the benefit of the *habeas corpus*; a ſuppoſition altogether incredible: for who can believe, that this parliament, ſo jealous, ſo learned, ſo induſtrious, ſo enthuſiaſtic of the liberty of the ſubject, when they were making a law to relieve priſoners againſt the power of the crown, ſhould bind the king, and leave his ſecretary of ſtate at large?

Whoever attends to all theſe obſervations will ſee clearly, that the ſecretary of ſtate in thoſe days never exerciſed the power of committing in his own right; I ſay, in his own right, becauſe that he did in fact commit, and that frequently even at the time when the matter of the *habeas corpus* was agitated in the third of king *Charles* the firſt, will appear from a paſſage in the *Ephemeris Parliamentaria*, page 162. This paſſage, when it comes to be attended to, will throw great light upon the preſent enquiry. It is ſufficient of itſelf to convince me, from what ſource this practice firſt aroſe. It was from a delegation of the king's royal prerogative to commit by his own power, and from the king devolved in point of execution upon the ſecretary of ſtate. The paſſage I allude to is a ſpeech of ſecretary *Cook*.

Whilſt the parliament were diſputing the king's authority to commit, either by himſelf or by his council, without ſhewing the cauſe, the king, who was deſirous to pacify thoſe diſcontents, and yet unwilling to part with his prerogative, ſent a meſſage to the houſe of commons to aſſure them, that if they would drop the buſineſs, he would promiſe them, upon his royal word, not to uſe this prerogative contrary to law. Secretary *Cook* delivers this meſſage, and then the book proceeds in theſe words. After ſpeaking of himſelf and the nature of his place, he ſays, ‘Give ‘me leave freely to tell you, that I know by experience, that by the ‘place I hold under his majeſty, if I will diſcharge the duty of my place ‘and the oath I have taken to his majeſty, I muſt commit, and neither ‘expreſs the cauſe to the gaoler, nor to the judges, nor to any coun‘cellor in *England*, but to the king himſelf. Yet do not think, I go ‘without ground of reaſon, or take this power committed to me to be ‘unlimited. Yea rather to me it is charge, burthen, and danger; for ‘if I by this power commit the pooreſt porter, if I do not upon a juſt ‘cauſe, if it may appear, the burthen will fall upon me heavier than the ‘law can inflict; for I ſhall loſe my credit with his majeſty and my ‘place: and I beſeech you conſider, whether thoſe that have been in the ‘ſame place, have not committed freely, and not any doubt made of it, ‘or any complaint made by the ſubject.’

To underſtand the meaning of this ſpeech, I muſt briefly remind you of the nature of that famous ſtruggle for the liberty of the ſubject between the crown and the parliament, which was then in agitation.

The points in controverſy were theſe: whether a ſubject committing by the king's perſonal command, or by warrant of the privy council, ought to expreſs the cauſe in the warrant, and whether the ſubject in that caſe was bailable.

The matter in diſpute was confined to thoſe two commitments. The crown claimed no ſuch right for any other warrant; nor did the commons demand redreſs againſt any other. The ſtatute of *Weſtminſter* the firſt, which was admitted on all ſides to be the only foundation upon which the pretenſions of the crown were built, ſpeaks of no other arreſts in the text, but the king's arreſt only; and the comment of law had never added any other arreſt by conſtruction, but that only of the privy council. No other commitment whatever was deemed by any man to be within the equity of that act. The caſe, cited upon that occaſion, ſpeaks of no other commitments but theſe. Nay the houſe of lords, who paſſed a reſolution in the heat of this buſineſs in favour of the king's authority, reſolves only, that the king or his council could commit, but meddle with no other commitment. Secretary *Cook* tells them in this public manner, that he made a daily practice of committing without ſhewing the cauſe; yet the houſe takes no notice of any ſecretary's warrant as ſuch, nor is the ſecretary's name mentioned in the courſe of all thoſe proceedings. What then were thoſe commitments mentioned by the ſecretary? They were certainly ſuch only, as were *per ſpeciale mandatum domini regis.* They could be no other. They were the commitments then under debate. They, and they only, were referred to by the king's meſſage, and were conſequently the ſubject matter of the ſecretary's apology; for no other warrant claimed that extraordinary privilege of concealing the cauſe.

This obſervation explains him, when he calls it a power committed to him; which I conſtrue, not as annexed to his office, but ſpecially delegated. This accounts too for his notion, that the law could not touch him; but that if he abuſed his truſt, he ſhould loſe his credit with the king and his place, which he deſcribes as a heavier puniſhment than the law could inflict upon him. Upon this ground it will be eaſy to explain the notable ſingularities of this miniſter's proceeding, which are not to be reconciled to any idea of a common-law magiſtrate. Such are his meddling only with a few ſtate-offences, his reach over the whole kingdom, his committing without the power of adminiſtering an oath, his employment of none but the meſſenger of the king's chamber, and his command to mayors, juſtices, ſheriffs, &c. to aſſiſt him; all which particularities are congruous enough to the idea of the king's perſonal warrant, but utterly inconſiſtent with all the principles of magiſtracy in a ſubject.

If on the other hand it can be underſtood, that he could and did commit without ſhewing the cauſe in his own right and by virtue of his office, then was his warrant admitted to be legal by the whole houſe, and without cenſure or animadverſion. It was neither condemned by the petition of right, nor ſubject to the *habeas corpus* act of 16 of *Charles* the firſt.

16 Cha. 1. c. 10.

The truth of the caſe was no more than this. The council-board were too numerous to be acquainted with every ſecret tranſaction that required immediate confinement; and the delay by ſummoning was inconvenient in caſes that required diſpatch. The ſecretary of ſtate, as moſt entruſted, was the fitteſt hand to iſſue ſudden warrants; and therefore we find him ſo employed by queen *Elizabeth* under the quality of a privy councellor. But when the attempt failed, the judges declaring, that he muſt ſhew the cauſe, and that they would remand none of his priſoners in any caſe but that of high treaſon, thoſe warrants ceaſed, and then a new method was taken by making him the inſtrument of the king's *ſpeciale mandatum*; for that is the form in which all warrants and returns were drawn, that were produced upon that famous argument.

Having thus ſhewn, not only negatively that this power of committing was not annexed to the ſecretary's office, but affirmatively likewiſe that he was notifier or counterſigner of the king's perſonal warrant acting *in alio jure* down to the times of the 16 of *Charles* the firſt, and conſequently to the Reſtoration, for there was no ſecretary in that interval, I have but little to add upon this head, but obſerving what paſſed between that time and the caſe of *Kendall* and *Rowe*.

13 & 14 Ch. 2. c. 33.

The licenſing act, that took place in the 13th and 14th of *Charles* the ſecond, gave him his firſt right to iſſue a warrant in his own name; not indeed to commit perſons, but a warrant to ſearch for papers. Whether upon this new power he grafted any authority to commit perſons in his own right, as it ſhould ſeem he did by the precedent produced the other day, is not very material. But it is remarkable, that during that interval he adhered in ſome caſes to the old form, by ſpecifying the expreſs command of the king in this warrant.

With reſpect to the caſes that have paſſed ſince the Revolution, ſuch as the king againſt *Kendall* and *Rowe*, the queen againſt *Darby*, and the king and *Earbery*, I ſhall take no other notice of them in this place, than to ſay, they afford no light in the preſent inquiry by ſhewing the ground of the officer's authority, though they are ſtrong caſes to confirm it.

But before I can fairly conclude, that the ſecretary of ſtate's power was derived from the king's perſonal prerogative and from no other origin, I muſt examine, what has paſſed relative to the power of a ſeparate privy councellor in this reſpect. This is the more neceſſary to be done, becauſe my lord chief juſtice *Holt* has built all his authority upon this ground; and the ſubſequent caſes, inſtead of ſtriking out any new light upon the ſubject, do all lean upon and ſupport themſelves by my lord chief juſtice *Holt*'s opinion in the caſe of *Kendall* and *Rowe*.

I will therefore fairly ſtate all that I have been able to diſcover touching the matter; and then, after I have declared my own opinion, ſhall leave others to judge for themſelves.

In the firſt place it is proper to obſerve, that a privy councellor cannot derive his authority from the ſtatute of *Weſtminſter* the firſt; which recites an arreſt by the command of the king to be one of thoſe caſes that were irrepleviſeable by the common law. The principal commentator upon theſe words is *Staundford*, who ſays, 'as to the commandment of the king, this is to be underſtood of the commandment of his own mouth, or of his council, 'which is incorporate to him, and ſpeaks with the mouth of the king 'himſelf; for otherwiſe, if you will take theſe words of commandment 'generally, you may ſay that every *capias* in a perſonal action is the 'command of the king.' *Lambard* in his chapter of bailment, where he cites this act of parliament, gives it the ſame conſtruction, by allowing a commitment by the council to be within the equity of theſe words, 'commandment of 'the king.' Thus far, and no further, did the crown lawyers in the third of king *Charles* the firſt endeavour to extend the text of the law; and it is plain from the caſes before cited, that the judges in queen *Elizabeth*'s time were of the ſame opinion, that the argument could not be extended in favour of the ſingle councellor; becauſe they held, that he is bound to ſhew the cauſe upon his warrant, as diſtinguiſhed from the other warrants, where they admit the cauſe need not be ſhewn.

Staundf. Pl. c. fo. 72. b.

Lamb. Eirenarch. & b. 3. c. 2. p. 335.

If he is not then entitled by this ſtatute, is he impowered by the common law? They, who contend he is, would do well to ſhew ſome authority in proof of their opinion. It is clear, he is not numbered among the conſervators. It is as clear, that he is not mentioned by any book as one of the ordinary magiſtrates of juſtice with any ſuch general authority.

The firſt place, in which any thing of this kind is to be found, is in the year-book of *Henry* the ſixth, where the ſheriff returns a detainer under the warrant of *duos de concilio pro rebus regem tangentibus*. This proof has an unlucky defect in it; becauſe the reading is doubtful, the word *dnos* as it is written ſtanding as well for *dominos*, as for *duos*; ſo that till the reading is ſettled, which is beyond my ſkill, the authority muſt be ſuſpended.

The next time you meet with a privy councellor in the light of a magiſtrate is in the firſt of *Edward* the ſixth, chap. 12. where one of the privy council is empowered to take the accuſation in ſome new treaſons therein mentioned; and he is for this purpoſe joined with the juſtice of aſſize and juſtice of the peace. The like power is given to him by the fifth and ſixth of the ſame king, c. 11. in a like caſe; and I find in *Kelyng*, p. 19, that when the judges met to reſolve certain points before the trial of the regicides, they reſolved, that a confeſſion upon examination before a privy councellor, though he be not a juſtice of the peace, is a confeſſion within the meaning of the ſtatute of the fifth and ſixth of *Edward* the ſixth. That act of parliament in the twelfth ſection had provided, that no perſon ſhould be attainted of treaſon, but upon the teſtimony of two lawful accuſers, unleſs the ſaid party arraigned ſhould willingly without violence confeſs the ſame.

1 E. 6. c. 12. ſ. 19.

5 & 6 E. 6. c. 11. ſ. 10.

It ſeems to me, that the ground upon which the judges proceeded in this reſolution, was the expreſs power given to the privy council in the clauſe next but one before that juſt mentioned, where the act enables them to take the accuſation in the new treaſons there mentioned.

Whether they reaſoned in that way, or whether they conceived that the power there given was a proof of ſome like power which they enjoyed to take accuſation in the caſe of treaſons at the common law, the book has not explained; ſo that hitherto this authority in the caſe of high treaſon ſtands upon a very poor foundation, being in truth no more than a conjecture of law without authority to ſupport it.

The next authorities are the caſes already recited in *Leonard*, which to the preſent point prove nothing more than this; that the judges do admit a power in a privy councellor to commit, without ſpecifying in what caſes. They demand the cauſe, and a better return; whereupon ſir *Francis Walſingham*, inſtead of relying upon his power as privy councellor, returns a new warrant ſigned by the whole board.

Two years after this came forth that famous reſolution of all the judges, which is reported in 1 *Anderſon* 297. 34th of *Elizabeth*. There is no occaſion to obſerve, how arbitrary the prerogative grew, and how faſt it increaſed towards the end of this queen's reign. It ſeems to me, as if the privilege claimed by the king's perſonal warrant, and from him derived to the council-board, by conſtruction, had ſome-how or other been adopted by every individual of that board; for in fact theſe warrants became ſo frequent and oppreſſive, that the courts of juſtice were obliged at laſt to interpoſe.

However they might be overborne by the terror of the king's ſpecial command either in or out of council, they had courage enough to reſiſt the novel encroachments of the ſeparate members; and therefore they did in the courts of *King's Bench* and *Common Pleas* ſet at large many perſons ſo committed: upon which occaſion a queſtion being put to the judges, to ſpecify in what caſes the priſoner was to be remanded, they anſwer the queſtion with a remonſtrance of their own againſt the illegal warrants granted by the privy councellors. The preamble relates entirely to theſe commitments, wherein they deſire, that ſome good order may be taken, that her highneſs's ſubjects may not be committed or detained in priſon by commandment of any nobleman, againſt the laws of the realm.

The queſtion is this: in what caſes priſoners ſent to cuſtody by her majeſty, her council, or any one or more of her council, are to be detained in priſon, and not to be delivered by her majeſty's courts or judges.

The anſwer is, 'We think, that if any perſon be committed by her 'majeſty's command from her perſon, or by order from the council-'board, or if any one or two of her council commit one for high treaſon, 'ſuch perſons ſo in the caſe before committed may not be delivered by 'any of her courts without due trial by the law and judgment of ac-'quittal had. Nevertheleſs the judges may award the queen's writs to 'bring the bodies of ſuch perſons before them; and if upon return there-'of the cauſes of their commitment be certified to the judges, as it ought 'to be, then the judges in the caſes before ought not to deliver him, but 'to remand the priſoner to the place from whence he came; which cannot 'conveniently be done, unleſs notice of the cauſes in generality, or elſe 'ſpecially, be given to the keeper or goaler that ſhall have the cuſtody of 'ſuch priſoner.'

There is a ſtudied obſcurity in this opinion, which ſhews, how cautious the judges were obliged to be in thoſe dangerous times; for whether they meant to acknowledge a general power in the king or his council to commit, as diſtinguiſhed from a ſpecial power in one or more of his council to commit, only in the caſe of high treaſon; or whether this caſe of high treaſon is to be referred to all the commitments as the only unbailable caſe; or again, whether in the ſuperior commitment by the royal perſon or his council, they would deliver the priſoner though no cauſe was ſpecified; or if one of the council committed for offences below high treaſon *where* they declare they would not remand, yet whether they would abſolutely diſcharge or only upon bail; is altogether either ambiguous or uncertain.

It is evident to me, that the judges did not intend to be underſtood touching theſe matters; and the only propoſitions, that are clearly laid down in this reſolution, are theſe.

Firſt, that they would never remand upon the councellor's commitment but in high treaſon.

Secondly, that the cauſe ought to be ſhewed in all caſes.

This reſolution grew to be much agitated afterwards in the third of *Charles* the firſt, and had the honour, like other dark oracles, to be cited on both ſides.

Thus much it was neceſſary to obſerve upon this famous opinion; becauſe it was upon this opinion, that lord chief juſtice *Holt* principally relied. At this time it is apparent, that all the privy councellors exerciſed this right in common. Whatever it was, the complaint ſhews, it was a general practice, and a privilege enjoyed by all the members of that board; from whence it is natural to ſuppoſe, that if the power was well founded, the ſame practice would have continued to this time in the ſame way, ſeeing how tenacious all men are of thoſe things that are called rights and privileges. Inſtead of this it doth not appear, that the council from that æra have ever aſſerted their rights; and now at laſt, when the ſecretary of ſtate has revived the claim, for the common benefit, as it ſhould ſeem, of the whole body, no other perſon has followed this example, or knows to this moment that he is entitled to ſuch right. Any body who conſiders what the conſequence muſt have been from theſe determinations of the judges, might venture to affirm, that the privy councellor's warrant from this period ceaſed and grew out of uſe; for as the cauſe in this caſe was neceſſary to be ſpecified, and the priſoner was never to be remanded but in the caſe of high treaſon, that warrant became at once unſerviceable, and the crown was forced to reſort to the royal mandate or the board-warrant, which, notwithſtanding the caſe in *Anderſon*, was ſtill inſiſted to be unbailable and good without a cauſe.

Hence it happened, that in the great debate in the third of king *Charles* the firſt, no privy councellor's warrants do once occur; but inſtead thereof you find the ſecretary of ſtate dealing forth the king's royal mandate, and the privy councellor's authority at reſt.

The only reaſon, why I touch upon theſe proceedings, is for the ſake of obſerving, that no notice is taken in thoſe arguments of the privy councellor's right to commit; and yet the power of the king himſelf, and of his council, by the ſtatute of *Weſtminſter* the firſt, is largely diſcuſſed, and ſo fully handled, that if the warrant of one privy councellor had then been in uſe, it muſt have been brought forth in the argument; for if it could have ſerved no other purpoſe, it would have been material, in order to mark the diſtinction between that and the warrant of the whole board.

16 Ch. 1. c. 10.

From theſe obſervations I conclude, that theſe warrants were then deceaſed and gone, and would probably have never made their appearance again even in deſcription, if the bill in the 16th of *Charles* the firſt, had not recalled them to memory, not as things either then in uſe or admitted to be legal, but as one of the modes of commitment which might be again revived, becauſe it had been formerly practiſed. Therefore when this form of warrant appears, as it does in the catalogue of other forms, both legal and illegal, no argument can be raiſed from a pretended recognition of this particular warrant; ſince it was neceſſary to name every mode, that ever had been uſed by the king, the council, or the ſtar-chamber, in order to make the remedy by *habeas corpus* univerſal.

Journ. Com.

But if there can be a doubt, whether this act of parliament is to be deemed a recognition of this authority, there is a paſſage in the journal of the houſe of commons, that proves the contrary in direct terms.

Whilſt this bill was paſſing, the houſe makes an amendment, which appears by the queſtion put to be this, whether the houſe ſhould aſſent to the putting the word *liberties* out of the bill.

But as the paſſage in the bill is not mentioned in the journals, it muſt be collected by inferences. By the phraſe *left out of the bill*, I preſume it was permitted to ſtand in the *preamble*. Now when you look into the preamble, the word *liberties* is there to be found in that part of the *preamble* which recites this uſurpation of the privy council upon the *liberties*, as well as the properties of the ſubject; whereas the *enacting* clauſe condemns only the juriſdiction of that board, ſo far as it aſſumed a juriſdiction over the *property* of the ſubject; from whence I collect that the word *liberties* ſtood in that clauſe; and the paſſage that follows in the journal does ſtrongly confirm it.

The words are theſe: 'Reſolved upon the queſtion, that this houſe does aſſent to the putting the word *liberties* out of the bill concerning the Star-Chamber and council pleadings; becauſe the houſe has a bill to be drawn to provide for the liberty of the ſubject in a large manner. Mr. ſerjeant *Wild* and Mr. *Whitelock* are appointed to draw a bill to that purpoſe upon the ſeveral points that have been here this day debated.

'Reſolved upon the queſtion, that the body of the lords of the council, nor any one of them in particular as a privy councellor, has any power to impriſon any free-born ſubject, except in ſuch caſes as they are warranted by the ſtatutes of the realm.'

It is pretty plain from this paſſage, that the debate turned upon the meaning of the ſtatute of *Weſtminſter* the firſt, and the reſolution of the judges in *Anderſon*, about which it is not fit to give any opinion; my deſign by citing this paſſage being only to ſhew, that this act of parliament does not even prove the actual practice of ſuch warrants at that time, much leſs does recognize their legality.

What follows is ſtill more remarkable touching this buſineſs, upon a doubt ſtarted in the trial of the ſeven biſhops. They were committed by a warrant ſigned by no leſs than thirteen privy councellors; but the warrant did not appear to be ſigned by them in council. The objection taken was, that the warrant was void, being ſigned only by the privy councellors ſeparately, and not in a body. If any man in *Weſtminſter-Hall* at that time had underſtood, that one or more privy councellors had a right to commit for a miſdemeanor, that would have been a flat anſwer to the objection; but they are ſo far from inſiſting upon this, that all the king's councellors, as well as the court, do admit the warrant would have been void, if it could be taken to be executed by them out of council.

The ſolicitor-general upon that occaſion cites the 16th of *Charles* the firſt, which ſtatute is produced and read, and yet no argument is taken from thence to prove the authority of the ſeparate lords, though the act is before them. Mr. *Pollexfen* in the courſe of the debate ſays, 'We do all pretty well agree, for aught I can perceive, in two things. We do not deny, but that the council-board has power to commit. They on the other ſide do not affirm, that the lords of the council can commit out of the council.

'*Attorney-General.* Yes, they may as juſtices of the peace.

'*Pollexfen.* This is not pretended to be ſo here.

'*Lord Chief Juſtice.* No, no, that is not the caſe.'

The court at laſt got rid of the objection, by preſuming the warrant to have been executed in council.

There cannot be a ſtronger authority than this I have now cited for the preſent purpoſe. The whole body of the law, if I may uſe the phraſe, were as ignorant at that time of a privy councellor's right to commit in the caſe of a libel, as the whole body of privy councellors are at this day.

The counſel on both ſides in that cauſe were the ableſt of their time, and few times have produced abler. They had been concerned in all the ſtate-caſes during the whole reign of king *Charles* the ſecond, on one ſide or the other; and to ſuppoſe that all theſe perſons could be utterly ignorant of this extraordinary power, if it had been either legal or even practiſed, is a ſuppoſition not to be maintained.

This is the whole that I have been able to find, touching the power of one or more privy councellors to commit; and to ſum up the whole of this buſineſs in a word it ſtands thus.

The two caſes in *Leonard* do preſuppoſe ſome power in a privy councellor to commit, without ſaying what; and the caſe in *Anderſon* does plainly recognize ſuch a power in high treaſon: but with reſpect to his juriſdiction in other offences, I do not find it was either claimed or exerciſed.

In conſequence of all this reaſoning, I am forced to deny the opinion of my lord chief juſtice *Holt* to be law, if it ſhall be taken to extend beyond the caſe of high treaſon. But there is no neceſſity to underſtand the book in a more general ſenſe; nor is it fair indeed to give the words a more large conſtruction: for as the concluſion ought always to be grounded on the premiſſes, and the premiſſes are confined to the caſe of high treaſon only, the opinion ſhould naturally conform to the caſes cited, more eſpecially as the caſe there before the court was a caſe of high treaſon, and they were under no neceſſity to lay down the doctrine larger than the caſe required.——Now whereas it has been argued, that if you admit a power of committing in high treaſon, the power of committing in leſſer offences follows *à fortiori*; I beg leave to deny that conſequence, for I take the rule with reſpect to all ſpecial authorities to be directly the reverſe. They are always ſtrictly confined to the letter; and when I ſee therefore, that a ſpecial power in any ſingle caſe only has been permitted to a perſon, who in no other inſtance is known or recorded by the common law as a magiſtrate, I have no right to enlarge his authority one ſtep beyond that caſe. Conſider how ſtrange it would ſound, if I ſhould declare at once, that every privy councellor without exception is inveſted with a power to commit in all offences without exception from high treaſon down to treſpaſs, when it is clear that he is not a conſervator. It might be ſaid of me, 'he ſhould have explained himſelf a little more clearly, and told us where he had found the deſcription of ſo ſingular a magiſtrate, who being no conſervator was yet in the nature of a conſervator.'

I have now finiſhed all I have to ſay upon this head; and am ſatisfied, that the ſecretary of ſtate hath aſſumed this power as a transfer, I know not how, of the royal authority to himſelf; and that the common law of *England* knows no ſuch magiſtrate. At the ſame time I declare, wherein my brothers do all agree with me, that we are bound to adhere to the determination of the queen againſt *Derby*, and the king againſt *Earbury*; and I have no right to overturn thoſe deciſions, even though it ſhould be admitted, that the practice, which has ſubſiſted ſince the Revolution, had been erroneous in its commencement.

The ſecretary of ſtate having now been conſidered in the two lights of ſecretary and privy councellor, and likewiſe as the ſubſtitute of the royal mandate; in the two firſt he is clearly no conſervator; in the laſt, if he can be ſuppoſed to have borrowed the right of conſervatorſhip from the ſovereign himſelf, yet no one will argue or pretend, that ſo great a perſon, one ſo high in authority, can be deemed a juſtice of the peace within the equity of the 24th of *Geo.* II.

However, I will for a time admit the ſecretary of ſtate to be a conſervator, in order to examine, whether in that character he can be within the equity of this act.

SECOND QUESTION.

Upon this queſtion, I ſhall take into conſideration the 7th of *James* I. *c.* 5. becauſe, though it is not material upon this record to determine, whether the ſpecial evidence can be admitted under the general iſſue of not guilty, the defendant having in this inſtance juſtified; yet as that act is made in *eâdem materiâ*, and for the benefit of the ſame perſons, the rule of conſtruction obſerved in that will in great meaſure be an authority for this.

The 24th of *Geo.* II. is entitled, 'An act for the rendering juſtices of the peace more ſafe in the execution of their offices, and for indemnifying conſtables and others acting in obedience to their warrants.' The preamble runs thus: 'Whereas juſtices of the peace are diſcouraged in the execution of their offices, by vexatious actions brought againſt them, for or by reaſon of ſmall and involuntary errors in their proceedings; and whereas it is neceſſary, that they ſhould be, as far as is conſiſtent with juſtice and the ſafety and liberty of the ſubjects over whom their authority extends, rendered ſafe in the execution of the ſaid office and truſt; and whereas it is alſo neceſſary, that the ſubject ſhould be protected from all wilful and oppreſſive abuſe of the ſeveral laws committed to the care and execution of the ſaid juſtices of peace.' Then comes the enacting part.

The only granter of the warrant in the enacting part, as well as the preamble, is the juſtice of the peace. The officers, as they are deſcribed, are conſtables, headboroughs, and other officers or perſons acting by their order, or in their aid. If any perſon acting in obedience to ſuch warrant, and producing the ſaid warrant upon demand, is afterwards proſecuted for ſuch act, the ſtatute ſays, he ſhall be acquitted, upon the production of ſuch warrant. The counſel for the defendants ſay, the ſecretary and the meſſengers are both within the equity of this act. The firſt is a juſtice of the peace, becauſe he is a conſervator. If ſo the latter is his officer, which I will admit. The propoſition then is, that conſervators are within the *equity* of this act. They are clearly not within the *letter*; for *juſtice* and *conſervator* are not convertible terms; and though it ſhould be admitted, that a juſtice of the peace is ſtill a conſervator, yet a conſervator is not a juſtice.

The defendants have argued upon two rules of conſtruction, which in truth are but one.

Firſt, where in a general act a particular is put as an example, all other perſons of like deſcription ſhall be comprized.

Secondly, where the words of a ſtatute enact a thing, it enacts all other things in like degree.

In *Plowden* 37, and 167, and 467, ſeveral caſes are cited as authorities under theſe rules of conſtruction; as, that the biſhop of *Norwich* in one act ſhall mean all biſhops; that the warden of the *Fleet* ſhall mean all goalers; that juſtices of a diviſion mean all juſtices of the county at large, that guardian in ſocage after the heir's attaining fourteen, ſhall be a bailiff in account; that executors ſhall include adminiſtrators, and tenant for years a tenant for one year or any leſs time; with ſeveral other inſtances to the like purpoſe.

In the firſt place, though the general rule be true enough, that where it is clear the perſon or thing expreſſed is put by way of example, the judges muſt fill up the catalogue; yet we ought to be ſure, from the words and meaning of the act itſelf, that the thing or perſon is really inſerted as an example.

This is a very inaccurate way of penning a law; and the inſtances of this ſort are ſcarce ever to be found, except in ſome of the old acts of parliament. And wherever this rule is to take place, the act muſt be general, and the thing expreſſed muſt be particular; ſuch as thoſe caſes of the warden of the *Fleet* and the biſhop of *Norwich*: whereas the act before us is equally general in all its parts, and requires no addition or ſupply to give it the full effect. Therefore if this way of arguing can be maintained by either of the rules, it muſt fall under the ſecond, which is, that where the words of a ſtatute enact a thing, it enacts all other things in like degree.

In all caſes that fall within this rule, there muſt be a perfect reſemblance between the perſons or things expreſſed and thoſe implied. Thus for inſtance, adminiſtrators are the ſame thing with executors; tenant for half a year and tenant for years have both terms for a chattel intereſt, differing only in the duration of the term; and ſo of the reſt, which I need not repeat one by one: and in all theſe caſes, the perſons or things to be implied are in all reſpects the objects of the law as much as thoſe expreſſed. Does not every body ſee from hence, that you muſt firſt examine the law before you can apply the rule of conſtruction? For the law muſt not be bent by the conſtruction, but that muſt be adapted to the ſpirit and ſenſe of the law. The fundamental rule then, by which all others are to be tried, is laid down in *Wimbiſh* and *Tailbois*, *Plowden* 57, 58. according to which the beſt guide is to follow the intent of the ſtatutes. Again, according to *Plowden*, *p.* 205 and 231. the conſtruction is to be collected out of the words according to the true intent and meaning of the act, and the intent of the makers may be collected from the cauſe or neceſſity of making the act, or by foreign circumſtances.

Let us try the preſent caſe by theſe rules; and let the juſtice of the peace ſtand for a moment in this act as a magiſtrate at large; and then compare him as he is here deſcribed with the conſervator.

The juſtice here is a magiſtrate intruſted with the execution of many laws, liable to actions for involuntary errors, and actually diſcouraged by vexatious ſuits; in reſpect of which perilous ſituation he is intended to be rendered more ſafe in the execution of his office.—He is beſides a magiſtrate, who acts by warrant directed to conſtables and other officers, namely, known officers who are bound to execute his warrants.

Now take the conſervator.—He is intruſted with the execution of no laws, if the word *law* is underſtood to mean *ſtatutes*, as I apprehend it is.—He is liable to no actions, becauſe he never acts; the keeping of the peace being ſo completely transferred to and ſo engroſſed by the juſtice, that the name of conſervator is almoſt forgot. He is far from being diſcouraged by actions. No man ever heard of an action brought againſt a conſervator as ſuch; unleſs you will call a conſtable a conſervator, which will not ſerve the preſent purpoſe, becauſe theſe perſons can hardly be deemed juſtices within the act.—Again, how does it appear, that the conſervator could either grant a warrant like the preſent, or command a conſtable to execute it? Theſe powers are at leaſt very doubtful; but I think I may take it for granted, that the conſervator could not command a meſſenger of the king's chamber.

Did then this act of parliament refer to magiſtrates of known authority and daily employment, or to antiquated powers and perſons known to have exiſted by hiſtorical tradition only? Did it mean to redreſs real grievances, or thoſe that were never felt? *Ad ea, quæ frequenter accidunt, jura adaptantur.*

From this compariſon it may appear, how little there is to drag the conſervator into the law, who hardly correſponds with the juſtice of the peace in any one point of the deſcription. But further, it is unfortunate for the conſervators upon this queſtion, that one half of them are the objects of the ſtatute by name, as conſtable, *&c.* and yet not one of their acts as conſervators is within the proviſion.

And now give me leave to aſk one queſtion. Will the ſecretary of ſtate be claſſed with the higher or the lower conſervator? If with the higher, ſuch as the king, the chancellor, *&c.* he is too much above the juſtice to be within the equity. If with the lower, he is too much below him. And as to the ſheriff and the coroner, they cannot be within the law; becauſe they never grant ſuch warrants as theſe. So that at laſt, upon conſidering all the conſervators, there is not one that does not ſtand moſt evidently excluded, unleſs the ſecretary of ſtate him ſhall be excepted.

But if there wanted arguments to confute this pretenſion, the conſtruction that has prevailed upon the ſeventh of *James* the firſt, would decide the point. That is an act of like kind to relieve juſtices of the peace, mayors, conſtables, and certain other officers, in troubleſome actions brought againſt them for the legal execution of their offices; who are enabled by that act to plead the general iſſue. Now that law has been taken ſo ſtrictly, that neither church-wardens, nor overſeers, were held to be within the equity of the word *conſtables*, although they were clearly officers, and acted under the juſtice's warrants. Why? Becauſe that act, being made to change the courſe of the common law, could not be extended beyond the letter. If then that privilege of giving the ſpecial matter in evidence upon the general iſſue is contrary to the common law, how much more ſubſtantially is this act an innovation of the common law, which indemnifies the officer upon the production of the warrant, and deprives the ſubject of his right of action?

It is impoſſible, that two acts of parliament can be more nearly allied or connected with one another, than that of 24 *George* II. and the 7th of *James* I. The objects in both are the ſame, and the remedies are ſimilar in both, each of them changing the common law for the benefit of the parties concerned. The one, in truth, is the ſequel or ſecond part of the other. The firſt not being an adequate remedy in caſe of the ſeveral perſons therein mentioned, the ſecond is added to complete the work, and to make them as ſecure as they ought to be made from the nature of the caſe. If by a contrary conſtruction any perſon ſhould be admitted into the laſt that are not included in that firſt, the perſon, whoever he is, will be without the privilege of pleading the general iſſue, and giving the ſpecial matter in evidence, which the latter would have certainly given by expreſs words, if the parliament could have imagined he was not comprized in the firſt.

Upon the whole, we are all of opinion, that neither ſecretary of ſtate, nor the meſſenger, are within the meaning of this act of parliament.

Third Queſtion.

But if they were within the general equity, yet it behoved the meſſenger to ſhew, that they have acted in obedience to the warrant; for it is upon that condition, that they are intitled to the exemption of the act. When the legiſlature excuſed the officer from the perilous taſk of judging, they compelled him to an implicit obedience; which was but reaſonable: ſo that now he muſt follow the dictates of his warrant, being no longer obliged to inquire, whether his ſuperior had or had not any juriſdiction. The late deciſion of the court of *King's Bench* in the caſe of general (*a*) warrants was ruled upon this ground, and rightly determined.

This part of the caſe is clear, and ſhall be diſpatched in very few words.

Firſt, the defendants did not take with them a conſtable, which is a flat objection. They had no buſineſs to diſpute either the propriety or the legality of this direction in the execution of the warrant; nor have their counſel any right to diſpute it here in their behalf. They can have no other plea under this act of parliament, than ignorance and obedience.

Secondly, they did not bring the papers to the earl of *Halifax*, to be examined according to the tenor of the warrant, but to Mr. *Lovell Stanhope*. This command ought to have been literally purſued; nor is it any excuſe to ſay now, as they do in their plea, that Mr. *L. Stanhope* was an aſſiſtant to the earl of *Halifax*. If he is a magiſtrate, he can have no aſſiſtant, nor deputy, to execute any part of that employment. The right is perſonal to himſelf, and a truſt that he can no more delegate to another, than a juſtice of the peace can transfer his commiſſion to his clerk.

I ſhall ſay no more upon this head. But I cannot help obſerving, that the ſecretary of ſtate, who has not been many years intruſted with this authority, has already eaſed himſelf of every part of it, except the ſigning and ſealing the warrant. The law clerk, as he is called, examines both perſons and papers. He backs or diſcharges. This is not right. I could wiſh for the future, that the ſecretary would diſcharge this part of his office in his own perſon.

Fourth and laſt Queſtion.

The queſtion that ariſes upon the ſpecial verdict being now diſpatched, I come in my laſt place to the point, which is made by the juſtification; for the defendants, having failed in the attempt made to protect themſelves by the *ſtat.* of the 24th of *Geo.* II. are under a neceſſity to maintain the legality of the warrants, under which they have acted, and to ſhew that the ſecretary of ſtate in the inſtance now before us, had a juriſdiction to ſeize the defendants papers. If he had *no ſuch* juriſdiction, the law is clear, that the officers are as much reſponſible for the treſpaſs as their ſuperior.

This, though it is not the moſt difficult, is the moſt intereſting queſtion in the cauſe; becauſe if this point ſhould be determined in favour of the juriſdiction, the ſecret cabinets and bureaus of every ſubject in this kingdom will be thrown open to the ſearch and inſpection of a meſſenger, whenever the ſecretary of ſtate ſhall think fit to charge, or even to ſuſpect, a perſon to be the author, printer, or publiſher of a ſeditious libel.

The meſſenger, under this warrant, is commanded to ſeize the perſon deſcribed, and to bring him with his papers to be examined before the ſecretary of ſtate. In conſequence of this, the houſe muſt be ſearched; the lock and doors of every room, box, or trunk muſt be broken open; all the papers and books without exception, if the warrant be executed according to its tenor, muſt be ſeized and carried away; for it is obſervable, that nothing is left either to the diſcretion or to the humanity of the officer.

This power ſo aſſumed by the ſecretary of ſtate is an execution upon all the party's papers, in the firſt inſtance. His houſe is rifled; his moſt valuable ſecrets are taken out of his poſſeſſion, before the paper for which he is charged is found to be criminal by any competent juriſdiction, and before he is convicted either of writing, publiſhing, or being concerned in the paper.

This power, ſo claimed by the ſecretary of ſtate, is not ſupported by one ſingle citation from any law book extant. It is claimed by no other magiſtrate in this kingdom but himſelf: the great executive hand of criminal juſtice, the lord chief juſtice of the court of *King's-Bench*, chief juſtice *Scroggs* excepted, never having aſſumed this authority.

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* *Money* and others againſt *Leach*, *Mich.* 6 *Geo.* 3. Ante 307.

The arguments, which the defendants counſel have thought fit to urge in ſupport of this practice, are of this kind.

That ſuch warrants have iſſued frequently ſince the Revolution, which practice has been found by the ſpecial verdict; though I muſt obſerve, that the defendants have no right to avail themſelves of that finding, becauſe no ſuch practice is averred in their juſtification.

That the caſe of the warrants bears a reſemblance to the caſe of ſearch for ſtolen goods.

They ſay too, that they have been executed without reſiſtance upon many printers, bookſellers, and authors, who have quietly ſubmitted to the authority; that no action hath hitherto been brought to try the right; and that although they have been often read upon the returns of *habeas corpus*, yet no court of juſtice has ever declared them illegal.

And it is further inſiſted, that this power is eſſential to government, and the only means of quieting clamours and ſedition.

Theſe arguments, if they can be called arguments, ſhall be all taken notice of; becauſe upon this queſtion I am deſirous of removing every colour or plauſibility.

Before I ſtate the queſtion, it will be neceſſary to deſcribe the power claimed by this warrant in its full extent.

If honeſtly exerted, it is a power to ſeize that man's papers, who is charged upon oath to be the author or publiſher of a ſeditious libel; if oppreſſively, it acts againſt every man, who is ſo deſcribed in the warrant, though he be innocent.

It is executed againſt the party, before he is heard or even ſummoned; and the information, as well as the informers, is unknown.

It is executed by meſſengers with or without a conſtable (for it can never be pretended, that ſuch is neceſſary in point of law) in the preſence or the abſence of the party, as the meſſengers ſhall think fit, and without a witneſs to teſtify what paſſes at the time of the tranſaction; ſo that when the papers are gone, as the only witneſſes are the treſpaſſers, the party injured is left without proof.

If this injury falls upon an innocent perſon, he is as deſtitute of remedy as the guilty: and the whole tranſaction is ſo guarded againſt diſcovery, that if the officer ſhould be diſpoſed to carry off a bank-bill, he may do it with impunity, ſince there is no man capable of proving either the taker or the thing taken.

It muſt not be here forgot, that no ſubject whatſoever is privileged from this ſearch; becauſe both houſes of parliament have reſolved, that there is no privilege in the caſe of a ſeditious libel.

Nor is there pretence to ſay, that the word 'papers' here mentioned ought in point of law to be reſtrained to the libellous papers only. The word is general, and there is nothing in the warrant to confine it; nay, I am able to affirm, that it has been upon a late occaſion executed in its utmoſt latitude: for in the caſe of *Wilkes* againſt *Wood*, when the meſſengers heſitated about taking all the manuſcripts, and ſent to the ſecretary of ſtate for more expreſs orders for that purpoſe, the anſwer was, *that all muſt be taken, manuſcripts and all.* Accordingly, all was taken, and Mr. *Wilkes*'s private pocket-book filled up the mouth of the ſack.

I was likewiſe told in the ſame cauſe by one of the moſt experienced meſſengers, that he held himſelf bound by his oath to pay an implicit obedience to the commands of the ſecretary of ſtate: that in common caſes he was content to ſeize the printed impreſſions of the papers mentioned in the warrant; but when he received directions to ſearch further, or to make a more general ſeizure, his rule was to ſweep all. The practice has been correſpondent to the warrant.

Such is the power, and therefore one ſhould naturally expect that the law to warrant it ſhould be clear in proportion as the power is exorbitant.

If it is law, it will be found in our books. If it is not to be found there, it is not law.

The great end, for which men entered into ſociety, was to ſecure their property. That right is preſerved ſacred and incommunicable in all inſtances, where it has not been taken away or abridged by ſome public law for the good of the whole. The caſes where this right of property is ſet aſide by poſitive law, are various. Diſtreſſes, executions, forfeitures, taxes, *&c.* are all of this deſcription; wherein every man by common conſent gives up that right, for the ſake of juſtice and the general good. By the laws of *England*, every invaſion of private property, be it ever ſo minute, is a treſpaſs. No man can ſet his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in treſpaſs, where the defendant is called upon to anſwer for bruiſing the graſs and even treading upon the ſoil. If he admits the fact, he is bound to ſhew by way of juſtification, that ſome poſitive law has empowered or excuſed him. The juſtification is ſubmitted to the judges, who are to look into the books; and if ſuch a juſtification can be maintained by the text of the ſtatute law, or by the principles of common law. If no ſuch excuſe can be found or produced, the ſilence of the books is an authority againſt the defendant, and the plaintiff muſt have judgment.

According to this reaſoning, it is now incumbent upon the defendants to ſhew the law, by which this ſeizure is warranted. If that cannot be done, it is a treſpaſs.

Papers are the owner's goods and chattels: they are his deareſt property; and are ſo far from enduring a ſeizure, that they will hardly bear an inſpection; and though the eye cannot by the laws of *England* be guilty of a treſpaſs, yet where private papers are removed and carried away, the ſecret nature of thoſe goods will be an aggravation of the treſpaſs, and demand more conſiderable damages in that reſpect. Where is the written law that gives any magiſtrate ſuch a power? I can ſafely anſwer, there is none; and therefore it is too much for us without ſuch authority to pronounce a practice legal, which would be ſubverſive of all the comforts of ſociety.

But though it cannot be maintained by any direct law, yet it bears a reſemblance, as was urged, to the known caſe of ſearch and ſeizure for ſtolen goods.

I anſwer, that the difference is apparent. In the one, I am permitted to ſeize my own goods, which are placed in the hands of a public officer, till the felon's conviction ſhall intitle me to reſtitution. In the other, the party's own property is ſeized before and without conviction, and he has no power to reclaim his goods, even after his innocence is cleared by acquittal.

The caſe of ſearching for ſtolen goods crept into the law by imperceptible practice. It is the only caſe of the kind that is to be met with. No leſs a perſon than my lord *Coke* denied its legality; and therefore if the two caſes reſembled each other more than they do, we have no right, without an act of parliament, to adopt a new practice in the criminal law, which was never yet allowed from all antiquity. 4 *Inſt.* 176.

Obſerve too the caution with which the law proceeds in this ſingular caſe.—There muſt be a full charge upon oath of a theft committed.—The owner muſt ſwear that the goods are lodged in ſuch a place.—He muſt attend at the execution of the warrant to ſhew them to the officer, who muſt ſee that they anſwer the deſcription.—And, laſtly, the owner muſt abide the event at his peril: for if the goods are not found, he is a treſpaſſer; and the officer, being an innocent perſon, will be always a ready and convenient witneſs againſt him.

On the contrary, in the caſe before us nothing is deſcribed, nor diſtinguiſhed: no charge is requiſite to prove, that the party has any criminal papers in his cuſtody: no perſon preſent to ſeparate or ſelect: no perſon to prove in the owner's behalf the officer's miſbehaviour.—To ſay the truth, he cannot eaſily miſbehave, unleſs he pilfers; for he cannot take more than all.

If it ſhould be ſaid, that the ſame law which has with ſo much circumſpection guarded the caſe of ſtolen goods from miſchief, would likewiſe in this caſe protect the ſubject, by adding proper checks; would require proofs before-hand; would call up the ſervant to ſtand by and overlook; would require him to take an exact inventory, and deliver a copy: my anſwer is, that all theſe precautions would have been long ſince eſtabliſhed by law, if the power itſelf had been legal; and that the want of them is an undeniable argument againſt the legality of the thing.

What would the parliament ſay, if the judges ſhould take upon themſelves to mould an unlawful power into a convenient authority, by new reſtrictions? That would be, not judgment, but legiſlation.

I come now to the practice ſince the Revolution, which has been ſtrongly urged, with this emphatical addition, that an uſage tolerated from the æra of liberty, and continued downwards to this time through the beſt ages of the conſtitution, muſt neceſſarily have a legal commencement. Now, though that pretence can have no place in the queſtion made by this plea, becauſe no ſuch practice is there alledged; yet I will permit the defendant for the preſent to borrow a fact from the ſpecial verdict, for the ſake of giving it an anſwer.

If the practice began then, it began too late to be law now. If it was more ancient, the Revolution is not to anſwer for it; and I could have wiſhed, that upon this occaſion the Revolution had not been conſidered as the only baſis of our liberty.

The Revolution reſtored this conſtitution to its firſt principles. It did no more. It did not enlarge the liberty of the ſubject; but gave it a better ſecurity. It neither widened nor contracted the foundation, but repaired, and perhaps added a buttreſs or two to the fabric; and if any miniſter of ſtate has ſince deviated from the principles at that time recognized, all that I can ſay is, that, ſo far from being ſanctified, they are condemned by the Revolution.

With reſpect to the practice itſelf, if it goes no higher, every lawyer will tell you, it is much too modern to be evidence of the common law: and if it ſhould be added, that theſe warrants ought to acquire ſome ſtrength by the ſilence of thoſe courts, which have heard them read ſo often upon returns without cenſure or animadverſion, I am able to borrow my anſwer to that pretence from the court of *King's-Bench*, which lately declared with great unanimity in the caſe of general warrants, that as no objection was taken to them upon the returns, and the matter paſſed *ſub ſilentio*, the precedents were of no weight. I moſt heartily concur in that opinion: and the reaſon is more pertinent here, becauſe the court had no authority in the preſent caſe to determine againſt the ſeizure of papers, which was not before them; whereas in the other they might, if they had thought fit, have declared the warrant void, and diſcharged the priſoner *ex officio*.

This is the firſt inſtance I have met with, where the ancient immemorable law of the land, in a public matter, was attempted to be proved by the practice of a private office.

The names and rights of public magiſtrates, their power and forms of proceedings as they are ſettled by law, have been long ſince written, and are to be found in books and records. Private cuſtoms indeed are ſtill to be ſought from private tradition. But whoever conceived a notion, that any part of the public law could be buried in the obſcure practice of a particular perſon?

To *ſearch ſeize and carry away all the papers* of the ſubject upon the firſt warrant: that ſuch a right ſhould have exiſted from the time whereof the memory of man runneth not to the contrary, and never yet have found a place in any book of law; is incredible. But if ſo *ſtrange* a thing could be ſuppoſed, I do not ſee, how we could declare the law upon ſuch evidence.

But ſtill it is inſiſted, that there has been a general ſubmiſſion, and no action brought to try the right.

I anſwer, there has been a ſubmiſſion of guilt and poverty to power and the terror of puniſhment. But it would be ſtrange doctrine to aſſert that all the people of this land are bound to acknowledge that to be univerſal law, which a few criminal bookſellers have been afraid to diſput.

The defendants upon this occaſion have ſtopped ſhort at the Revolution. But I think it would be material to go further back, in order to ſee, how far the ſearch and ſeizure of papers have been countenanced in the antecedent reigns.

Firſt, I find no trace of ſuch a warrant as the preſent before that period, except a very few that were produced the other day in the reign of king *Charles* II.

But there did exiſt a ſearch-warrant, which took its riſe from a decree of the Star-Chamber. The decree is found at the end of the 3d volume of *Ruſhworth*'s Collections. It was made in the year 1636, and recites an older decree upon the ſubject in the 28th of *Elizabeth*, by which probably the ſame power of ſearch was given.

By this decree the meſſenger of the preſs was empowered to ſearch in all places, where books were printing, in order to ſee if the printer had a licence; and if upon ſuch ſearch he found any books which he ſuſpected to be libellous againſt the church or ſtate, he was to ſeize them, and carry them before the proper magiſtrate.

It was very evident, that the Star-Chamber, how ſoon after the invention of printing I know not, took to itſelf the juriſdiction over public libels, which ſoon grew to be the peculiar buſineſs of that court. Not that the courts of *Weſtminſter-Hall* wanted the power of holding pleas in thoſe caſes; but the attorney-general for good reaſons choſe rather to proceed there; which is the reaſon, why we have no caſes of libels in the *King's-Bench* before the Reſtoration.

The Star-Chamber from this juriſdiction preſently uſurped a general ſuperintendance over the preſs, and exerciſed a legiſlative power in all matters relating to the ſubject. They appointed licencers; they prohibited books; they inflicted penalties; and they dignified one of their officers with the name of the meſſenger of the preſs, and among other things enacted this warrant of ſearch.

After that court was aboliſhed, the preſs became free, but enjoyed its liberty not above two or three years; for the long parliament thought fit to reſtrain it again by ordinance. Whilſt the preſs is free, I am afraid it will always be licentious, and all governments have an averſion to libels. This parliament, therefore, did by ordinance reſtore the Star-Chamber practice; they recalled the licences, and ſent forth again the meſſenger. It was againſt the ordinance, that *Milton* wrote that famous pamphlet called *Areopagitica*. Upon the Reſtoration, the preſs was free once more, till the 13th and 14th of *Charles* II. when the licenſing act paſſed, which for the firſt time gave the ſecretary of ſtate a power to iſſue ſearch warrants: but theſe warrants were neither ſo oppreſſive, nor ſo inconvenient as the preſent. The right to enquire into the licence was the pretence of making the ſearches; and if during the ſearch any ſuſpected libels were found, they and they only could be ſeized.

This act expired the 32d year of that reign, or thereabouts. It was revived again in the 1ſt year of king *James* II. and remained in force till the 5th of king *William*, after one of his parliaments had continued it for a year beyond its expiration.

I do very much ſuſpect, that the preſent warrant took its riſe from theſe ſearch-warrants, that I have been deſcribing; nothing being eaſier to account for than this engraftment; the difference between them being no more than this, that the apprehenſion of the perſon in the firſt was to follow the ſeizure of papers, but the ſeizure of papers in the latter was to follow the apprehenſion of the perſon. The ſame evidence would ſerve equally for both purpoſes. If it was charged for printing or publiſhing, that was ſufficient for either of the warrants. Only this material difference muſt always be obſerved between them, that the ſearch-warrant only carried off the criminal papers, whereas this ſeizes all.

When the licenſing act expired at the cloſe of king *Charles* II.'s reign, the twelve judges were aſſembled at the king's command, to diſcover whether the preſs might not be as effectually reſtrained by the common law, as it had been by that ſtatute.

I cannot help obſerving in this place, that if the ſecretary of ſtate was ſtill inveſted with a power of iſſuing this warrant, there was no occaſion for the application to the judges: for though he could not iſſue the general ſearch-warrant, yet upon the leaſt rumour of a libel he might have done more, and ſeized every thing. But that was not thought of, and therefore the judges met and reſolved:

Firſt, that it was criminal at common law, not only to write public ſeditious papers and falſe news; but likewiſe to publiſh any news without a licence from the king, though it was true and innocent.

Secondly, that libels were ſeizable. This is to be found in the *State Trials*; and becauſe it is a curioſity, I will recite the paſſages at large.

Vol. II. p. 1038. The trial of *Harris* for a libel. *Scroggs* ch. juſtice.

'Becauſe my brethren ſhall be ſatisfied with the opinion of all the judges of *England* what this offence is, which they would inſinuate, as if the mere ſelling of books was no offence; 'tis not long ſince that all the judges met by the king's commandment, as they did ſome time before: and they both times declared unanimouſly, that all perſons, that do write, or print, or ſell any pamphlet that is either ſcandalous to public or private perſons, ſuch books may be ſeized, and the perſons puniſhed by law; that all books which are ſcandalous to the government may be ſeized, and all perſons ſo expounding may be puniſhed: and further, that all writers of news, though not ſcandalous, ſeditious, nor reflective upon the government or ſtate; yet if they are writers, as they are few others of falſe news, they are indictable and puniſhable upon that account.'

It ſeems the chief juſtice was a little incorrect in his report; for it ſhould ſeem as if he meant to puniſh only the writer of falſe news. But he is more accurate afterwards in the trial of *Carre* for a libel. *State Trials*, vol. III. p. 57, 58.

Sir *G. Jefferies* recorder.

'All the judges of *England* having met together to know, whether any perſon whatſoever may expoſe to the public knowledge any matter of intelligence, or any matter whatſoever that concerns the public, they give it in as their reſolution, that no perſon whatſoever could expoſe to the public knowledge any thing that concerned the affairs of the public, without licence from the king, or from ſuch perſons as he thought fit to intruſt with that power.'

Then *Scroggs* takes up the ſubject, and ſays,

'The words I remember are theſe. When by the king's command we were to give in our opinion, what was to be done in point of regulation of the preſs, we did all ſubſcribe, that to print or publiſh any new books or pamphlets or any news whatſoever is illegal; that it is a manifeſt intent to the breach of the peace, and they may be proceeded againſt by law for an illegal thing. Suppoſe now that this thing is not ſcandalous, what then? If there had been no reflection in this book at all, yet it is *illicitè* done, and the author ought to be convicted for it.'

Theſe are the opinions of all the twelve judges of *England*; a great and reverend authority.

Can the twelve judges extrajudicially make a thing law to bind the kingdom by a declaration, that ſuch is their opinion?—I ſay no.—It is a matter of impeachment for any judge to affirm it. There muſt be an antecedent principle or authority, from whence this opinion may be fairly collected; otherwiſe the opinion is null, and nothing but ignorance can excuſe the judge that ſubſcribed it. Out of this doctrine ſprang the famous general ſearch-warrant, that was condemned by the houſe of commons; and it was not unreaſonable to ſuppoſe, that the form of it was ſettled by the twelve judges that ſubſcribed the opinion.

The deduction from the opinion to the warrant is obvious. If you can ſeize a libel, you may ſearch for it: if ſearch is legal, a warrant to authorize that ſearch is likewiſe legal: if any magiſtrate can iſſue ſuch a warrant, the chief juſtice of the *King's-Bench* may clearly do it.

It falls here naturally in my way to aſk, whether there be any authority beſides this opinion of theſe twelve judges to ſay, that libels may be ſeized? If they may, I am afraid, that all the inconveniences of a general ſeizure will follow upon a right allowed to ſeize a part. The ſearch in ſuch caſes will be general, and every houſe will fall under the power of a ſecretary of ſtate to be rummaged before proper conviction.—Conſider for a while how the law of libels now ſtands.

Lord chief juſtice *Holt* and the court of *King's-Bench* have reſolved in the *King* and *Bear* *, that he who writes a libel, though he neither compoſes it nor publiſhes, is criminal.

In the 5th Report, 125. lord *Coke* cites it in the Star-Chamber, that if a libel concerns a public perſon, he that hath it in his cuſtody ought immediately to deliver it to a magiſtrate, that the author may be found out.

In the caſe of *Lake* and *Hutton*, *Hobart* 252. it is obſerved, that a libel, though the contents are true, is not to be juſtified; but the right way is to diſcover it to ſome magiſtrate or other, that they may have cognizance of the cauſe.

In 1ſt. *Ventris* 31. it is ſaid, that the having a libel, and not diſcovering it to a magiſtrate, was only puniſhable in the Star-Chamber, unleſs the party maliciouſly publiſh it. But the court corrected this doctrine in the *King* and *Bear*, where it ſaid, though he never publiſhed it, yet his having it in readineſs for that purpoſe, if any occaſion ſhould happen, is highly criminal: and though he might deſign to keep it private, yet after his death it might fall into ſuch hands as might be injurious to the government; and therefore men ought not to be allowed to have ſuch evil inſtruments in their keeping. *Carthew* 409. In *Salkeld*'s Report of the ſame caſe, *Holt* chief juſtice ſays, if a libel be publickly known, a written copy of it is evidence of a publication. *Salk.* 418.

If all this be law, and I have no right at preſent to deny it, whenever a favourite libel is publiſhed (and theſe compoſitions are apt to be favourites) the whole kingdom in a month or two becomes criminal, and it would be difficult to find one innocent jury amongſt ſo many millions of offenders.

I can find no other authority to juſtify the ſeizure of a libel, than that of *Scroggs* and his brethren.

If the power of ſearch is to follow the right of ſeizure, every body ſees the conſequence. He that has it or has had it in his cuſtody; he that has publiſhed, copied, or maliciouſly reported it, may fairly be under a reaſonable ſuſpicion of having the thing in his cuſtody, and conſequently become the object of the ſearch-warrant. If libels may be ſeized, it ought to be laid down with preciſion, when, where, upon what charge, againſt whom, by what magiſtrate, and in what ſtage of the proſecution. All theſe particulars muſt be explained and proved to be law, before this general propoſition can be eſtabliſhed.

As therefore no authority in our books can be produced to ſupport ſuch a doctrine, and ſo many Star-Chamber decrees, ordinances, and acts have been thought neceſſary to eſtabliſh a power of ſearch, I cannot be perſuaded, that ſuch a power can be juſtified by the common law.

I have now done with the argument, which has endeavoured to ſupport this warrant by the practice ſince the Revolution.

It is then ſaid, that it is neceſſary for the ends of government to lodge ſuch a power with a ſtate officer; and that it is better to prevent the publication before than to puniſh the offender afterwards. I anſwer, if the legiſlation be of that opinion, they will revive the licenſing act. But if they have not done that, I conceive they are not of that opinion. And with reſpect to the argument of ſtate neceſſity, or a diſtinction that has been aimed at between ſtate-offences and others, the common law does not underſtand that kind of reaſoning, nor do our books take notice of any ſuch diſtinctions.

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* Reported *Carth* 407. 1 *L. Raym.* 414. 12. *Mod.* 299. 2 *Salk.* 417. 646.

Serjeant *Aſhley* was committed to the *Tower* in the 3d of *Charles* I. by the houſe of lords only for aſſerting in argument, that there was a *law of ſtate* different from the common law; and the ſhip-money judges were impeached for holding, firſt, that ſtate-neceſſity would juſtify the raiſing money without conſent of parliament; and ſecondly, that the king was judge of that neceſſity.

If the king himſelf has no power to declare when the law ought to be violated for reaſon of ſtate, I am ſure we his judges have no ſuch prerogative.

Laſtly, it is urged as an argument of utility, that ſuch a ſearch is a means of detecting offenders by diſcovering evidence. I wiſh ſome caſes had been ſhewn, where the law forceth evidence out of the owner's cuſtody by proceſs. There is no proceſs againſt papers in civil cauſes. It has been often tried, but never prevailed. Nay, where the adverſary has by force or fraud got poſſeſſion of your own proper evidence, there is no way to get it back but by action.

In the criminal law ſuch a proceeding was never heard of; and yet there are ſome crimes, ſuch for inſtance as murder, rape, robbery, and houſe-breaking, to ſay nothing of forgery and perjury, that are more atrocious than libelling. But our law has provided no paper-ſearch in theſe caſes to help forward the conviction.

Whether this proceedeth from the gentleneſs of the law towards criminals, or from a conſideration that ſuch a power would be more pernicious to the innocent than uſeful to the public, I will not ſay.

It is very certain, that the law obligeth no man to accuſe himſelf; becauſe the neceſſary means of compelling ſelf-accuſation, falling upon the innocent as well as the guilty, would be both cruel and unjuſt; and it ſhould ſeem, that ſearch for evidence is diſallowed upon the ſame principle. There too the innocent would be confounded with the guilty.

Obſerve the wiſdom as well as mercy of the law. The ſtrongeſt evidence before a trial, being only *ex parte*, is but ſuſpicion; it is not proof. Weak evidence is a ground of ſuſpicion, though in a lower degree; and if ſuſpicion at large ſhould be a ground of ſearch, eſpecially in the caſe of libels, whoſe houſe would be ſafe?

If, however, a right of ſearch for the ſake of diſcovering evidence ought in any caſe to be allowed, this crime above all others ought to be excepted, as wanting ſuch a diſcovery leſs than any other. It is committed in open day-light, and in the face of the world; every act of publication makes new proof; and the ſolicitor of the Treaſury, if he pleaſes, may be the witneſs himſelf.

The meſſenger of the preſs, by the very conſtitution of his office, is directed to purchaſe every libel that comes forth, in order to be a witneſs.

Nay, if the vengeance of government requires a production of the author, it is hardly poſſible for him to eſcape the impeachment of the printer, who is ſure to ſeal his own pardon by his diſcovery. But ſuppoſe he ſhould happen to be obſtinate, yet the publication is ſtopped, and the offence *puniſhed*. By this means the law is ſatisfied, and the public ſecured.

I have now taken notice of every thing that has been urged upon the preſent point; and upon the whole we are all of opinion, that the warrant to ſeize and carry away the party's *papers* in the caſe of a ſeditious libel, is illegal and void.

Before I conclude, I deſire not to be underſtood as an advocate for libels. All civilized governments have puniſhed calumny with ſeverity; and with reaſon; for theſe compoſitions debauch the manners of the people; they excite a ſpirit of diſobedience, and enervate the authority of government; they provoke and excite the paſſions of the people againſt their rulers, and the rulers oftentimes againſt the people.

After this deſcription, I ſhall hardly be conſidered as a favourer of theſe pernicious productions. I will always ſet my face againſt them, when they come before me; and ſhall recommend it moſt warmly to the jury always to convict when the proof is clear. They will do well to conſider, that unjuſt acquittals bring an odium upon the preſs itſelf, the conſequence whereof may be fatal to liberty; for if kings and great men cannot obtain juſtice at their hands by the ordinary courſe of law, they may at laſt be provoked to reſtrain that preſs, which the juries of their country refuſe to regulate. When licentiouſneſs is tolerated, liberty is in the utmoſt danger; becauſe tyranny, bad as it is, is better than anarchy; and the worſt of governments is more tolerable than no government at all.

[*A great change of the king's miniſters happened in the* July *before the judgment in the preceding caſe*; *particularly the marquis of* Rockingham *was placed at the head of the Treaſury. The judgment was ſoon followed with a reſolution of the houſe of commons, declaring the* ſeizure of papers *in the caſe of a libel to be illegal.* Journ. Com. 22 April, 1766. *At the ſame time the commons paſſed a reſolution condemning* general warrants *in the caſe of libels. The latter reſolution was afterwards extended by a further vote, which included a declaration, that general warrants were* univerſally *illegal, except in caſes provided for by act of parliament.* Journ. Com. 25 April, 1766.—*All theſe reſolutions were in conſequence of Mr.* Wilkes's *complaint of a breach of privilege above two years before.* Journ. Com. 15 November 1763. *Two prior attempts were made to obtain a vote in condemnation of general warrants and the ſeizure of papers, one in* 1764, *the other in* 1765. Journ. Com. 14 *and* 17 February 1764. 29 January, 1765. *and* Almon's Deb. Com. *But they both had miſcarried, and one of the reaſons aſſigned for ſo long reſiſting ſuch interpoſition of the houſe was the pendency of ſuits in the courts of law. This objection was in part removed by the ſolemn judgment of the* Common Pleas *againſt the ſeizure of papers, and the acquieſcence in it. Whether the queſtion of general warrants ever received the ſame full and pointed deciſion in any of the courts, it is not in our power at preſent to inform the reader. The point aroſe on the trial of an action by Mr.* Wilkes *againſt Mr.* Wood, *which is the firſt caſe in Mr.* Loft's *Reports*; *and lord* Camden *in his charge to the jury appears to have explicitly avowed his own opinion of the illegality of general warrants*; *but what was done afterwards is not ſtated. How a regular judgment of the point was avoided, in the caſe of error in the* King's Bench *between* Money *and* Leach, *by conceding that the warrant was not purſued, we have obſerved in a former note. Ante* 312. *As to the action, in which Mr.* Wilkes *finally recovered large damages from the earl of* Halifax, *it was not tried till after the declaratory vote of the Commons, which moſt probably prevented all argument on the ſubject.*]

No. V. *Proceedings in the Caſe of* John Wilkes, *Eſquire, on two Informations for Libels*, King's-Bench, Michaelmas Term 1764, *to* Hilary Term 1770, *incluſive.*

[*This caſe is wholly extracted from Sir* James Burrow's Reports. 4 Burr. 2527.]

Wedneſday 7th February 1770.

AS this cauſe, in the ſeveral branches of it, came ſeveral times before the court, it ſeemed better to reſerve a general account of it till a final concluſion of the whole, than to report the particular parts of it disjointedly, in order of time as they were reſpectively argued and determined.

In *Michaelmas Term* 1764, the fourth year of his preſent majeſty king *George* the third, ſir *Fletcher Norton*, then his majeſty's ſolicitor-general, (the office of attorney-general being then *vacant*,) exhibited an information againſt Mr. *Wilkes*, for having publiſhed, and cauſed to be printed and publiſhed a *ſeditious and ſcandalous* libel (the *North Briton*, No. 45.).

And ſoon after, he exhibited another information againſt him, (the office of attorney-general ſtill remaining *vacant*,) for having printed and publiſhed, and cauſed to be printed and publiſhed, an *obſcene and impious* libel (an *Eſſay on Woman*, &c.).

Mr. *Wilkes* having pleaded 'not guilty' to both theſe informations, and the records being made up and ſealed, and the cauſes * ready for trial, the counſel for the crown thought it expedient to amend them, by ſtriking out the word '*purport*,' and in its place inſerting the word '*tenor*.' The propoſed amendments were in all thoſe parts of the information where the charge was that the libel printed and publiſhed by Mr. *Wilkes* contained matters '*to the* purport *and effect following, to wit*:' which the counſel for the crown thought it adviſeable to alter into words importing that ſuch libel contained matters '*to the* tenor *and effect following, to wit*.'

Sir *Fletcher Norton* (then become himſelf attorney-general) directed Mr. *Barlow*, clerk in court for the crown, to apply to a judge for ſuch an order; apprehending it (as he afterwards publickly declared) to be a matter of *courſe*.

Mr. *Barlow*, in purſuance of theſe directions, applied to lord *Mansfield*, for a ſummons to ſhew cauſe 'why ſuch amendment ſhould not be made.' And his lordſhip iſſued a ſummons in each cauſe, dated 18th of *Feb.* 1764, for the defendant's clerk in court, agent, attorney or ſolicitor, to attend him at his houſe in *Bloomſbury-ſquare* on *Monday* the 20th of *February* at eight o'clock in the morning; to ſhew cauſe why the information ſhould not be *amended*, by ſtriking out the word '*purport*,' in the ſeveral places where it is mentioned in the ſaid information, and inſerting inſtead thereof the word '*tenor*.' *N. B.* The ſummons in the cauſe relating to the ſeditious libel excepted the firſt place—'*except* in the firſt place.'

On notice of this ſummons, Mr. *Philips*, agent and ſolicitor for Mr. *Wilkes*, and Mr. *Hughes* his clerk in court, and attorney for him upon the record, both attended his lordſhip, at his *own houſe*, upon the ſaid 20th of *February* 1764, accordingly, (being now vacation-time, and no court ſitting;) and *did not object* to the propoſed amendment: on the contrary, Mr. *Hughes*, upon being aſked as a fair practicer, candidly acknowledged 'that it *was amendable*;' and Mr. *Philips acquieſced* in it, though he ſaid he *could not* conſent to it. Lord *Mansfield* having, in the preſence of theſe gentlemen, conſulted and produced many precedents, and being fully ſatisfied 'that the amendment *might* be made, and that it 'might be made *by a ſingle judge at his houſe or chambers*,' told Mr. *Philips* 'that there was no need of his *conſent*;' and immediately made the following order—'Upon hearing the clerks in court on both ſides, I do 'order that the information in this cauſe *be amended*; by ſtriking out the 'word *purport* in the ſeveral places where it is mentioned, in the ſaid in'formation, and by inſerting inſtead thereof the word *tenor*. Dated this '20th day of *February* 1764.'

The orders in both cauſes were exactly alike; only that the words '*except* in the firſt place' were added in that of the information for the ſeditious libel.

Mr. *Wilkes* was at this time in *France*; whither he had voluntarily retired ſome time before, and from whence he did not return till towards the election of members for the new parliament (into which he was afterwards choſen.)

The trial came on at the appointed time, and proceeded in the uſual manner; Mr. *Wilkes*'s counſel and agents *making no objection* thereto, *nor declining to enter into his defence*. Verdicts were found againſt him, upon both informations: after which, judgment was duly ſigned againſt him, in each cauſe; and writs of *capias* were awarded and iſſued againſt him, as in ordinary caſes of convictions upon informations for miſdemeanours. —Upon his non-appearance, the proceedings were carried on to proclamation and exigents: and upon his not appearing on the fifth time of being exacted, he was, by the judgment of the coroners of the county of *Middleſex*, according to the law and cuſtom of the realm, *outlawed*.

On *Wedneſday* the 20th of *April* 1768, (being the firſt day of *Eaſter Term* 1768,) ſoon after the ſitting of the court, and *before any proceſs* had iſſued on this outlawry, Mr. *Wilkes* voluntarily made his perſonal appearance in it; accompanied by three or four friends, who probably meant to become his bail, in caſe of his being now admitted to bail.

He opened with a ſpeech, which is already in * print, and therefore needs not be here repeated. He took notice, in it, that the *record was altered*, before the trial, by lord *Mansfield*'s order: ſo that he was *tried upon altered facts*. This he particularly complained of, as being *unconſtitutional and illegal*; and was adviſed, he ſaid, that it rendered both the verdicts abſolutely void.

Mr. Attorney-general (Mr. *De Grey*) prayed that Mr. *Wilkes* might ſtand committed; as he had been convicted of printing and publiſhing one of theſe libels, and of publiſhing the other; and had now avowed himſelf to be the perſon ſo convicted.

Mr. Serjeant *Glynn*, of counſel for Mr. *Wilkes*, oppoſed this. He ſaid, he had ſeveral objections to the *outlawry*; and that, till laſt night, they had expected a *fiat* for a writ of error: but that, laſt night, Mr. Attorney-general declined granting one, becauſe he doubted 'whether it belonged 'to *his* office to grant it,' or 'whether it ought not to be granted by the 'lord chief juſtice.' He ſaid, Mr. Attorney-general did not refuſe his *fiat*, from any doubt about the propriety of the application for it, or the ſufficiency of the objections to the outlawry; but merely from a doubt '*to whom* it belonged to *allow* the writ of error.' He ſaid, he would propoſe ſome errors, which he hoped would ſatisfy the court that a writ of error *ought* to be granted. They were of two ſorts: firſt, *errors in fact*; 2dly, *errors in law*.

1ſt. An error in *fact* was, 'that Mr. *Wilkes* was abſent and *out of the 'kingdom*, at the time of the *award of the writ of exigent*.'

2dly. Three errors in *law*. Firſt, 'that the ſheriff has *returned no pro'clamations*.' It is only ſaid, 'that he has obeyed the writ;' whereas he ought to have returned particulars; that the court might judge of them. Secondly, it is not ſtated in the return of the *exigent*, 'that Mr. *Wilkes* 'was exacted *in the county of Middleſex*:' nor is it ſaid to be '*at a county'court*.' It is only ſaid to be 'at his county court at the Three Tons 'in *Brook-ſtreet near Holborne in the county of Middleſex*:' which is no allegation 'that *Brook-ſtreet* is in the county of *Middleſex*.'' And though it is ſaid 'at *my* county-court,' yet he might be ſheriff of two counties. He cited 2 *Roll's Abr.* 802. Title '*utlagaire*, error *utlagarie*.' Thirdly, *no judgment of the coroner* is here ſtated; but only a mere fact, 'that he *was outlawed* by the coroner.' In ſupport of which objection, he cited 1 *Brown's Entries* 361. as in point. He therefore prayed that his lordſhip would grant Mr. *Wilkes* an *allowance* of his writ of error, in order to his getting this erroneous outlawry reverſed. He ſaid, it was improper at this time to enter into any litigation about the validity of the *convictions* upon which theſe judgments are founded. Mr. *Wilkes*'s preſent circumſtances under the outlawry are more penal than the convictions themſelves. Therefore it is incumbent upon him, firſt to get rid of the outlawry. And he prayed that Mr. *Wilkes* might be, in the mean time, admitted to bail.

Mr. Recorder of *London* (*Eyre*) on the ſame ſide, enforced what the ſerjeant had urged; and obſerved, that by 4, 5 *W.* and *M.* c. 18. § 4. Mr. *Wilkes* was not compellable to appear in perſon; but might have appeared by attorney, and reverſed the outlawry without bail (unleſs otherwiſe ordered by the court). He therefore propoſed, that he ſhould either appear by attorney, to reverſe it; or give bail to proſecute a writ of error. And he cited *Earbury*'s caſe in this court, in *Eaſter* and *Trinity* Terms 1723. 9 G. I *.

Mr. *Mansfield*, on the ſame ſide, argued that Mr. *Wilkes* was clearly intitled to be admitted to bail, under this ſtatute. The convictions can not at this time be proceeded upon; as the ſentence of outlawry is ſtanding out againſt him. He has done all that is in his power to do. He appears in court, and ſubmits to the laws of his country. He has ſhewn errors of weight, in the outlawry; and has uſed all methods to obtain a writ of error to be allowed; and prays to be admitted to bail by the court, as he muſt have been by the ſheriff, if he had been taken upon a *capias utlegatum*.

Mr. *Davenport*, on the ſame ſide, ſpoke to the ſame effect.

Mr. Attorney-general explained the fact, and the reaſon of his declining to grant the *fiat* for a writ or error. He ſaid, that upon the application made to him on the part of the defendant, he directed an attend-

* They were tried on the 21ſt of Feb. 1764.

* It was printed in the public papers of the next Day, 21ſt of April 1768.

* That caſe was an outlawry for non-appearance, I have a note of it, of my own taking. And there is a report of it in Forteſcue Aland 37 and another in 8 Mod. 177. very bad in the 1ſt edition, but much mended in the late edition of that book.

ance: which was accordingly had. That he thought the errors ſpecified to him, to be a ſufficient foundation for a fiat, in caſe the party had been *in cuſtody:* but he could not find any precedent for an *attorney-general*'s granting a fiat when the party was *not* in cuſtody. The writ of error was not tendered to him, he ſaid, till laſt night: and the court was to ſit, this morning. He was ready to liſten to any method that could have been ſhewn to be proper: but none was propoſed. He added, that he thought Mr. *Wilkes* could not be intitled to his writ of error, *till* he ſhould be in cuſtody. He obſerved, that this was not an outlawry for non-appearance; but an outlawry upon and after conviction.

Lord *Mansfield.*—Here are two motions made, upon the defendant's appearing perſonally in court: one, for *committing* him; the other, for *bailing* him.

I am of opinion againſt *both* theſe motions.

He ought to be brought in *regularly*, upon a *return* of the *capias* by the ſheriff.* I have no doubt but that we *might* take notice of him, upon his voluntary appearance as the perſon outlawed; and commit or bail him: but we are not abſolutely *bound* to do it, without *ſome reaſon* to excuſe the going out of the regular courſe.

If the defendant could ſhew that the attorney-general *refuſed* to take him up and bring him into court, *in order to prevent* his having this advantage; or *if* the attorney-general had in fact uſed all methods to take him up, and he had concealed himſelf and abſconded, and afterwards had come in thus voluntarily, *in order to ſurprize*; upon either of theſe, or any other *extraordinary* ground, we ſhould be bound to interpoſe, and overlook the impropriety of the defendant's *coming*, inſtead of being *brought*, into court.

But the real cauſe of *this* irregularity is the ſtrongeſt argument why we ſhould *not* give way to a new mode, liable to miſconſtruction, and carrying a bad appearance. It is notorious, that the defendant has appeared very publicly: *why* was he not apprehended?

The outlawry muſt certainly be diſpoſed of, *before* you can come at any thing *elſe:* the judgment upon the *convictions* can not, *at preſent*, be proceeded upon.

I could wiſh this gentleman had been better adviſed than to have come thus prematurely, with a written ſpeech, to juſtify the crimes of which he ſtands convicted; and to arraign an order made by me.

I am very happy in having this opportunity of explaining my conduct in making the *amendment* that has been mentioned. If I was wrong, I ſhould think it more honourable to acknowledge and rectify any error that I ſhould have committed, than to juſtify and defend it. The application to me was, to amend the word "purport" into "tenor." Mr. *Hughes*, the clerk in court for the defendant, agreed it to be amendable. I recollected a caſe of the like kind, of an amendment of an information juſt before trial: and, looking for it, I found a collection of ſuch caſes. After reading one or two, Mr. *Philips*, attorney and agent for the defendant, was perfectly ſatisfied, and deſired me not to give myſelf any further trouble; but ſaid "he *could not conſent* to it." I ſaid, "I did not want a conſent:" I thought myſelf *bound* to order the amendment; and *did* ſo. I had made ſome ſuch orders before; and I have made ſeveral ſuch orders ſince; even in *quo warranto* informations. In this caſe, it made no alteration in the defendant's defence. His counſel never objected to it, nor took any notice of it. I think it *right* and *uſual*, and *as of courſe:* not but that I am open to conviction, and ready to hear what can be ſaid to ſhew that it was wrong.

Mr. juſtice *Yates.*---If this amendment was wrong, it will ſtill be open to the conſideration of the court; although the *proper* opportunity of objecting to it was *at the trial.* In the caſe of *the king* againſt *Charleſworth*, an information for forging a warrant of attorney 'to acknowledge ſatiſ-'faction upon a judgment' was amended, without coſts (the proſecutor having been admitted a pauper), and without giving the defendant leave to plead *de novo.* 2 *Stra.* 871.

As to the two preſent oppoſite motions, one for committing, the other for bailing the defendant; the ſame anſwer ſerves for both: 'the court can take no notice of any thing but what comes *judicially* before them.' We can not take cognizance of this matter, in the method in which it now comes before us: we can not take *judicial* notice 'that this is the *perſon* 'convicted or outlawed.' Mr. *Browne*'s caſe in *Dyer* 192. is clear and ſtrong, as to the outlawry. And as to committing him upon the convictions, that can't be done whilſt the *outlawry* is ſubſiſting: the outlawry muſt firſt be diſpoſed of, before we proceed upon the convictions. The judgment of outlawry *ſuſpends* all proceedings upon them. The judgments on the convictions would probably be fine and impriſonment. But it would be manifeſt oppreſſion to ſet a fine upon him, when all his effects ſtand forfeited to the king already: and he is already liable to impriſonment upon the outlawry; from which he can never be freed whilſt that ſtands in force. There cannot be two different judgments for the ſame offence: there cannot be judgment of outlawry, and judgment for the miſdemeanour likewiſe. In the caſe of *the king and queen* againſt *Tippin*, 1 *W.* and *M. Salk.* 494. the defendant was outlawed upon an information for a miſdemeanour, and fined 5000*l.* It was moved, on his behalf, that he could not be fined upon the outlawry; becauſe, in miſdemeanour, the outlawry does not enure as a conviction for the *offence*, (as it does in caſes of treaſon and felony), but as a conviction of the *contempt* for not anſwering; which contempt is puniſhed by the forfeiture of his goods and chattels: and if he might be fined now, he muſt be fined again, upon the *principal* judgment. And the * *firſt* was held to be irregular: for, the outlawry in theſe caſes is *not* a conviction; as appears by *Fleta* 42. '*Quamvis quis pro contumacia et fuga* '*utlagetur*, non *propter hoc convictus eſt de facto principali.*' And there is a caſe in *Bro. Abr.* title 'Utlagary,' *pl.* 26. where a man was outlawed of felony, and taken by a *capias utlagatum*, and detained in the *King's Bench*; and divers bills were brought againſt him in cuſtody of the Marſhal: and the court would not ſuffer it. For, his body lands and goods are the *king*'s; and therefore the plaintiff can not have the effect of his ſuit againſt him before the outlawry: but if he obtains a pardon, the plaintiff ſhall be anſwered. If the defendant in the preſent caſe had come in *by proceſs*, his identity would have appeared. If he had come in *by record*, he might have applied to be bailed, either upon the ſtatute of 4, 5 *W.* and *M.* c. 18. (if that ſtatute can be ſhewn to be applicable to an outlawry on a *miſdemeanour)*, or under the plenary power of the court upon the circumſtances of his caſe. But that ſtatute ſeems only applicable to *civil* caſes. I mention this, only for the conſideration of the counſel, when it ſhall come before the court. By the 5th ſection, the ſheriff may 'take ſecurity of the defendant taken upon a *ca-*'*pias utlagatum*, in caſes where bail is required, in *double the ſum* for which 'bail is required.' But how can the ſheriff, under the directions of this ſtatute, take bail in *double the ſum*, in a *criminal* caſe? How can the ſheriff *know* what the fine *will be?* Or why ſhould the ſum of the *fine* be doubled? The ſtatute ſeems to relate only to *civil* caſes, and to mean 'double the '*debt.*'

The defendant ought, in my opinion, to have come hither in a *regular* way: but as the matter now ſtands, upon this voluntary appearance, without return of proceſs or any matter of record whatſoever, the court can neither commit him nor bail him.

Mr. juſtice *Aſton.*---I think there is but one queſtion: and I ſhall keep to that. It is, 'whether he ſhall be committed.' The attorney-general prays us to commit a man *as an outlaw*, againſt whom he himſelf would not iſſue proceſs of outlawry; though there does not appear to be any particular circumſtances to prevent his iſſuing ſuch proceſs. The officers of the crown might have exerciſed their power by proper proceſs: and then he would have been in cuſtody. But they have not choſen to do ſo: and he remains as much at his liberty, as he was before he came into court. The motion to commit him ſeems unneceſſary: and I ſhall not, at preſent, take notice of any other queſtion; he not being at all in cuſtody.

Mr. juſtice *Willes.*---There has been, for ſome time, a judgment of outlawry againſt the defendant, who is not an abſconding perſon. The attorney-general has not thought proper to iſſue proceſs againſt him upon it. And now he comes into court *gratis*, voluntarily, not by any return of proceſs, or any matter of record. We can not take any notice at all of him; nor can we know, *judicially*, 'that he is the man.' I don't ſee why the attorney-general ſhould demand of the *court* to commit the defendant upon this outlawry, when he himſelf has long ſuffered him to go at large, without any attempt to take him up; or even iſſuing proceſs againſt him.

Nothing was taken by either of the two motions; namely, the attorney-general's, 'that the defendant might be committed,' or his own counſel's, 'that he might be bailed.'

On *Wedneſday* the 27th of *April* 1768, (a week after the former tranſaction,) Mr. *Wilkes* having this morning ſurrendered himſelf to the ſheriff of *Middleſex* upon a *capias utlagatum* which had been ſince the laſt motion iſſued againſt him, and being now in the ſheriff's cuſtody, was *brought* into court by the ſaid ſheriff, upon the *return of a habeas corpus* directed to him for that purpoſe. In the mean time, Mr. Attorney-general had granted his fiat for a writ of error: which he did immediately upon receiving an aſſurance that Mr. *Wilkes* was in actual cuſtody upon the *capias utlagatum.* The return to the *habeas corpus* being read in court, it appeared that the defendant was charged with two outlawries; *viz.* one on each conviction for the reſpective miſdemeanours before mentioned. A writ of error in each cauſe was delivered into court.

The outlawries, the writs of error, and the aſſignment of errors, were exactly alike in both cauſes: it will therefore be ſufficient to ſpecify only one of each ſort.

The material part of the outlawry, on which the queſtion turned, was this. The ſheriff returned the writ of exigent executed and indorſed as follows---'By virtue of this writ to me directed, at *my* county court 'held at the houſe known by the ſign of the *Three Tuns in Brook ſtreet near* '*Holborn in the county of Middleſex*, the 12th day of *July* in the fourth 'year of the reign of our preſent ſovereign lord *George* the third now king 'of *Great Britain*, &c. the within named *John Wilkes* was the firſt time 'exacted, and did not appear.' It goes on in the ſame manner, till the *quinto exactus*; *viz.* 'at my county court held *at the ſame place* the 9th day 'of *Auguſt* in the year aforeſaid, the ſaid *John Wilkes* was a ſecond time 'exacted, and did not appear:' and ſo, in the ſame words, only changing the days, to the 5th incluſive. Therefore by the judgment of *Edward Umfreville*, eſq; and *Thomas Philips*, gent. his majeſty's coroners of the county of *Middleſex*, the ſaid *John Wilkes*, according to the laws and cuſtoms of this realm, is outlawed.

Writ of error.

The writ of error was *verbatim* as follows---Of *Eaſter* Term 1768, 8 *G.* III. Our lord the king hath ſent to his juſtices appointed to hold pleas before him his writ cloſed in theſe words (that is to ſay) *George* the third by the grace of God of *Great Britain*, *France*, and *Ireland* king, defender of the faith, &c. To our juſtices appointed to hold pleas before us greeting. Foraſmuch as in the record and proceſs, as alſo in the publication of an outlawry againſt *John Wilkes* late of *Weſtminſter*, in the county of *Middleſex*, eſq; on a certain information againſt the ſaid *John Wilkes*, for printing and publiſhing a certain libel or compoſition, intitled *An Eſſay on Woman*; whereof the ſaid *John Wilkes* is impeached, and thereupon by a jury of the county is convicted, as it is ſaid; manifeſt error hath intervened, to the great damage of the ſaid *John Wilkes*, as by his complaint we are informed: We, willing that the ſaid error (if any be) be duly amended, and full and ſpeedy juſtice done to the ſaid *John Wilkes* in this behalf, do command you, that if the ſaid outlawry be returned before us as hath been ſaid; then inſpecting the ſaid record and proceſs, you cauſe further to be done therein for annulling the ſaid outlawry as of right, and according to the law and cuſtom of *England*, ſhall be meet to be done. Witneſs ourſelf at *Weſtminſter*, the twenty-ſeventh day of *April*, in the eighth year of our reign.

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* I ſuſpect this word '*firſt*' to be an error of the preſs; and that it ſhould be '*fine.*'

Aſſignment of error.

And hereupon the ſaid *John Wilkes* comes in his proper perſon, and ſays, that in the record and proceſs, and alſo in the publication of the aforeſaid outlawry, there is manifeſt error in this, that there is *no ſufficient information* filed or exhibited againſt the ſaid *John Wilkes*, whereon to ground the proceſs of the outlawry aforeſaid: by reaſon whereof, the ſaid outlawry is void and of no effect or force whatſoever. There is alſo error in this, that *no public proclamation* whatſoever is mentioned to have been made at any open county court, or at any general quarter-ſeſſions of the peace whatſoever, or at the door of any pariſh church where the ſaid *John Wilkes* was an inhabitant, according to the exigency of the ſaid writ of *capias cum proclamatione*: therefore in that, there is manifeſt error. There is alſo error in this, that it is not ſhewn, nor does it appear by the return of the ſheriff of *Middleſex*, that the ſheriff of *Middleſex* did *cauſe to be exacted* the ſaid John Wilkes *in the ſaid county of Middleſex, from county court to county court*, until he was outlawed according to the law and cuſtom of *England*, as the ſaid ſheriff by the ſaid writ of exigent is commanded; and that it is not ſhewn nor does it appear by the return of the ſheriff of *Middleſex*, that the ſaid *John Wilkes* was a *firſt*, *ſecond*, *third*, *fourth and fifth time exacted at the county court of the county of Middleſex*, as by the law of the land he ought to have been before he was outlawed: therefore in that, there is manifeſt error.---There is alſo error in this, that in the record and proceſs aforeſaid, and in the publication of the outlawry aforeſaid, it is *no where expreſsly ſhewn* that the place called *Brook-ſtreet* (if any ſuch there be) where the ſeveral county courts are ſuppoſed to have been held, at which the ſaid *John Wilkes* is ſaid to have been exacted, is in the county of *Middleſex*, or in any or what *other* county. Therefore in *that*, there is manifeſt error. There is alſo error in this, that it does not appear that *any judgment of outlawry was given or pronounced* againſt the ſaid *John Wilkes*; or, if any ſuch judgment was given or pronounced, in *what form* the ſame was ſo given or pronounced; as it ought to have done, in order that the legality and propriety of the ſaid judgment might have been ſeen and examined: but in the record and proceſs aforeſaid, and in the publication of the outlawry aforeſaid, *reference and relation only* are had to ſome judgment not ſhewn or expreſſed, but ſuppoſed to have been before given againſt the ſaid *John Wilkes*. Therefore in *that*, there is manifeſt error. Wherefore the ſaid *John Wilkes* prays that the outlawry aforeſaid, for the errors aforeſaid, and other errors appearing in the record and proceſs aforeſaid, may be reverſed and held for nothing; and that he may be reſtored to the common law, and to all which he hath loſt by occaſion of the outlawry aforeſaid, &c.---And *William De Grey*, eſq; now attorney-general of our preſent ſovereign lord the king, preſent here in court in his proper perſon, having heard the matters aforeſaid above aſſigned for error, for our ſaid lord the king ſaith, that neither in the record and proceſs aforeſaid, nor in the publication of the aforeſaid outlawry, is there any error: and he prays that the court of our ſaid lord the king now here may proceed to the examination as well of the record and proceſs aforeſaid, as of the matters aforeſaid above aſſigned for error; and that the outlawry aforeſaid may in all things be affirmed.

Joinder in error.

Lord *Mansfield*.---Let the writs of error be allowed.

His lordſhip then aſked the attorney-general, ‘ to *what priſon* he prayed that the defendant might be committed.’

Mr. Attorney-General anſwered---‘ To the *Marſhal*.’

Lord *Mansfield*.---Let him be committed to the Marſhal.

Mr. ſerjeant *Glynn* moved, that he might be admitted to *bail*, on 4 & 5 *W.* & *M.* *c.* 18. * which, he ſaid, extended to caſes of *miſdemeanour*. He was ſupported by Mr. Recorder of *London*, Mr. *Mansfield*, and Mr. *Davenport*.

* Vide § 4.

They urged the ſpirit, ſcope and deſign of this ſtatute, as well as the words of it, as arguments to prove that it extended to miſdemeanours; and that the preamble and enacting part of it do, both of them, apply to Mr. *Wilkes*'s caſe: and they ſaid, that even if the words were doubtful, the conſtruction of them ought to be ſuch as would be moſt favourable to liberty. But theſe words are expreſs; they include *all* cauſes, except treaſon and felony. ‘ For the more eaſy and ſpeedy reverſing of outlawries ‘ in the court of *King's Bench*, be it enacted, that no perſon or perſons ‘ whatſoever, who are or ſhall be outlawed in the ſaid court, for *any cauſe*, ‘ *matter or thing whatſoever*, (treaſon and felony *only* excepted), ſhall be ‘ compelled to come in perſon into, or appear in perſon in the ſaid court, ‘ to reverſe ſuch outlawry; but ſhall or may appear by attorney and re‘ verſe the ſame, except where ſpecial bail ſhall be ordered by the ſaid ‘ court.’ Caſes of miſdemeanour are within the ſame miſchief as civil caſes: and it extends to outlawries after conviction of miſdemeanours, as well as to outlawries upon meſne proceſs. If the queſtion ſhould take a long time in diſcuſſing, the defendant may be actually puniſhed by an impriſonment upon the outlawry, though it ſhould be at laſt reverſed; or ſtill more unjuſtly, in caſe it ſhould afterwards appear that no puniſhment ought to be inflicted upon the convictions themſelves. In civil caſes, a pardon is of courſe, upon paying the debts and coſts: but a defendant outlawed upon meſne proceſs for a miſdemeanour has no ſuch opportunity of getting rid of the outlawry. He ought to have an opportunity of putting himſelf in a condition of being amenable to the juſtice of his country. Though ſome of the expreſſions in this ſtatute may ſeem more applicable to civil caſes, yet there are general words ſufficient to take in criminal miſdemeanours. They mentioned ſir *John Read*'s caſe, and that of *Matthias Earbury* in 1723.

Mr. Attorney-General (Mr. *De Grey*), ſir *Fletcher Norton*, and Mr. *Morton*, on the other ſide, argued that this ſtatute relates only to *civil* caſes; and not to criminal miſdemeanours. The expreſſions of it relate to civil property. It can relate only to ſuch caſes where a defendant can appear by attorney. The preamble * ſays, ‘ Whereas divers ‘ perſons are proſecuted in the ſaid court of *King's Bench*, to ‘ outlawries for debts, treſpaſſes, or other miſdemeanours; and there is ‘ no reverſing ſuch outlawries but by the perſonal appearance of the per‘ ſons outlawed: ſo that the perſons arreſted upon ſuch outlawries, if ‘ poor, lie in priſon till their deaths; but if able, it coſts them very dear, ‘ to reverſe the ſame outlawries.’ The former of theſe words relate to property: the latter, to actions for malicious proſecutions and ſuch like. The whole relates only to *civil* ſuits. And as to *Earbury*'s caſe, they ſaid it was neither a direct determination, nor any authority in the preſent caſe.

* Vide § 2.

Serjeant *Glynn* replied, that ‘ treſpaſſes’ include all other actions not ariſing *ex contractu*: and ‘ miſdemeanours’ muſt mean *offences*. ‘ All ‘ cauſes, matters, and things,’ certainly include criminal offences and miſdemeanours. And the ſtatute ſpeaks of outlawries in general. It is not reaſonable, that the defendant ſhould undergo the penalty of a contempt for withdrawing from juſtice, when the very validity of the outlawry itſelf is in queſtion. And *Earbury*'s caſe, though it was not an outlawry after conviction (as this is), yet clearly proves ‘ that this act ‘ *does relate* to miſdemeanours:’ for, the judges were all of that opinion.

Lord *Mansfield*.—God forbid that the defendant ſhould not be allowed the benefit of every advantage he is intitled to by law!

It is to be conſidered, *how* he is in cuſtody.

After conviction, if he had been preſent in court, he might have been committed: if not preſent, he might have been taken by a *capias*.

It is, indeed, in the diſcretion of the court, to bail a perſon ſo circumſtanced.

But *diſcretion*, when applied to a court of juſtice, means *ſound* diſcretion *guided by law*. It muſt be governed by rule, not by humour: it muſt not be arbitrary, vague, and fanciful; but legal and regular.

This defendant was not preſent, when convicted. He afterwards withdrew from juſtice, and was outlawed: and a *capias utlagatum* has now iſſued; and he is in cuſtody upon it.

If a perſon convicted be taken upon a *capias pro fine*, he is liable to be committed, unleſs the proſecutor conſents to his being bailed. This is the common courſe of proceeding: though it is uſual to admit to bail, upon the proſecutor's conſenting to it. In the caſe of the journeymen Taylors, and again in that of the Weavers, the defendants were by conſent bailed, and by conſent were not to appear till called upon. But I do not remember any caſe where ſuch a perſon has been bailed *without* conſent. When a perſon ſo convicted is committed, ſuch commitment ſhall be taken into conſideration by the court when they come to pronounce their ſentence upon him, and ſhall go as *part* of his puniſhment.

Here, the defendant is in cuſtody *under* the conviction: for, he is in cuſtody upon the *capias utlagatum*, which iſſued *upon* his conviction.

Now, whatever doubts there may be about what *is* within the act of parliament of the 4 & 5 *W.* & *M.* *c.* 18. it is moſt certain that a perſon convicted of a miſdemeanour is *not* within it; becauſe his caſe is *not a bailable caſe*. Nothing therefore can be clearer, than that ſuch a perſon is not within an act of parliament that relates only to bailable caſes. This act relates to caſes where no ſpecial bail is required, and to caſes where ſpecial bail is required *: and the ſheriff is directed what to do in either caſe. Where the caſe is bailable, the defendant is to be diſcharged upon the ſecurity-bond. But even in *civil* actions, he could not be bailed, where he was not bailable: he is only to be put into the ſame condition as if he had not been outlawed at all. If the outlawry was after judgment in debt, or any other civil action, and the defendant was *not bailable* before the outlawry, the act did not make ſuch defendant bailable, who was not ſo before the outlawry. I am clear, that this caſe is *not* within the act.

* Vide § 5.

Mr. juſtice *Yates* was alſo clear in the ſame opinion. It is ſaid, ‘ that ‘ miſdemeanours of *all* kinds are within the words of this act, as well ‘ as within the ſcope and meaning of it.’ But miſdemeanours are here * connected with *debts* and *treſpaſſes*; which are deſcriptions of *civil* actions: and ſo may the word ‘ *miſdemeanour*’ be. This act might, in the general words of the preamble, have a view to actions of conſpiracy, deceit, or popular actions upon penal ſtatutes; (on which an outlawry was given by 21 *Ja.* I. *c.* 4.) And taking the whole of the act together, there can be no doubt about it: for, it muſt be conſtrued of thoſe caſes where the clauſes of the act are *practicable*; which, in the preſent caſe, they are *not*. A conviction in a *criminal* caſe can not be within this act. The ſheriff is directed by it, ‘ to take ſecurity of the ‘ perſon outlawed, in the penalty of double the ſum for which ſpecial bail ‘ is required.’ But the ſheriff cannot take bail of a perſon after his being *convicted of a crime*. The ſheriff cannot form his own idea of the *offence*, or ſettle a *ſum* wherein he ſhould take the bail of ſuch a perſon: nor can he require bail in *double* the fine, or any thing more than what the fine ſhall be fixed at; which is uncertain and future. The concluding words of the ſecurity-bond, ‘ and to do and perform ſuch things as ſhall be re‘ quired by the ſaid court,’ mean putting in bail to a new action, pleading within a limited time, putting the plaintiff in the ſame condition, and ſuch like matters. And it ſhould be conſidered, how the law ſtood in civil caſes, *before* this act of parliament; and that no bail could then be taken on a *capias utlagatum*. *Vide* 13 *C.* 2. *ſtat.* II. *c.* 2. § 4.

* Vide § 2.

What I have been ſaying, may throw *ſome light* upon this act of parliament. But I confine my opinion to its being an outlawry *after conviction* *in a criminal* caſe: which can not be a caſe within this act of parliament.

If a defendant is taken upon a *capias pro fine* (or *pro redemptione,*) it is an *execution*; and no *ſheriff* can take bail of him: it is a *favour*, if the *court* does it. By 5 *E.* III. *c.* 12. no pardon for an outlawry ſhall be granted, till the chancellor is certified that the plaintiff is ſatisfied of his damages. In a *criminal* caſe, if the party be convicted, and a *capias ad ſatisfaciendum* iſſues, and he is taken upon it, he is in execution, to make ſatisfaction; and the ſheriff can never foretel, before the court have given the final judgment, *what* that ſatisfaction is to be, on which he ſhould admit the defendant to bail, on the *capias utlagatum:* he has nothing to direct himſelf by. No clauſe of this act can be put in execution, on an outlawry upon a *conviction in a criminal* caſe. Therefore I am of opinion, that the preſent caſe is *not* within it.

Mr. juſtice *Aſton.*---I am of the ſame opinion. I think this act of parliament relates only to *civil* actions: this is evidently the true ſpirit of it. It cannot be imagined, that the act can mean to allow of a defendant's appearing by attorney, in caſes where the defendant is obliged to appear perſonally, and can not appear by attorney at all: neither can it extend to taking bail in caſes not bailable. But ſurely it can not extend to caſes of criminal miſdemeanours, *after conviction*; becauſe in ſuch caſes, a defendant is not intitled to be bailed at all. Outlawries after conviction are very different from the caſe of outlawries for non-appearance upon meſne proceſs. After conviction, there is no caſe where it has been holden that the defendant has a *right* to be admitted to bail. In an outlawry after conviction for miſdemeanour, no ſheriff could take bail: and conſequently this act could not have any ſuch caſe in view, or be meant to extend to it.

Mr. juſtice *Willes.*---It is clear that the defendant has no *right* to demand being admitted to bail. This is an outlawry *after conviction.* If it ſhould be granted that he is intitled to be bailed upon the *outlawry*, yet as he ſtands convicted of the crime, he muſt be committed upon the *conviction.* This ſtatute is indeed as obſcure a one as any in the ſtatute-book: it is difficult to aſcertain its true meaning. Therefore I do not chuſe to give any direct opinion about its *extent*; unleſs it ſhould become abſolutely neceſſary for me to do ſo. As the preſent caſe ariſes upon an outlawry *after conviction*, it is clearly *not* a caſe within this act of parliament. In treaſon and felony, outlawries were convictions of the fact: and therefore they are particularly excepted out of this act. But outlawries in caſes of miſdemeanour are not convictions of the fact: yet after actual conviction of a miſdemeanour, the defendant is not intitled to bail; whether he be or be not outlawed. Even in a *civil* action, a perſon outlawed *after judgment* could not have a pardon, till payment of the debt. In the preſent caſe, it would be merely nugatory, to diſcharge the defendant upon giving bail to proſecute his writ of error upon the outlawry, when we muſt immediately commit him upon the conviction. How can the ſheriff know, at the time of the defendant's being taken upon the *capias utlagatum*, whether the court will at all *admit of ſpecial bail*, or not? Or if they ſhould, how ſhall the ſheriff know in *what ſum* it ſhall be? Or, if he ſhould be fined, what will be the *amount* of his fine? Clearly, an outlawry *after conviction* of a miſdemeanour is *not* within this act; whatever elſe may be within it.

The court having thus declared their unanimous opinion, ‘ that Mr. ‘ *Wilkes*, under his preſent circumſtances of ſtanding convicted of a cri- ‘ minal miſdemeanour, had no *right to demand* being admitted to bail, ‘ *under this act of parliament*;’

His counſel moved that he might be bailed, upon the foot of the *general diſcretion* which the court would exerciſe, of bailing or committing a perſon convicted of a miſdemeanour, according to the particular circumſtances of his caſe: which they alledged to be ſufficient, in this gentleman's caſe, to induce the court to permit him to remain at large, under proper bail. Public juſtice was not intended, they ſaid, nor at all likely to be evaded. He had always been amenable to juſtice: he now ſurrendered voluntarily. Indeed, little care had ever been taken to apprehend him. He always appeared publickly upon the huſtings, both in *London* and *Middleſex*; and he is member of parliament for the latter county.

Lord *Mansfield.*---I have ſaid, ‘ that I knew no caſe where a perſon ‘ convicted of a miſdemeanour has been admitted to bail without *conſent* ‘ of the proſecutor.’ If any gentleman knows any ſuch caſe, I ſhould be glad to be informed of it: I know of none. We can not therefore do it, if the attorney-general does *not* conſent. For, we muſt act alike in all caſes of like nature: and what we do now, ought to be agreeable to former precedents, and will become a precedent in future caſes of a like kind.

The court declining to bail him *without* the conſent of the attorney-general as proſecuting for the crown, he was committed to the Marſhal.

His counſel then moved for a rule to bring him up to-morrow, to aſſign errors. Which was granted.

There were two rules. The former was this. ‘ The defendant being ‘ brought here into court, in cuſtody of the ſheriff of the county of *Mid-* ‘ *dleſex*, by virtue of a writ of *capias utlagatum*; it is ordered, upon the ‘ motion of Mr. Attorney-general, that the ſaid defendant be now *com-* ‘ *mitted* to the cuſtody of the Marſhal of the *Marſhalſea* of this court, to ‘ be by him kept in ſafe cuſtody until he ſhall be from thence diſcharged ‘ by due courſe of law. And the ſaid defendant now here in court pro- ‘ ducing a writ of error, and praying oyer of the record, it is ordered by ‘ this court, that the ſaid writ of error be *allowed.* On the motion of ‘ Mr. Attorney-general.’

The other rule, ‘ that the Marſhal or his deputy bring the defendant ‘ up to-morrow, to aſſign errors,’ was a diſtinct rule; and was taken up on the motion of one of the defendant's counſel.

On *Wedneſday* the 4th of *May*, 1768, (a week after making the laſt mentioned rule), the defendant having aſſigned errors upon the record of the outlawry, and the crown having joined in error; (all which was, by conſent on both ſides, privately tranſacted between the agents, without actually bringing Mr. *Wilkes* into court;)

Mr. *Davenport* moved to make the joinder in error a *concilium:* and *Saturday* next was agreed upon as the day on which it was to be argued.

Accordingly, on *Saturday* the 7th of *May*, 1768, it was argued by ſerjeant *Glynn* on the part of the defendant, and Mr. *Thurlow* on the part of the crown. It was very well argued on both ſides: but it would draw this report out into an inſufferable length, if the particulars of it ſhould be here inſerted.

The great and capital error that the ſerjeant inſiſted upon, was the inſufficiency of the return in not ſhewing that the defendant had been five times exacted from county-court to county-court, till he was outlawed, as the law directs, and the writ requires. He argued that this ought to appear certainly and preciſely upon the ſheriff's return; that outlawries are odious; and that the court will intend nothing in ſupport of ſo cruel a proceeding, but, on the contrary, liſten to the leaſt objection of error in it. And here, the firſt exaction does not appear to have been made *in the county of Middleſex*; nor any of the ſubſequent ones, which are ſaid to have been at the ſame place with the firſt. The words ‘ *near* ‘ *Holborn*, in the county of *Middleſex*,’ do not import its being in the county. Beſides, the time and place of the ſecond, third, fourth and fifth exactions ought to have been particularly ſpecified and deſcribed; and not by reference only to the firſt. Moreover, the ſheriff ought to have ſtated the *proclamations* explicitly and particularly, and the particular manner and circumſtances of them. He alſo made a queſtion, ‘ Whether ‘ an outlawry *lies* upon an *information.*’ And he concluded with an objection to the information, as not being properly exhibited; being exhibited by his majeſty's ſolicitor-general, without taking any notice of the vacancy of the office of attorney-general: whereas the attorney-general is the known and proper officer of the crown for this purpoſe; and the ſolicitor-general has *no ſuch right.*

He cited a great number of caſes and precedents, in ſupport of his objections.

Mr. *Thurlow* defended the regularity of the whole proceeding, by reaſon, argument, and practice: and he alſo cited a great number of caſes and precedents, to ſupport his arguments and allegations.

To which Mr. ſerjeant *Glynn* having replied; and the counſel for the defendant having declared, ‘ that they did *not* deſire a ſecond argument;’

The court ſaid, that the very great number and variety of authorities and precedents that had been produced and very ably urged on both ſides, deſerved and would require their mature conſideration; and directed copies of the records cited on both ſides to be laid before them; or at leaſt one copy of each record, which they would deliver over from one to another.

On *Saturday* the 14th of *May*, 1768, (a week after the before-mentioned argument,) after lord *Mansfield* and Mr. juſtice *Yates* were gone,

Mr. *Davenport* moved for a rule to bring the defendant up on *Monday*, in order to be *bailed:* but he had no affidavit of any particular circumſtances to induce the court to grant ſuch a rule.

Mr. juſtice *Aſton* did not ſee, he ſaid, how the court could bail him, without any particular circumſtances being laid before them, when they had already and ſo lately determined, after a full hearing of counſel on both ſides, ‘ that he was *in execution* upon the outlawry *after conviction* of ‘ miſdemeanours, and was *not admiſſable* to bail.’ He would not therefore, after two of the four judges were gone away, make ſuch a rule as was prayed: but Mr. *Davenport* might move it again, if he pleaſed, on *Monday* morning at the ſitting of the court; and that would allow time enough for the defendant's being brought up the ſame day, to be bailed, if the court ſhould think it a reaſonable motion.

Mr. juſtice *Willes* was of the ſame ſentiments with Mr. juſtice *Aſton*; and agreed to Mr. *Davenport*'s having leave to move it at the ſitting of the court on *Monday.*

Upon *Monday* the 16th of *May* 1768, the court being then full,

Mr. *Davenport* accordingly renewed his motion. He could only urge, that there were but two grounds of impriſonment: one, for *ſecurity*; the other, for *puniſhment.* The former failed in the preſent caſe; becauſe Mr. *Wilkes* had always voluntarily ſurrendered: the latter failed, becauſe it was premature; for, the caſe was not yet ripe for judgment upon the conviction; and the validity of the outlawry was at preſent doubtful.

Mr. *Davenport*, upon being aſked by lord *Mansfield*, ‘ Whether he had giv- ‘ en notice to the attorney-general of this motion,’ owned that he had not.

Lord *Mansfield*---However, it cannot prevail; becauſe the defendant is in cuſtody *after conviction:* which is a cuſtody *in execution.* It is not a cuſtody for ſecurity only; but goes in *part of the puniſhment*, and will be taken into conſideration, upon the final judgment: and ſo we told you before. It was ſo in *Lookup*'s caſe, and in the caſe of a *Welch* clergyman.

A defendant in execution upon an outlawry after conviction of a miſdemeanour, in crown proſecutions, can not be admitted to bail *without the conſent* of the attorney-general.

If the court had been of opinion, upon the laſt argument, to *reverſe the outlawry*, yet the defendant muſt have continued in cuſtody *upon the conviction.*

Errors upon outlawries have ſeldom been ſolemnly argued. This writ of error has been ſolemnly and exceedingly well argued: and the matter deſerves to be ſeriouſly conſidered. What is determined upon ſolemn argument eſtabliſhes the law, and makes a precedent for future caſes: which is not the caſe of queſtions agreed by conſent of parties, or never litigated. *This* will be a precedent.

The court, in all caſes (without regarding who is the particular defendant), leans to the reverſal of outlawries; becauſe the puniſhment of the outlawry is often greater than the puniſhment of the offence itſelf. Here, the defendant had the merit of coming in voluntarily; not being brought in by proceſs and in cuſtody. But the court can not *make* errors; nor reverſe for errors which do *not exiſt*, or which they *can not ſee:* they muſt be ſatisfied, that there *are* errors. If the court had been ſatiſfied on any one error aſſigned, they would have reverſed the outlawry for that error. We did, ſeveral of us, when we came into court, ſeem to think that the *want of proclamations* was a flaw: but my brother *Yates* doubted 'Whether *proclamations were at all neceſſary* in ſuch a proceeding 'as this.' I wiſh that the precedents and acts of parliament may be looked into, to ſee 'whether *proceſs of outlawry* will lie upon *informations* '*for miſdemeanours*;' as well as to ſee 'whether *proclamations* are neceſſary 'or not, upon proceſs of outlawry *after convictions* for miſdemeanours.' I deſire that the counſel will apply themſelves to ſearch into this point, 'Whether proceſs of outlawry will *at all lie* upon informations for miſ'demeanours.' And, as many precedents have been already cited and produced, I deſire alſo that the precedents may be left with us, for our peruſal and conſideration.

Mr. juſtice *Yates.*---I ſhould have thought that what was ſaid by the court upon the former argument, would have been ſufficient to have ſpared the preſent motion. The matter was then largely and very well argued; and the court explained their ſentiments very fully at that time: their opinion was, 'that the defendant being *in execution*, he could *not* 'be bailed, *without conſent* of the attorney-general on the part of the 'crown.' To bail him upon the *mere aſſignment* of errors, would be *prejudging* upon the errors: it would *preſuppoſe* 'that they were *fatal.*' He is at preſent *in execution*; and can not be taken out of execution, without conſent of the attorney-general on behalf of the crown.

But ſince this matter is again brought upon the tapis, it gives me an opportunity of ſuggeſting my own doubts. *If* proclamations are *neceſſary*, I ſhould think this return to be clearly bad: but if proclamations are not neceſſary, it is then immaterial when, or where, or how they were made. As to what has been ſaid about the expreſſion, 'at *my* county'court,' not being determinate, becauſe he might be ſheriff of *two* counties --- there are two authorities which either were not mentioned at the bar, or at leaſt were not fully ſtated. One of them is 1 *Ventris* 108. where an outlawry was reverſed, for that the proclamations were returned to be '*ad comitatum meum tent. apud* 'ſuch a place *in comp. prædict.*;' and not ſaid, '*pro comitatu:*' '*for*, anciently one ſheriff had two or three counties, and might hold the court in one county for another. The other of theſe caſes is in 2 *Roll's Reports* 52. *Robert Alder*'s caſe; who was outlawed for murder: and it was moved for error, that the ſheriff returned, '*ad* '*comitatum meum tentum apud D. in le county de* Northumberland;' and did not ſay, '*Comitat. meum Northumbriæ tentum*, &c.' And this was holden to be error, by the court; according to the caſe in 6 *H.* IV. where it is returned, '*ad com. meum* Somerſett *tentum.*' And therefore it was holden erroneous: for, one may be ſheriff of *Surrey* and *Suſſex*, and alſo of *Huntingdonſhire* and *Cambridgeſhire.* But this is not poſſible in the caſe of the ſheriff of *Middleſex.* The ſheriffs of *London* have been immemorially the ſheriff of *Middleſex:* therefore he could not have two counties. But I ſhould always incline to favour errors aſſigned in outlawry; becauſe it is more juſt and right, that judgment ſhould be given upon the conviction for the *offence.* Therefore, my doubt being againſt the errors aſſigned, I ſhould be unwilling that more regard ſhould be paid to it, than it ſhall appear ſtrictly to deſerve: and I would not have propoſed it, if I had not thought it incumbent upon me to communicate it, ſince it has occurred to me, and ſeems to me to have more weight than perhaps it might appear to others to have.

But my lord's doubt is a very material one---'Whether the offence 'charged in the information is *ſuch* a crime as will *warrant* an out'lawry.'

The 18 *Ed.* III. *Stat.* 1. *c.* 1. * has negative words in it, in the printed edition of the ſtatutes; though it is ſaid not to be ſo in the parliament-roll. At common-law, outlawry lies only for treaſon and felony, as I apprehend. Therefore the court will be glad of hearing the arguments at the bar, to aſſiſt their inquiry in this doubt.

Mr. juſtice *Aſton.*---The opinion of the world ought not to weigh at all with the court in forming their opinion upon the validity of the errors aſſigned upon this outlawry. If one flat deciſive objection had clearly appeared, the court would have immediately given their opinion, upon the firſt argument. I was not ſatisfied, myſelf, that the *minor* objections had ſufficient force in them: and as to the *greater* ones, the counſel for the defendant ſeemed to me to be too ſanguine and too much attached to their own opinions, when they declined the offer of a further argument, when the court wiſhed to be further informed by hearing it argued again. But this doubt which my lord has mentioned, 'Whether proceſs of out'lawry will lie for the crimes charged in theſe informations,' is a very material one, and ought to be well conſidered. It may be neceſſary to look into *Bracton* and other books; and the ſtatutes of 18 *E.* III. *St.* 1. *c.* 1. and *St.* 2. *c.* 5. and 1 *E.* I. *c.* 20. and a caſe in the year-book of 35 *H.* VI. *f.* 6. *pl.* 9. 'that proceſs of outlawry did not lie; becauſe the 'action was not for a tort ſuppoſed to be done *vi et armis.*' It may be a doubt, 'Whether proceſs of outlawry lies on informations of this kind, 'for offences which though expreſſed to be done *vi et armis*, are *not really* 'done with *actual* force.' The 18 *Ed.* III. *Stat.* 2. *c.* 5. ſays, 'that no 'exigent ſhall go, where a man is indicted of treſpaſs, if it be not againſt 'the peace, or of things contained in 18 *E.* III. *Stat.* 1.' And though the words, '*nemy des autres*,' are not to be found in the parliament-roll, yet they are in ſeveral manuſcript copies. Theſe things deſerve to be maturely conſidered.

It is proper alſo to inquire into the practice and precedents; and to ſee whether they have been uniform and concomitant. Treſpaſſes in parks may be effectually done, without actual force.

The court will not keep back their opinion, without having ſufficient ground for doubting, and a neceſſity of taking time to ſatisfy their doubts: on the other hand, they will not give their opinions over-haſtily and prematurely, merely to gratify the humours or paſſions of mankind.

Mr. juſtice *Willes* concurred that the defendant was *not* bailable; being *in execution* upon the outlawry after conviction. He thought, with Mr. juſtice *Aſton*, that the defendant's counſel were in the wrong when they declined a ſecond argument, which might have given the court further light. He expreſſed his inclination towards the reverſal of outlawries, on account of the ſeverity of the judgment upon them, which ſometimes exceeded what would be the puniſhment upon the conviction itſelf.

For the reaſons above particularized,
Mr. *Davenport* took nothing by this motion.

On *Wedneſday* the 8th of *June* 1768, (being the ſixth day of *Trinity* term, 8 *G.* III.) Mr. Attorney-general and other counſel for the crown were further heard. But the counſel for the defendant reſted their caſe upon the former argument.

Lord *Mansfield* expreſſed himſelf to the following effect.

Great pains have been taken, and great ſearches have been made, ſince the laſt argument; not only (as I ſee now) by Mr. Attorney-general and thoſe he has employed, but by *ſome of us*; I ſay, '*ſome of us*;' becauſe I cannot, with truth, aſſume the merit to *myſelf:* the load of *other* buſineſs which lay upon me, made it impoſſible. But from the able aſſiſtance of thoſe who have taken the trouble to make ſearches and to collect materials, I think I am now thoroughly maſter of a ſubject which I am not at all aſhamed to ſay I knew very little of before: and I never give a judicial opinion upon any point, until I think I am maſter of every material argument and authority relative to it. It is not only a juſtice due to the crown and the party, in every criminal cauſe where doubts ariſe, to weigh well the grounds and reaſons of the judgment; but it is of great conſequence, to explain them with accuracy and preciſion, in open court; eſpecially if the queſtions be of a general tendency, and upon topics never before fully conſidered and ſettled; that the criminal law of the land may be certain and known.

Outlawry is a very important part of that law. Yet it is no wonder, that the forms and method of proceeding are ſo little attended to, and ſo little underſtood: for, this is perhaps the firſt occaſion where any queſtion of law, upon a writ of error to reverſe an outlawry in a *criminal* caſe, ever underwent a ſerious litigation.

Outlawry in *civil* actions is conſidered as in the nature of civil proceſs, to compel an appearance to the ſuit; or, if after judgment, to procure ſatisfaction. The forfeiture, though nominally to the king, yet in truth goes to the plaintiff, towards payment of his demand. If the outlaw appears, pays all the coſts, puts in ſufficient bail, and does every thing he can to put the plaintiff in as good a condition as he would have been in originally; or if, after judgment, the outlaw pays the debt and coſts; the court reverſes the outlawry upon motion, *without* any writ of error. The *form* of the reverſal always is, 'For the errors *aſſigned* and *other* errors '*appearing upon the record:*' although there is, in truth, *no* error at all.

Flight, in *criminal* caſes, is itſelf a crime. If an innocent man flies for treaſon or felony, he forfeits all his goods and chattels. Outlawry, in a *capital* caſe, is as a *conviction* for the crime: and many men who never were tried have been executed upon the outlawry.

In *miſdemeanours*, outlawry is generally a more ſevere puniſhment than would be inflicted for the crime of which the outlaw ſtands accuſed or convicted. It is a forfeiture of his goods and chattels, and all the profits of his real eſtate; and perpetual impriſonment, with many incapacities. If it is erroneous, it cannot be reverſed without a writ of error.

Till the third of queen *Ann*, a writ of error in any *criminal* caſe was held to be merely *ex gratia.* Lord-keeper lays it down * 'that 'a writ of error in a *criminal* matter was *ex gratia regis*, in '*all* caſes;' and ſaid †, 'He had a collection of ſeveral caſes 'out of the old books of the law, that were given him by 'lord chief juſtice *Hales*, which ſhew that writs of error in 'criminal caſes are *not* grantable *ex debito juſtitiæ*, but *ex gra'tia regis:* and in ſuch a caſe, a man ought to make applica'tion to the king; and he will then refer it to his counſel; 'and if they certify that there is error, the king will not deny a writ of 'error.' It never was granted, except when the king, from juſtice, where there really was error, or from favour, though there was no error, was *willing* the outlawry ſhould be reverſed. After a writ of error granted, the attorney-general never made any oppoſition: becauſe, either he had certified 'there was error,' and then he could not argue againſt his own certificate; or the crown meant to ſhew favour, and then he had orders 'not to oppoſe.' The king, who alone was concerned as the proſecutor, and who had the abſolute power of pardon, being *willing* that the outlawry ſhould be reverſed, this court reverſed upon very *ſlight and trivial* objections, which could not have prevailed, if any oppoſition had been made, or if the precedent had been of conſequence. The *form* of reverſal, 'for the errors aſſigned *and other errors* appearing upon record,' delivered the court from the neceſſity of *ſpecifying* any; and they might think themſelves well warranted to reverſe, upon the tacit or expreſs conſent of the king, where he alone was concerned to oppoſe; though there really was no error at all: and, as the king had the power to *refuſe* a writ of error, the precedent was of *no conſequence.*

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* Vid. alſo Stat. 2. c. 5.

* 1 Vernon 170. Crawle v. Crawle.

† Vid. 1 Vern. 175. in the Rioters caſe.

* v. the Ailſbury Caſe.

But in the third of queen *Ann* *, ten of the judges were of opinion, 'that in *all* caſes *under* treaſon and felony, a writ of 'error was *not merely of grace*; but *ought* to be granted.' *Price* and *Smith* were of a contrary opinion, 'that a writ of error was of *grace only*, 'in *all criminal* caſes.' The ten did not mean 'that it was a writ *of* '*courſe*;' but that, 'where there was *probable error*, it *ought not to be denied.*'

It cannot iſſue *now*, without a *fiat* from the attorney-general; who always examines whether it be ſought merely for delay, or upon a probable error.

‡ 9 Geo. 1.

In the caſe of the *king* againſt *Earbury*, ‡ the opinion of the court was taken, before the attorney-general granted his *fiat* for a writ of error. In the preſent caſe, the attorney-general refuſed his *fiat*, while the defendant was out of cuſtody.

This opinion in the third of queen *Ann* has made a great alteration as to outlawries in criminal caſes *under* treaſon and felony. In a *miſdemeanour*, if there be *probable cauſe*, it *ought not to be denied.* This court would *order* the attorney-general to grant his *fiat.* But be the error ever ſo manifeſt in *treaſon* or *felony*, the king's pleaſure to deny the writ is *concluſive.* Lord *Muſkerry*, the ſon and heir of the earl of *Clancarty*, petitioned for a writ of error, to reverſe his father's outlawry, becauſe his father was a priſoner in the *Tower* of *London* during the whole time of the proceedings againſt him. The fact was verified beyond doubt, by entries from the books of the *Tower*, and by the affidavit of the ducheſs of *Marlborough.* The late lord chief juſtice *Willes*, then attorney-general, reported the writ to be *merely of grace:* and, upon political reaſons, it was abſolutely refuſed; and the outlawry ſtands.

A writ of error being as a matter of right, where there is error in the outlawry; ſince the third of queen *Ann*, in all crimes under treaſon and felony, 'What is an error?' *became an important queſtion:* which was of *no* conſequence, before. Since that time, this court has not given way to *trivial* objections, though admitted by the attorney-general. In 1708, lord *Griffin* was brought into this court upon an outlawry for high treaſon: and upon the prayer of the ſolicitor-general, (there being then no attorney-general,) a rule was made for his execution. He was reprieved, from time to time, till his death. His grandſon and heir, from the grace and favour of king *George* the firſt, obtained a writ of error. Sir *Philip Yorke*, then attorney-general, came into court, and ſaid he had a ſign manual, 'to *confeſs the errors* and conſent to the reverſal.' The court told him, '*His confeſſing* an error in *law* would not do: they *muſt* '*judge* it to be an error; and *their judgment* would be a precedent. But 'the plaintiff in error might aſſign an error in *fact*; which, by proper 'authority, he might confeſs.' Accordingly, the plaintiff aſſigned an error in fact, *viz.* 'that the place of his grandfather's reſidence was in 'the county of *Northampton*; whereas he had been outlawed in *London.*' The attorney-general confeſſed the fact: whereupon, the outlawry was reverſed §. Since the third of queen *Ann*, no queſtion of law has been *litigated*, upon a writ of error to reverſe an outlawry; no criminal outlawry has been reverſed upon a *trivial* objection: no caſe, ſince that time, has been found, of *either* kind.

§ Hill. 13°. G. 1.

Outlawry is an eſſential part of the criminal law. The rules and method of proceeding are wiſely calculated to prevent ignorance and ſurprize. The conſequences are made ſevere, becauſe the offence is heinous; and it imports the ſtate, that no man ſhould fly from the laws and juſtice of his country. This court is bound to pronounce the law as they think it is; always leaning to the favourable ſide, where they doubt: for, ſo ſays the law. It is as much a breach of duty to reverſe a good, as it would be to affirm a bad outlawry. The miſchief goes farther than an unrighteous ſentence in the particular caſe. For, to reverſe without an error, is to aboliſh that part of the law. And therefore ſerjeant *Glynn* admitted that criminal outlawries were not to be reverſed of courſe: an error muſt be found.

In a matter where the conſequence may be ſo penal to the defendant in this particular caſe; where the grounds of the judgment muſt be ſo important to a very eſſential part of the criminal law, never before brought adverſely in queſtion, and therefore lying under great obſcurity and confuſion; I feel myſelf extremely obliged (and I think the publick obliged) to thoſe who, in the ſhort time taken for conſideration, have ſearched the ſubject to the bottom. From the materials with which I have been furniſhed, I think myſelf ſufficiently inſtructed, to form an opinion: and I will declare the grounds and reaſons of that opinion which I have formed, to this great and numerous audience, with as much accuracy and preciſion as I can, to prevent miſapprehenſion.

There are two ſorts of error which have been aſſigned and argued.

1ſt, The firſt ſort are errors which give riſe to *queſtions of law*, and to *real arguments.*

2d, The ſecond are criticiſms upon *words* and *ſyllables* in the return.

Of the firſt ſort, two are aſſigned.---

That there is *no ſufficient information* filed or exhibited againſt the defendant, whereon to *ground the proceſs of outlawry.*

That *no public proclamation* whatſoever is mentioned to have been made at any open court, or at any general quarter-ſeſſions of the peace whatſoever; or at the doors of any pariſh church where the ſaid defendant was an inhabitant; according to the exigency of the ſaid writ of *capias cum proclamatione.*

Under the firſt error aſſigned, three objections have been made.---

1ſt, That the information is by the ſolicitor-general, and not the attorney-general.

2d, That an outlawry does *not lie* upon an *information.*

3d, That though it may lie upon an information, yet it does not lie for *ſuch an offence* as is proſecuted in either of *theſe* caſes.

Firſt---The information is by the ſolicitor-general.

If this objection is founded, it will equally hold upon a motion in arreſt of judgment. But, I believe, none of us, from the beginning, ever entertained the leaſt doubt concerning it. An information for a miſdemeanour is the king's ſuit. The title of the cauſe is, 'The king againſt 'the defendant:' the oath, at the trial, to the jurors and the witneſſes, is 'between the king and the defendant.' As a ſubject ſues by attorney, ſo does the king; with a little variation of form, from decency: inſtead of ſaying, 'The king ſues by ---,' it is ſaid, 'ſues for the king;' and yet, '*Coram domino rege venit* * *dominus rex per attornatum* '*ſuum, et inde producit ſectam,*' was held to be good. (*Hale* chief juſtice ſaid, it was but an unmannerly way of declaring for the king). The attorney is anſwerable, if he acts without authority; and upon complaint by the party whoſe name he has falſly uſed, the court would puniſh him, and ſet aſide the proceedings: but while the principal avows him, neither the adverſe party nor the court can diſpute his authority. The coroner of this court proſecutes informations for the king, as his attorney. The form of the proclamation at criminal trials is a ſtrong proof that anciently the king's ſerjeant might proſecute for the king. When there did not exiſt ſuch an officer as ſolicitor-general, the king's ſerjeant or his attorney, or other that would ſue for the king, ſhould be received to aver againſt the teſtimony of the parties impriſonment, where the outlawry was pronounced at the king's ſuit †. There are many entries in *Raſtal* ‡, which ſhew that at the common law others than the attorney-general have ſued for the king; or, in other words, the king has ſued by others as his attornies. Serjeant *Glynn* cited a manuſcript treatiſe concerning the Star-Chamber; of which Mr. *Filmer* has a copy: the original is in the *Muſeum* §. The author's name is preſerved in a note written in this preſent-book, at the beginning, by the lord keeper *Finch*, as follows---'This treatiſe was compiled by *William Hudſon* of '*Gray's-Inn*, eſq; one very much practiced and of great experience in the Star-Chamber, and my very affectionate friend. His 'ſon and heir, Mr. *Chriſtopher Hudſon*, (whoſe hand-writing this book 'is,) after his father's death, gave it to me. 19 *December* 1635. *J. Finch.*'

* 2 Lev. 82. 3 Keble 127. Raſtal's Entr. 655. *b.*

† Vid. 5. Ed. 3. c. 13

‡ Title Debt. 192 *b* pl. 4. Title Eſcheat 114 *b* pl 3. Title Quare impedit, 527 *b* pl. 1.

§ Harleian Catalogue, No. 226. vol. i.

The whole paſſage ſhould be taken together; and is in theſe * words---'It remaineth that I ſhall, in the next place, treat 'of the king's ordinary ſuits: which are of two ſorts;--- 'either by his attorney, informing of himſelf, or by other mens relations, and by the king's almoner; the one being in criminal cauſes, 'the other in civil. For the king's attorney, I have known it much 'queſtioned, Whether any other of the king's counſel may not inform 'for the king, as well as the attorney-general. And it is true, that 'in *Eaſter* term, 8 *H.* VIII. it is ordered that the king's ſolicitor ſhall 'not proſecute any further the merchants of the *Stiliard*, till it were 'otherwiſe ordered by the council: and the ſame term, the ſolicitor was 'commanded to ſue out proceſs againſt ſome which acquitted 'one *Blaſe* of a rape. So that it ſeemeth, that others of the 'king's counſel did proſecute cauſes for the king, as well as the king's 'attorney. But in 1 & 2 *James* the firſt, it was reſolved by the court, 'that it belongeth to the place of the attorney. And ſerjeant *Heale*, 'the king's ſerjeant, putting in a bill againſt ſir *John Luſon*, was denied 'that privilege. For, if a bill be put in by the king's counſel as 'for the king, there are no coſts to be paid to the defendant, nor fees 'for the proſecution: but in this caſe, ſerjeant *Heale*'s bill was diſmiſſed 'with 30*l.* coſts; it continuing in proſecution not above two terms.' It is aſtoniſhing how any other law-officer of the king could claim, *as an official right*, to be the king's attorney in all ſuits which he ſhould think fit to bring in the king's name. The very conſtitution of an attorney-general is deciſive againſt it. He might ſtop every ſuit brought by another. And therefore the council did very right, as between the king's law-officers, to overrule ſerjeant *Heale:* but they did not mean, that the king himſelf, for ſpecial reaſons, might not appoint another to act as his attorney. In that reign, afterwards, *Yelverton* was ſuſpended, and the ſolicitor appointed to act. Suppoſe the attorney-general perſonally the defendant: there muſt be another to ſue for the king. Suppoſe the attorney-general out of the realm; or under a diſability from ſickneſs: ſuppoſe the office of attorney-general vacant. When it is, the buſineſs (which cannot ſtand ſtill) muſt devolve upon another of the king's counſel: and there is nothing ſo certain, as that the whole buſineſs and authority of the attorney devolves upon the ſolicitor-general. I am ſatisfied, that if the matter was traced, the two precedents in *Eaſter* term, 8 *Henry* VIII. mentioned by Mr. *Hudſon*, were during the vacancy of the attorney's office. It is impoſſible the council could, in the ſame term, order the ſolicitor-general to ſtop one public proſecution and commence another, if there had been an attorney-general. As far back as the memory of the vacancies of the attorney's office has led to a ſearch, precedents have been found of informations filed by the ſolicitor-general, in *Chancery*, and on the law-ſide of the *Exchequer.* In this court, the information againſt the earl of *Devonſhire* † was proſecuted by the ſolicitor general: and though the enormity of the fine ſet, and the revolution of government which immediately followed, made this caſe the ſubject of much animadverſion and juſt cenſure; 'the ſolicitor-general 'having proſecuted,' was never objected. There are precedents of replying, demurring, taking iſſue, praying judgment or award of execution, by the ſolicitor-general, during the vacancy of the other office. We all know, from our own experience, that upon every vacancy which we remember of the attorney's place, his office has been executed by the ſolicitor-general. But it is ſaid, 'The information ought to have *ſug*-'*geſted* that the office of attorney was vacant.' Many of the precedents do not ſuggeſt it: and there can be no occaſion. The attorney-general is a great officer of the law and of this court. The court take notice when the office is vacant; and by whom it is filled, when full. They give credit to the ſolicitor-general, when he ſues as attorney for the king, 'that he *has authority.*' He does it at his peril. In this caſe, before the defendant pleaded, the ſolicitor-general was made attorney, and in that

* Fol. 84. and 85.

Fo. 85.

† 3 Jac. 2.

capacity brought into court the information he had filed as ſolicitor. If an objection could lie to his authority as ſolicitor, the only queſtion would be, ‘ From what time the information ſhould be conſidered as commenced: from the filing by the ſolicitor; or the bringing into court by the attorney.’ And that could be of no conſequence, but in reſpect of the time when the defendant ought to plead. But he has pleaded to the information brought in by the attorney-general; and been tried. In every light and in every view, this objection is groundleſs: nothing has been offered to ſupport it, but ſerjeant *Heale*'s caſe. Upon ſo plain a point, I certainly ſhould not have ſaid ſo much, but that the objection alſo goes in arreſt of judgment, and therefore may be argued again. The counſel are apprized of my reaſons: and if they ſhould think their objection tenable, I am open to conviction.

Second objection under the firſt error aſſigned---‘ That an outlawry does *not lie* upon an *information.*

The counſel for the defendant ſupported this objection, *two* ways. Firſt, they ſaid, The books were ſilent on this head: and the *ſtatute of additions* mentions only that ‘ in original writs of perſonal actions, appeals, and *indictments*, in which the exigent ſhall be awarded, &c. &c. [*]’ But an *information* is not therein mentioned. Secondly, They ſaid, that from the *nature of the proceſs* in an information, the *exigent was not awardable*. For, the proceeding by information in this court is ſimilar to the Star-Chamber precedents: and in ſuch proceedings, they did not award a *capias*, but a *ſubpœna.* That here, the antecedent proceſs is by ſummons of *attachment*, not by *capias:* and conſequently, if there is no *capias* to introduce the proceſs of exigent, it can not lie in this caſe. Serjeant *Glynn* admitted, as a point beyond all doubt, ‘ that informations of this kind were competent, in this court, at the *common-law*.’ No lawyer ever doubted of it: no lawyer would ſeriouſly argue againſt it. So that ſir *Bartholomew Shower* had no opportunity to deliver the argument he has printed [†]. Informations here neither derive their being, nor the form of proceeding upon them, from the Star-Chamber; but from the common-law of the land, and the uſage and practice of this court where they are exhibited. Although informations are not mentioned in the ſtatute of additions, yet the ſame requiſites of certainty and preciſion muſt be in an information, as in an indictment [‡]. *Preſentment* is not mentioned in this ſtatute. And yet, on a preſentment before the coroner, ‘ that *French* was *felo de ſe*,’ (which was certified into the *King's Bench*,) ‘ and that certain of *French*'s goods were in the poſſeſſion of *J. S.*’ proceſs iſſued againſt *J. S.* until he was outlawed. And upon error brought ‘ for that there was not any addition given to the ſaid *J. S.* in the preſentment upon which he was outlawed,’ it was at firſt doubted ‘ whether upon that preſentment proceſs of outlawry did lie:’ and *Ive*, clerk of the *Crown-office*, ſaid to the court, ‘ that ſuch proceſs in ſuch caſe did lie: and that he could ſhew five hundred precedents of it.’ And, ſecondly, it was moved, ‘ if this outlawry ought to be reverſed for default of addition.’ But it was agreed by the whole court, that as to this purpoſe, the preſentment ſhould be accounted in law as an indictment [§]. To an information in nature of a *quo warranto*, to ſhew by what authority the defendant claimed to be a burgeſs of *Grampound*, the defendant pleaded in abatement, for want of proper addition; the information ſtyling him ‘ labourer,’ whereas he was clothier; and this plea was moved to be ſet aſide, on the ground, ‘ that an addition was not neceſſary.’ The court refuſed to ſet it aſide on that ground: but they found another, the want of a proper affidavit to verify the plea [||]. There ſeems as good ground to ſay, upon the foot of precedents and conſtruction of the ſtatute of additions, ‘ that proceſs of outlawry *lies*, and addition is *requiſite* in an *information*,’ as in the preſentment in *French*'s caſe. As to the other argument from the *nature* of the proceſs---there was no authority or precedent cited or produced, to prove the aſſertion. On the contrary, there are many precedents where the proceſs was by *capias*; and the exigent followed: ſome, as in the preſent caſe; though moſt are before conviction. But ‘ that a *capias does lie*, in proceſs upon theſe informations,’ I take to be as old as their exiſtence. If not, how could there have been ſuch a number of outlawries upon informations; and ſome, of ancient date? All theſe records are ſo many authorities to ſupport this proceſs; which are not, after ſo great a length of unqueſtioned uſage, to be now impeached [*]. And it is obſervable on the 18 *Edw.* III. *ſt.* 1. that it not only clearly relates to a proceeding *before* judgment; but it gives the exigent, if the party is not brought in on an *attachment* or *diſtreſs*. However, there is no need to reſort to that kind of reaſoning; when *uſage* ſupports the *capias*, in the preſent caſe, as the common proceſs upon theſe occaſions.

Third objection under the firſt error aſſigned---‘ That outlawry does not lie, from the *nature of the offence*.’

This objection was ſlightly touched by Mr. ſerjeant *Glynn*; but ſtruck us, at firſt, as a point fit to be conſidered: and I mentioned to the bar, ‘ that it might be proper to look into it.’ The doubt was, ‘ whether the offence charged in either of theſe informations was ſuch as rendered the perſon accuſed of ſuch crime liable to the proceſs of outlawry, either at *common-law*, or by any *ſtatute*. In *Coke Littleton* 128 *b.* it is ſaid, ‘ that in the reign of king *Alfred*, and till a good while after the Conqueſt, no man could be outlawed but for felony; the puniſhment whereof was death: but after, in *Bracton*'s time and ſomewhat before, proceſs of outlawry was *ordained* to lie in all actions that were *quare vi et armis*, which *Bracton* calls *Delicta*, for there the king ſhall have a fine.’ The 18 *Edw.* III. *ſt.* 1. declares the caſes and offences for which the exigent ſhall be awarded, if the party cannot be found or brought in by attachment or diſtreſs; and not againſt any other. Alſo, the 18 *Ed.* III. *ſt.* 2. *c.* 5. ſays---‘ No exigent ſhall from henceforth go out, where a man is indicted of treſpaſs; unleſs it be againſt the peace, or of things which be contained in the declaration made in that caſe at the laſt parliament.’ But upon full conſideration, I am very well ſatisfied that the counſel for the defendant judged right in laying no ſtreſs upon this objection. The offences laid in theſe informations, and the proceedings upon them, are at the common-law. The *ſtatutes* giving proceſs of outlawry in certain caſes, and reſtricting its iſſuing in others but under certain circumſtances, do not affect the preſent queſtion: the proceſs is warranted, in the preſent caſe, by the common-law, or not at all. *Actual* force or violence does not appear to be the criterion upon which the proceſs of outlawry was founded. The *greatneſs of the crime*, and the *ſeverity of the puniſhment*, ſeem to be the material circumſtances originally attended to, in founding this proceſs; according to the paſſage I have juſt cited from *Coke*, as to the earlieſt times: for, felony does not imply or convey the idea of actual outrage; grand larceny being in its definition, as well as practice, different. And *Hawkins* confirms this notion, by ſaying, ‘ that this proceſs probably lay for all crimes of a [†] higher nature than treſpaſs *vi et armis*.’ The extenſion of this proceſs is ſuppoſed by lord *Coke*, in the paſſage I quoted, (and what he ſays, is repeated, without examination, by a variety of authors), to have been ſomewhat before *Bracton*'s time. The eſtabliſhing that period, for a ſuppoſed ordinance concerning outlawries, ſtrongly authenticates the teſtimony of that cotemporary writer, touching the caſes in which, and under what circumſtances this proceſs lay. Lord *Coke* ſaw, that it was impoſſible to ſay, ‘ that outlawry did not lie for any crime under felony:’ univerſal practice ſhewed the contrary. So he ſuppoſes a poſitive ſtatute made about *Bracton*'s time. There does not appear any particular ordinance for extending this proceſs: and there is no authority for the ſuppoſition. But *Bracton* (who wrote in the reign of *Henry* the IIId) ſays [‡], ‘ that it lay *in omni tranſgreſſione quæ fit contra pacem*;’ and afterwards, ‘ *pro omni tranſgreſſione, licet minimâ, ubi quis ad pacem domini regis vocatus, venire recuſaverit, et hoc propter contumaciam*.’ That this neceſſary ingredient, ‘ *contra pacem*,’ did not mean poſitive force in the committing of the offence, appears from the reaſon given why it lay for felony, 2 *Ro. Abr.* 805. ‘ Outlawry lay for felony; *becauſe* it was *contra pacem*.’ For, that could not mean (as I have already ſaid) more than its being an offence in its nature againſt the laws of ſociety, and a diſturbance of that good order and government which keeps a ſtate in unity and peace The crime of *larceny*, in its very nature, is ſecret and fraudulent, unleſs it be done with open violence; and then it is diſtinguiſhed by the aggravated name of robbery. Beſides, in the caſe of writs *quare vi et armis*, (in which caſes this proceſs is given,) it is acknowledged to be on account of the *ſuppoſed*, not the actual force. And ſo is the ſame place in 2 *Ro. Abr.* 805. and the 35 *H.* VI. (*a*) and (*b*) and many other books. In fact, therefore, it appears from *Bracton*, ‘ *that every offence committed againſt the peace* ſubjected the delinquent to the proceſs of outlawry.’ And the caſes ſhew, that the peace of the king is broke by diſorders without force. And indeed ſome of the greateſt crimes are without force. If force was the criterion on which this proceſs of exigent was founded at common-law, why was that proceſs given by the [§] *firſt* ſtatute of *Edward* the third, in the caſe of *riots*, &c.? Or what occaſion had there been for the [||] ſubſequent ſtatute of *Edward* the third to ſay---‘ From henceforth, it ſhall not iſſue in treſpaſs, *unleſs it is againſt the peace*,’ if the practice had not been, upon indictments, *though not ſo alledged*, for proceſs of exigent to iſſue? And that ſeems to be the true reaſon of the laſt reſtrictive ſtatute. I do not find it ever was denied, but that upon a preſentment or indictment for the king, proceſs of outlawry lay: and ſo it is expreſsly ſaid to be agreed, in *Brooke*, title ‘ exigent;’ which cites 8 *H.* VI [§]. But a number of outlawries have been found, in crimes laid to be *contra pacem*, *without vi et armis*, and which could not be committed with force; and this error never aſſigned: which, alone, is deciſive. I think, Mr. Attorney-general produced one as far back as the fifth of *Edward* the fourth.

The ſecond error aſſigned is as to the proclamations.

The return ſays---‘ I have cauſed public proclamation to be made, *in manner and form as I am within commanded.*.’ This is certainly *too looſe:* the proclamations are not ſufficiently ſet out, for the court to judge whether they were properly made or not. I thought this error *fatal.* But Mr. *Thurlow* ſatisfied me, ‘ that it was *unneceſſary* to make *any proclamation at all.*’ The *ſtatutes* which require proclamations do not extend to this caſe: and they are not required by the common-law. Indeed, this error was in a manner dropped and given up by ſerjeant *Glynn*, upon his reply: he did not contend, ‘ that they were neceſſary.’ The preſent record, drawn in the *Crown-Office* and ſettled by the king's counſel, ſhews under what obſcurity and perplexity this matter lies: the reſult of ignorance in the practicers; and productive of a ſhameful confuſion in the precedents of the office. They have not diſtinguiſhed between *civil* and *criminal* outlawries: they have not diſtinguiſhed between the manner of proceeding to outlaw in *criminal* caſes, *before* and *after* conviction. All is jumbled together: whatever is required in *any* caſe, they have applied to *all.* Circumſtances are unneceſſarily required, and defectively returned; becauſe former miſtakes are copied as precedents, without examination, But, as the proclamations, in *this* caſe, were nugatory and ſuperfluous, the imperfection of the return is of no conſequence: it is no error.

Of the ſecond ſort of errors, *critical* and *verbal*, two are aſſigned: which were argued.

1*ſt*. For that it is not ſhewn, nor does it appear by the return of the ſheriff of *Middleſex*, ‘ that the defendant was a firſt, ſecond, third, fourth, and fifth time exacted *at the county-court of the county of Middleſex*;’ as, by the law of the land, he ought to have been, before he was outlawed.

Under this error thus aſſigned, two objections were made: as to the *firſt exaction*; and as to the *ſubſequent*.

First,

[*] Vid. 1. H. 5. c. 5. § 1.

[†] 1 Shower 106. Rex. v. Berchet et al. Prynn's Caſe, 5 Mod. 459.

[‡] 2 Hawkins P. C. 260, 261.

[§] Frenche's Caſe, Mich. 26 Eliz. 2. Leonard 200.

[||] The King againſt Pardew, H. 15. G. 2. 1741.

[*] 5 Mod. 463, 464.

[†] 2 Hawkins P. C. l. 2. c. 27. p. 302.

[‡] Lib. 3. p. 127 b.

[§] 18 Edw. 3. ſt. 1.

[||] 18 Edw. 3. ſt. 2. c. 5.

[§] Vide Bro. Abr. Title Exigent and Capias, pl. 29 and Title Proceſs, pl. 16.

Firſt, As to the *firſt*.---The return is by two men, ſheriff of *Middleſex:* ‘ At *my* county-court, held, *&c.*’ So that two men, making one officer, that is, *ſheriff* of the county of *Middleſex*, ſay, ‘ At *my* court held in the ‘ county of *Middleſex.*’ To raiſe a doubt, it is neceſſary to go out of the record, into hiſtory and law. We know from thence, that the ſame man might be ſheriff of *two* counties. Till the thirteenth of *Elizabeth*, one perſon was ſheriff of *Somerſet* and *Dorſetſhire*; and ſo of *Suſſex* and *Surrey*; of *Oxford* and *Berks*; of *Nottingham* and *Leiceſterſhire:* and to this day, the ſame perſon is ſheriff of *Cambridge* and *Huntingdonſhire.* Such a ſheriff might by law hold *in either*, the county-court of the *other*. 6 *H.* VII. 15 *b* In the caſe of the ſheriff of *Somerſet*, who was then alſo ſheriff of *Dorſetſhire*, ‘ *my court* in the county of *Somerſet*’ was adjudged uncertain. 11 *H.* VII. 10 *a*, in a like caſe, *Rede Fairfax* and *Huſſey* inclined to think it certain enough; and adjourned the conſideration. But *here* it is impoſſible to raiſe a doubt. *Unleſs* the ſheriff of *Middleſex* may hold the court of *another* county in *Middleſex*, ‘ At *my* county-court,’ *can* only be the county-court of *Middleſex*. *Two* men, ſheriff of *Middleſex*, never were nor could be *ſheriff* of any *other* county. The error is not aſſigned, for want of any technical form of words; but ‘ that it is not ſhewn, nor ‘ does it appear by the return:’ whereas I am of opinion it *is* ſhewn, and *does* appear by the return, that the county-court was of *Middleſex*, and could not poſſibly be the court of any other county.

Secondly---As to the *ſubſequent exactions*---The objection is, ‘ that it ‘ is not ſhewn, nor does it appear, *where the court was held*, at which he ‘ was exacted.’ The return, having ſpecified the place where the court was held at which he was firſt exacted, ſtates ſeverally the ſubſequent exactions, ‘ *at my court held at the ſame place*.’ So that the whole doubt is, ‘ whether the *ſame place* includes the deſcription of the place referred to:’ which can not be a doubt, in any language of the world. For, in truth, the doubt can be no other than ‘ whether the *ſame place* means the *ſame* ‘ *place*, that is, the place before deſcribed.’

Second *critical* error. The only other error aſſigned and argued, is---

‘ It is no where expreſsly ſhewn, that the place called *Brook-ſtreet*, ‘ where the ſeveral county-courts are ſuppoſed to have been held, is *in* ‘ the county of *Middleſex*.’ The return ſays---‘ At the houſe known ‘ by the ſign of the *Three Tuns* in *Brook-ſtreet*, near *Holborn*, in the county ‘ of *Middleſex*.’ The counſel for the defendant contend, that the true conſtruction ought to be, to apply ‘ in the county of *Middleſex*,’ *to Holborn*, and *not to Brook-ſtreet*; and ſo make a *ſtop*, at *Brook-ſtreet*. It is impoſſible for me to doubt whether ‘ *near Holborn*,’ is not part of the deſcription of *Brook-ſtreet*. It could be added for no other reaſon: it could anſwer no end, to ſay, ‘ *near Holborn*,’ but as part of the name or deſcription of *this Brook-ſtreet*, in contradiſtinction to ſome other *Brook-ſtreet*. It is immaterial, what county *Holborn* is in: but the ſheriff was bound to ſhew that *Brook-ſtreet* was *in Middleſex*. There is no *law* in this: it is a queſtion of *conſtruction*. All men can judge of it; and would treat with contempt the judgment of this ſovereign court, if it could be founded upon ſo pitiful a prevarication. It is not permitted to me to *ſay* ‘ I doubt of the conſtruction,’ *unleſs* I *do* doubt; how much ſoever I may *wiſh* that this outlawry ſhould *not* ſtand. I am of opinion, that, according to the letter, ſenſe, and grammatical conſtruction of the ſentence, the court was held in ‘ *Brook-ſtreet* near *Holborn*; and that ‘ *Brook-ſtreet* ‘ near *Holborn*’ lies in the county of *Middleſex:* and I am perſuaded, there is no man who can think otherwiſe.

Theſe are the errors which have been objected: and *this* the manner and form in which they are aſſigned. For the reaſons I have given, I can not allow *any* of them. It was our duty, as well as our inclination, ſedulouſly to conſider whether upon any *other* ground, or in any *other* light, we could find an informality which we might allow with ſatisfaction to our own minds, and avow to the world.

But here, let me pauſe——

It is fit to take ſome notice of the various terrors hung out; the numerous crouds which have attended and now attend in and about the Hall, out of all reach of hearing what paſſes in court; and the tumults which, in other places, have ſhamefully inſulted all order and government. Audacious addreſſes in print dictate to us, from thoſe *they call* the people, the judgment to be given *now*, and afterwards upon the *conviction*. Reaſons of *policy* are urged, *from danger to the kingdom*, by commotions and general confuſion.

Give me leave to take the opportunity of this great and reſpectable audience, to let the whole world know, *all ſuch attempts are vain*. Unleſs we have been able to find an error which will bear us out, to reverſe the outlawry; it muſt be *affirmed*. The conſtitution does not allow reaſons of ſtate to influence *our* judgments: God forbid it ſhould! We muſt not regard *political conſequences*, how formidable ſoever they might be: if rebellion was the certain conſequence, we are bound to ſay, ‘ *Fiat juſtitia*, ‘ *ruat cœlum*.’ The conſtitution truſts the *king* with reaſons of ſtate and policy; *he* may ſtop proſecutions; *he* may pardon offences; it is *his*, to judge whether the law or the criminal ſhould yield. *We* have *no election*. None of *us* encouraged or approved the *commiſſion* of either of the crimes of which the defendant is convicted: none of us had any hand in his being *proſecuted*. As to *myſelf*, I took no part (in *another* place,) in the addreſſes for that proſecution. *We* did not adviſe or aſſiſt the defendant to fly from juſtice: it was his *own* act; and he muſt take the conſequences. None of us have been conſulted or had any thing to do with the preſent proſecution. It is not in *our* power to ſtop it: it was not in *our* power to bring it on. *We* can not pardon. We are to ſay, what we take the law to be: if we do not ſpeak our *real* opinions, we prevaricate with God and our own conſciences.

I paſs over many *anonymous* letters I have received. Thoſe in *print* are public: and ſome of them have been brought judicially before the court. Whoever the writers are, they take the *wrong* way. I will do my duty, *unawed*. What am I to *fear?* That *mendax infamia* from the *preſs*, which daily coins *falſe facts* and *falſe motives?* The lies of *calumny* carry no terror *to me*. I truſt, that my temper of mind, and the colour and conduct of my life, have given me a ſuit of armour againſt *theſe* arrows. If, during this king's reign, I have ever ſupported his government, and aſſiſted his meaſures; I have done it without any other reward, than the *conſciouſneſs* of doing what I thought *right*. If I have ever oppoſed, I have done it upon the points themſelves; without mixing in *party* or *faction*, and *without any collateral views*. I honour the king; and reſpect the people: but, many things acquired by the *favour of either*, are, in *my* account, objects *not worth ambition*. I wiſh *popularity:* but, it is *that* popularity which *follows*; not that which is *run after*. It is *that* popularity which, ſooner or later, never fails to do juſtice to the purſuit of *noble ends*, by *noble means*. I will not *do* that which my *conſcience* tells me is *wrong*, upon this occaſion, to gain the huzzas of thouſands, or the daily praiſe of all the papers which come from the preſs: I will not *avoid doing* what I *think is right*, though it ſhould draw on me the whole artillery of libels; all that falſehood and malice can invent, or the credulity of a deluded populace can ſwallow. I can ſay, with a great magiſtrate, upon an occaſion and under circumſtances not unlike, ‘ *Ego hoc animo ſemper fui, ut* ‘ *invidiam virtute partam, gloriam, non invidiam, putarem.*’

The threats go *further than abuſe:* perſonal *violence* is denounced. I do not believe it: it is not the genius of the worſt men of *this* country, in the worſt of times. But I have ſet *my* mind at reſt. The laſt end that can happen to any man, never comes too ſoon, if he falls in ſupport of the *law* and *liberty* of his country (for, liberty is ſynonimous to law and government). Such a ſhock, too, might be productive of public good: it might awake the better part of the kingdom out of that lethargy which ſeems to have benumbed them; and bring the mad part back to their ſenſes, as men intoxicated are ſometimes ſtunned into ſobriety.

Once for all, let it be underſtood, ‘ that no endeavours of *this kind* will ‘ influence *any* man who at preſent ſits here.’ If they had *any* effect, it would be *contrary* to their intent: leaning *againſt* their impreſſion, might give a bias the *other* way. But I hope, and I know, that I have fortitude enough to reſiſt *even that* weakneſs. No libels, no threats, nothing that has happened, nothing that can happen, will weigh a feather againſt allowing the defendant, upon this and every other queſtion, not only the whole advantage he is entitled to from *ſubſtantial law and juſtice*; but *every* benefit from the moſt critical nicety of *form*, which any other defendant could claim under the like objection. The only effect I feel, is an anxiety to be able to explain the grounds upon which we proceed; ſo as to ſatisfy all mankind, ‘ that a flaw of form given way to in *this* ‘ caſe, could *not* have been got over in *any other*.’

From the precedents we have ſeen, it appears, that a ſeries of judgments have required a *technical form of words*, in the *deſcription* of the county-court at which an outlaw is exacted: that after the words ‘ *at my county-court*,’ ſhould be added the *name of the county*; and after the word ‘ *held*,’ ſhould be added---‘ *for the county of* ——— (naming it). Whereas here, the ſheriff ſays, ‘ *at my county court*,’ without adding---‘ of *Middleſex:*’ and he ſays---‘ *held at the houſe, &c.*’ without adding the words, ‘ *for the county* ‘ *of Middleſex*,’ after the word ‘ *held*.’

As to the firſt expreſſion, the caſes begin as far back as the ſeventh of *James* the firſt. As to the ſecond expreſſion, they begin about the 18th of *Charles* the ſecond.

If we are compelled by authority, to look upon *either* expreſſion as *technically neceſſary*, it is ſufficient upon *this* occaſion; becauſe, here, *both* are wanting.

If an outlawry be returned in this manner---“ *Ad com. meum* ‘ *tent. apud* Ciceſtriam *in comitatu* Suſſex, *&c.*’ it is erroneous; becauſe it is not ſaid “ ad com. meum *Suſſex* tentum, &c.’* *Alder* was outlawed for murder; and it was moved for error, that the ſheriff returned---‘ *ad com. meum tentum apud* D. in ‘ the county of *Northumberland*,’ and did not ſay, ‘ ad com. ‘ meum *Northumbriæ* tentum, &c:’ and this was holden to be error †. Among the errors for which, the reporter ſays, the outlawry was reverſed, the ſecond is--- not ſaid ‘ *Suffolciæ*,’ after ‘ *com. meum:*’ and this, he ſays, had been a *common* exception ‡. Three copies have been left with us, from the records: and they are, ‘ ad com. meum § *Middleſex* tent. &c;’ agreeable to the judgments I have mentioned. *Winnington* aſſigned error of outlawry: and one, ſaid to be allowed, was, ‘ that the court is ſaid to be held at the county of *Hereford*;’ and doth not ſay---‘ *for* the county.’‖ An outlawry was reverſed, becauſe ſaid---‘ *ad com. meum*, &c.’ and not ſaid ‘ *pro* ‘ comitatu.’* This term, ſeveral outlawries were reverſed, for want of ‘ *pro com.*’ or ‘ *nec eorum aliquis*,’ or ‘ *per judicium coronatorum*.’† One who was outlawed for the murder of ſir *Edmondbury Godfrey*, now brought a writ of error in his hand to the bar; praying ‘ that it might be read and allowed.’ The outlawry was reverſed. Among the errors aſſigned, one was, ‘ that it did not appear the court was held *pro comitatu*.’ The other was clearly a fatal objection ‡. After ſtating the caſe, ſir *Bartholomew Shower* ſays---‘ ſhe brings a writ of error, to reverſe the outlawry: and the error which I aſſigned ‘ *ore tenus*, was the *uſual fault*, in not ſaying the county-court ‘ was held *pro comitatu*.’ The outlawry was reverſed. § This is a very ſtrong authority, to ſhew that in the third of *W.* & *M.* it was ſettled ‘ that the words *pro comitatu* were *technically* ‘ *neceſſary*.’ A *record* of an outlawry has been found, agreeable to this form, eſtabliſhed as neceſſary; and ſays---‘ ad com. ‘ meum tent. *pro com. Middleſex*, apud le *Cheſhire-cheeſe* in ‘ *Gray's-inn-lane* in com. prædict.’*

No caſe, report, or record has been found, ſince the third of queen *Ann*, which can be of any uſe, either way, upon this point, or any of the errors aſſigned.

The authorities I have ſtated ſtand, to this day, uncontradicted. They are many; and have prevailed above a century. I think, they begun againſt law and reaſon. The former authorities were otherwiſe: the precedent in *Dalton* is otherwiſe. There is no reaſon for requiring theſe words: there is ſufficient certainty, without them. It is impoſſible to doubt, upon this record, but that the county-court at which the defendant was exacted, was the court *of* and held *for* the county of *Middleſex*. But, this is a criminal caſe, highly penal. Outlaws have had the benefit of this exception, for a great length of time. *Can* we refuſe it to the defendant? We *can not:* though I am clearly of opinion, ‘ there was not a colour *originally*, to hold theſe words to be neceſſary.’

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* P. 7 Jac. 2. Ro. Abr. 802. Whiting's Caſe.

† Mich. 16 Jac. Alder's Caſe, 2 Roll's Reports 52.

‡ Tr. 13 C. 2. 1 Keble 50, 51. Rex *v.* Siclemore.

§ Rex *v.* Hallet, H. 22, 23, C. 2. rotulo 16. Rex *v* Preſton, H. 22, 23 C. 2. rotulo 17. Rex *v.* Vernatt. H. 1. 2 J. 2. rotulo 9.

‖ M 18 C. 2. Rex *v.* Tufton. 2 Keble 128.

* H. 22, 23. C. 2. 1 Vent. 108. anonymous.

† E. 31 Car. 2. 2 Shower 60.

‡ H. 1 J. 2. 3 Mod. 89. anonymous; (S. C. as Rex *v* Vernatt. left with us from the record.

§ M. 3 W. & M. 1 Show. 309. Rex *v.* Lady Oneby alias Truder.

* Tr. 9 W. 3. 1697. rotulo 1. Rex *v.* Bell.

The objection to the blunder between the peace ‘ of the ‘ *now*,’ and ‘ the * *late* king,’ after conviction, has not much more ſolidity in it: yet the houſe of lords thought themſelves bound by precedents. And ſo muſt we, had the flaw been diſcovered before judgment. I *can not* ſay, ‘ that it does *not appear* upon this re‑ ‘ cord, that the court was *of* and held *for* the county of *Middleſex:*’ becauſe I am clearly of opinion, ‘ that, moſt manifeſtly, it *does*.’ But I *can* ſay, that a ſeries of authorities, unimpeached and uncontradicted, from the 7th of *James* I. as to one expreſſion, and from the 18th of *Charles* II. as to the other, have ſaid ‘ ſuch words *are formally neceſſary:*’ I *can* ſay, that *ſuch authority*, though begun without law reaſon or common ſenſe, *ought to avail* the defendant. It would be dangerous, to ſay that any exception *allowed ſo long*, ſhould now be over-ruled. The exception certainly would not have prevailed, had it been oppoſed at firſt: but, before the third of queen *Ann*, there being no oppoſition after a writ of error was granted, the court conſidered the crown as conſenting to the reverſal upon *any* pretence, how ſlight ſoever. Though that is *not* the caſe *now*, the *neceſſity of the form of words* muſt not be canvaſſed; ſince it has been *ſo often adjudged* neceſſary. The officers of the crown are in fault, for not attending to the form preſcribed, and copying the precedent of the *king* v. *Bell*.

* Vide Lookup's caſe.

There can no miſchief or incertainty ariſe from this determination: becauſe, it being once known ‘ *what* form of words is neceſſary,’ it is eaſy to follow it. But great ſuſpicion and incertainty muſt follow, from this court's *allowing* a formal exception one day, and *diſallowing* it another.

I beg to be underſtood, that I ground my opinion *ſingly upon the authority of the caſes adjudged*; which, as they are on the *favourable* ſide, in a *criminal* caſe *highly penal*, I think ought not to be departed from: and therefore I am bound to ſay that, *for want of theſe technical words*, the outlawry ought to be *reverſed*.

The other three judges ſpoke *ſeriatim*. But, as their arguments tended to ſupport and illuſtrate the ſame doctrine which his lordſhip had laid down; and as they did not differ, in any part, from the opinion given by his lordſhip; I omit, for the ſake of brevity, reporting particularly what they ſaid.

> A rule was accordingly made (in each cauſe) ‘ that the outlawry ‘ be reverſed.’

On the ſame 8th of *June* 1768,

> Rules were made, for the proſecutor to ſhew cauſe (upon *Tueſday* then next) why the judgment ſhould not be arreſted; and why the verdict ſhould not be ſet aſide.
>
> And alſo a rule for now remanding the defendant to the cuſtody of the Marſhal, and for bringing him into court again upon *Tueſday* next.

Accordingly, on *Tueſday* the 14th of *June* 1768, the two following points were argued, very ſtrenuouſly and very copiouſly on both ſides: namely, ‘ whether the informations could be exhibited by the ſolicitor‑ ‘ general;’ and ‘ whether the amendment could be made by a *ſingle judge* ‘ *out of court*, in the manner before ſpecified.’ The former was objected to, as a ground for arreſting the judgment: the latter, as a ground for a new trial.

Lord *Mansfield*, as to the motion in arreſt of judgment, adhered to the opinion he had before given, ‘ that the informations were *well* exhibited by the ſolicitor-general.

As to the motion for a new trial on account of the amendment, he *declared* his ſatisfaction at the motion's having been made, and the matter ſo fully diſcuſſed and underſtood.

Matters of *practice*, he obſerved, are not to be known from *books*. What paſſes at a judge's chambers is matter of *tradition:* it reſts in *memory*. In caſes of this kind, judges muſt inquire of their officers. This is done in court, every day, when the practice is diſputed or doubted. It is in its nature official. The officers are better acquainted with it, than the judges. For his own part, neither his education, nor his walk in life before he came into this court, ever led him into any knowledge of the practice of orders made by judges in the vacation. The making this order for the amendment appeared to him to be right, and to be a matter of courſe. It came to him as a matter of courſe, and recommended *as ſuch* from a gentleman of *great experience*, who (he knew) would as ſoon have cut off his right hand, as have deceived him by repreſenting this *as* a thing of courſe, when it was not ſo. Accordingly, he iſſued a ſummons, ‘ to ‘ ſhew cauſe why the amendment ſhould not be made.’ A ſummons always iſſues, before a judge makes an order. A ſummons, therefore, went out, of courſe. Upon the attendance, his lordſhip aſked Mr. *Hughes* (an old and experienced officer), the defendant's clerk in court, ‘ whether there ‘ was any doubt but that this was amendable.’ He, very rightly, and as was his duty, *admitted* ‘ that it *was* amendable, and that he could not ſay ‘ otherwiſe.’ His lordſhip then took down a book in which were entered ſome caſes where informations were amended by a judge's order, juſt before trial; and after reading one or two, Mr. *Philips*, the defendant's attorney, deſired him not to give himſelf any further trouble. Mr. *Philips* ſaid indeed, ‘ that he *could not conſent* to it.’ But he did not *object* to it, nor *contradict* it; nor was it objected to, *at the trial*. The counſel *ſaw* that there could be no objection made to the order.

Mr. juſtice *Blackſtone*, in his third volume *, gives the riſe and hiſtory of amendments, very ſhortly and in few words. He ſhews how it ſtood, before the reign of *Edward* I. in whoſe time, (probably about his 13th year) *Britton*'s treatiſe was publiſhed, in the king's name and by the king's authority: which ſeems intended to give a check to the unwarrantable practices of ſome judges who had made falſe entries on the rolls, to cover their own miſbehaviour. And about the 18th year of his reign, almoſt all the judges, even the moſt able and upright, were proſecuted by him; and ſome of them very heavily fined; and one of the cauſes aſſigned for it, was eraſing and altering records: particularly, ſir *Ralph Hengham* was fined 800 marks at leaſt, (ſome ſay 7000.) for altering, out of mere compaſſion, a fine ſet upon a very poor man, from 13*s.* 4*d* to 6*s.* 8*d.* Upon this, the judges grew ſo ſtrict, that after inrollment they would not amend their judgments, even to ſet them right. They were ſo alarmed by this ſeverity, that through a fear of being ſaid to do wrong, they heſitated at doing that which was right; and becauſe criminal and clandeſtine alterations, to make a record ſpeak a falſity, were forbidden, they conceived that they might not judicially and publickly amend it, to make it agreeable to truth. But declarations and pleas might always be amended at any time: it was only *inrollments* that were prohibited by *Britton*. There never was any diſtinction (as to amendments at the common law) between criminal and civil cauſes; that is, before the † 8 *H.* VI. of Jeofails. The judges adhered to ſuch ſtrictneſs, that juſtice was entangled in the net of form. The legiſlature was therefore forced to interpoſe; and no leſs than twelve ſtatutes of amendment were made, to remedy theſe opprobrious niceties.

* Book 3. c, 25. p. 407.

† 8 H. 6. c. 12.

The fundamental queſtion here is, ‘ whether an information may be ‘ amended, at *common law*, at the deſire of the crown, *after plea pleaded*.’

Numberleſs precedents are produced, from the time of queen *Elizabeth*, and all through the reigns of *James* I. and *Charles* I. and many ſide-bar rules, which ſhew that it was of courſe: for, if it were not of courſe, it would have been moved in court, as every thing not of courſe is.

So long ago as 6 *W.* III. lord chief juſtice *Holt* treats it as a known thing, a thing of courſe. 1 *Salk.* 47. *The king* againſt *Harris*. A motion was made, to amend an information for perjury; and oppoſed, becauſe the defendant had pleaded. *Et per Holt* chief juſtice ‘ as to ‘ amendment *after plea pleaded*, there is no great matter in *that*. After a ‘ record has been *ſealed up*, I have known it amended, even ‘ juſt as it was going to be tried.’ In 12 *W.* III. * Sir *Bartholomew Shower* moved to amend an information of forgery, in ten places: and, though oppoſed, the motion was granted, becauſe it made no alteration of the fact; and that, without coſts or imparlance. In the caſe of *the king* againſt *Charleſworth*, 2 *Stra.* 871. the information was for forging a warrant of attorney to acknowledge ſatisfaction upon a judgment of *Eaſter* term: and, after iſſue joined, the record appearing to be of *Hilary* term, the information was amended, without coſts (the proſecutor having been admitted a pauper), and without giving the defendant leave to plead *de novo*. And *Hil.* 10. *Ann. the queen* againſt *Simmonds* was there cited: where the title of an act ſet forth in an information was amended. And there is *no* authority to the contrary. There can be no doubt therefore of its being amendable; upon the authority of a ſeries of precedents, without any objection, and all theſe printed caſes uncontradicted.

* 1 Salk. 50. anon.

And *why* ſhould it not be amended? If it had not been amended, the attorney-general would have dropped this information, if he thought there was a ſlip in it; and have brought another. And this would have been more inconvenient to the defendant, and have harraſſed him more: he would have no benefit, and more vexation. This amendment avoids delays, and ſaves expences: it ſaves the defendant the expence of bringing his witneſſes up again. The attorney-general pays no coſts. The defendant *never aſked* leave to *plead again*, or to have the *trial put off:* nor was there any cauſe for it. The defence was not at all varied. The *ſubſtance* of the charge was not at all altered: it remained the *very ſame*. The true merits of the cauſe ſtood the *very ſame*. There is no difference at all, but that the proſecutor muſt *prove more*. The nature of the paper was the ſame: every objection was equally open to the defendant, and he had the further advantage of any verbal ſlip in ſetting out the libel upon the record.

But it is objected, ‘ that it could not be done *out of court*.’

Anſwer. It might be done by the court: it might be done at the ſide-bar. And a great deal that may be done in court, is done by judges at chambers, in term-time: in vacation, a great deal more is done by them at chambers; becauſe it can be done no where elſe. Moſt of the precedents of amendments before trial are in the vacation. Lord chief juſtice *Lee* amended a record of an information, ſent up from *York*; the miſtake being there diſcovered during the aſſizes: and the record ſo amended was returned, and immediately tried. I am obliged to a gentleman at the bar, who ſent me a caſe of *the king* againſt *King*, 19th of *March* 1746, where Mr. juſtice *Foſter* ordered the word ‘ *diviſion*’ to be ſtruck out, and ‘ *pariſh*’ to be inſerted; though it was ſtrenuouſly oppoſed, and the defendant muſt have been acquitted, if it had ſtood unamended. Mr. juſtice *Foſter* had applied himſelf particularly to the crown-law; was a ſtrict adherer to legal forms; and had more experience in buſineſs proper to be done out of court, than any other judge.

‘ Whether it was a *neceſſary* amendment, or not,’ I give no opinion, nor form any.

There is a great difference between amending *indictments*, and amending *informations*. Indictments are found upon the oaths of a jury; and ought only to be amended by themſelves: but informations are as declarations in the king's ſuit. An officer of the crown has the right of framing them originally; and may, with leave, amend, in like manner as any plaintiff may do. If the amendment can give occaſion to a *new defence*, the defendant has leave to change his plea: if it can make *no* alteration as to the defence, he don't want it. In *this* caſe, the defendant could not poſſibly plead *any other* plea.

I am fully ſatisfied, that none of the defendant's counſel or agents ever thought there was the leaſt colour of objection to the order for amendment: but, long after the trial, it occurred to others, that by calling it '*an alteration of the record*,' inſtead of 'an order to amend the information,' they who derive all their knowledge and law from libels in the news-papers, might be bewildered and miſled.

Mr. juſtice *Yates* took notice of a difference which there ſeemed to him to be, between the attorney-general and the maſter of the crown-office: the attorney-general is the officer of the *king*; the maſter of the crown-office, the officer of the *public*. Informations exhibited by the king's attorney-general are conſidered as the king's *own* proſecutions, and are called 'declarations for the king:' therefore *no coſts* are paid upon *them*. In the *other* informations, coſts are often payable.

He ſaid, he was greatly confirmed in his opinion, upon the caſe now before the court, and had the greater reaſon to think it a right one, as his brother *Glynn* had not, by all his arguments, been able to ſhake it.

He agreed that the *ſtatute*-power of amending does not extend to criminal proceedings: but in *common*-law amendments, there is no difference between criminal and civil proceedings. And he cited, and repeated (in part) the caſe of *the queen* againſt *Tutchin*, in 6 *Mod.* 268 to 287.† He cited alſo, to the ſame purport, the caſe of *Bondfield qui tam &c.* v. *Milner*, in this court, *M.* 1 *G.* III.

† Vide 6. Mod. 274, 282, 283.

The queſtion therefore turns upon *what is* a *common-law amendment.*

Many caſes have been cited, of common-law amendments. But there is *one*, which has not been mentioned: it is *the king* againſt *Goffe*, in 1 *Lev.* 189. It was moved to amend an *information of perjury.* And it was ruled, that they ſhould give notice of the things to be amended, to the defendant; and he to ſhew cauſe why it ſhould not be amended: for, the court ſaid, 'it *might be amended*.' The caſe of *the king* againſt *Charleſworth* was a very ſtrong one: for, the defendant muſt have been acquitted; and yet that amendment was made without payment of coſts, and without liberty to plead *de novo*.

Indictments, being upon *oath*, can not be amended. But *informations* may be *amended*; becauſe they are *declarations* for the king. 2 *Viner* 394. Title 'amendment and Jeofails,' *pl.* 12. 12 *Mod.* 229. *The king* againſt *Lewis.* 6 *Mod*, 281. 1 *Stra.* 185. *Rex* v. *Nixon*.

It is clear, therefore, that informations *may be amended*, at *common*-law.

As to their being amended by a *judge at chambers*---it is, moſt certainly, the practice. *Non conſtat* 'when it *begun*:' but it ſeems to have been exerciſed time out of mind; and that the buſineſs of the court could not be done without it. The buſineſs done at chambers is the moſt irkſome part of the office of a judge: but it is greatly for the benefit of the ſubject, and tends to the advancement and expedition of juſtice. It ariſes from the overflowing of the buſineſs of the court; which can not be all tranſacted *in* court. The order of a judge is ſubject to an appeal to the court: but if acquieſced under, it is as valid as any act of the court. It is common, to apply to the court, 'to diſcharge a judge's order:' but the very courſe of applying to the court, 'to diſcharge the order of a judge, made at chambers,' ſupports the proceeding; and ſhews that the order is valid as to its effect, if it be not diſcharged. Indeed, if it becomes neceſſary to inforce it by attachment, there muſt be a motion 'to make it a rule of court.' The validity of a judge's order can be impeached only two ways: either by appealing to the court, to ſet it aſide; or, if made in vacation, by applying in the next term, to ſet aſide the proceedings that have been had under it. Now, this order was made in vacation. The defendant might have declined going to trial, and might have moved, in the next term, 'to ſet aſide the verdict.' But he acquieſced, and went to trial.

The *materiality* of this amendment is not in any degree equal to *many* of thoſe that were made in the caſes that have been cited. The *defence* was, indeed, *made eaſier* thereby: for, the word '*tenor*' imports a *literal* copy. It could not vary the *nature* of the defence: the proof lay upon the *crown*. If the defendant had had any objection to the alteration, he ſhould have made *no defence at the trial:* that would have been a conſiſtent conduct. But as he *did make a defence*, he has *acquieſced* in it. And yet, if he had made no defence at the trial, the verdict nevertheleſs would have ſtood: for, it could not have been ſet aſide, *unleſs* the order was a *bad* one; which it now clearly appears, 'that it was *not*.' Therefore it ought to be ſupported by the court.

This is a motion for a new trial, *after* a ſeries of proceedings upon it. The court have indeed ſpontaneouſly relaxed their own rule, in order to give an opportunity of having this matter fully and fairly argued and conſidered: which I am glad of; but I hope, it will not be made a precedent.

Mr. juſtice *Aſton*.---I entirely concur with my lord and my brother *Yates*, in diſcharging theſe rules. I think, the importance of this caſe does not conſiſt in the nature of it; but in the noiſe and clamour that it has occaſioned, and the miſrepreſentations that have been thrown out to the public, of the conduct of the judges in the courſe of the proceedings in it; who have been very unjuſtly charged with being induced to it by partial motives.

In the caſe of *the queen* and *Norton*, reported in lord *Forteſcue*'s Reports 232, the court agreed that it is a general rule, 'to amend informations at any time, even juſt before trial:' but then it muſt not make the information different. And, to be ſure, it ought not: for, it would make a different defence. In the caſe of *Ruſh* and *Seymour*, 10 *Mod.* 88. it is ſaid, 'that ſtatutes of amendment extend only to pleadings of record; and that pleadings, while in paper, are amendable by common-law; and that it is a motion that the court can not refuſe: but they may refuſe it, if the party deſiring it refuſe to pay coſts, or the amendment deſired ſhould amount to a new plea.' And as to the *practice*, it was almoſt of courſe, where the amendment made no alteration in the defence. Where it altered the defence, then it was upon terms. There is nothing that I ever looked upon as ſo plain.

Then as to doing it *at chambers*---the practice of the court has been always ſo. The buſineſs done at chambers is become an immenſe load upon the judges, and is exceedingly troubleſome to them: but it is the *practice*, the *cuſtom* of the court; and therefore, the *law of the land.* And what has been done by the judge at chambers, in the preſent caſe, has been *rightly* done: if it had not, I ſhould have had no ſcruple in overturning it. But here is not the leaſt colour for *that:* the order is juſtified by a vaſt number of precedents. I am glad, that it has been thus fully diſcuſſed; to convince the great number of perſons that I ſee attending here, that judges have acted in this caſe, as they do in all others; and that there is no ſort of ground for the ſcandalous intimations that have been induſtriouſly propagated, of their having been influenced by partial or improper motives.

Mr. juſtice *Willes* concurred in both points.

He declared himſelf to be clearly of opinion, that *during the vacancy* of the office of the king's *attorney*-general (which was the preſent caſe), the power of the attorney-general *devolves* upon the *ſolicitor*-general for the time being. Conſequently, this information was regularly and properly exhibited.

As to the *order for the amendment* of the information---he held it to be juſtified by an uninterrupted ſeries of precedents, from the time of *W.* III. at leaſt. And as the order was right, he ſaw no ground for the obloquy that had been thrown upon the noble perſon who made it. It makes no alteration in the charge: it makes no alteration in the defence. No objection was made to it: no advantage was taken of it. It was acquieſced in: and the cauſe went on to trial. It is authorized by ſeveral caſes, and by a great number of precedents for many years backward. He grounded his opinion, he ſaid, upon the chain and ſeries of precedents for near a century paſt.

He concurred therefore with his lordſhip and his brothers, that both rules be diſcharged.

The court unanimouſly ordered both theſe rules to be diſcharged.

Serjeant *Glynn* thereupon moved, that the preſent proceedings might be *entered upon record*, that the defendant might have opportunity of applying to another juriſdiction.

The court told him, they could not go out of the uſual and ordinary method and courſe of proceeding: every thing muſt be done in *this* caſe, in the *ſame manner* as in all *other* proceedings of the *like kind.*

Mr. Attorney-general then moved for lord *Mansfield*'s *report* of the evidence (the cauſes having been tried before his lordſhip; at *niſi prius*).

Whereupon, after the records of the convictions had been read,
Lord *Mansfield* reported the evidence in each cauſe.

The attorney-general and the ſerjeant made their reſpective obſervations upon the evidence reported.

Mr. *Wilkes* then applied for the ſentence of the court.

The court told him, it was neceſſary to take ſome time to conſider of it: the conſtant courſe is ſo. They promiſed to do it without delay; and to give Mr. *Wilkes* notice, when they were ready: but, at preſent, they had not had the leaſt conference together about the puniſhment; nor could they, without great impropriety, have had any, before they had heard *all* the arguments.

Serjeant *Glynn* then hinted at his client's being bailed in the mean time.

But the court told him, he *knew that could not be.*

The defendant was remanded to the cuſtody of the Marſhal.

On *Friday* the 17th of *June* 1768,
The court declared their intention of giving final judgment to-morrow; and ordered that the defendant ſhould be brought up accordingly.

On *Saturday* the 18th of *June* 1768,
Mr. juſtice *Yates* (as ſecond judge) pronounced the ſentence of the court in each cauſe; *viz.*

> On the information for the *North Briton*, No. 45. a fine of 500*l.* and impriſonment for ten calendar months, and till the fine be paid: on the other information, 500*l.* fine; and impriſonment for twelve calendar months after the expiration of the former ten; and to find ſecurity for his good behaviour for ſeven years, himſelf in 1000*l.* and two

ſureties in 500*l.* each; and to be remanded, till the fine ſhould be paid and ſuch ſecurity given.

Mr. *Wilkes* deſired, that his former impriſonment might be conſidered in the puniſhment now inflicted upon him.

The court aſſured him ‘ that it had been ſo; and that they had *fully* ‘ conſidered *all* circumſtances, both for him and againſt him.

Serjeant *Glynn* then deſired, that Mr. *Wilkes* might have the benefit of a writ of error to the houſe of lords.

Lord *Mansfield* anſwered, that this *court* could not give any particular directions about that matter: he muſt apply to the *attorney-general.* And he added, that if Mr. Attorney-general would take *his* advice, he ſhould grant it the moment it was applied for.

Mr. Attorney-general ſaid, he certainly ſhould grant it *immediately.*

Mr. *Wilkes* then deſired, that it might be put into ſuch a method, as that he might have the advantage of objecting, in the houſe of lords, to the alterations made in the record by lord *Mansfield* at his lordſhip's *own houſe.*

Lord *Mansfield* told him, that the court could not alter the law.

Mr. *Wilkes* replied, that he did not wiſh the law to be altered.

Lord *Mansfield.*---It is impoſſible to alter it in any *particular caſe:* the ſame courſe muſt be taken in *this* caſe as is uſual in others of the like kind. The defendant's *counſel* would adviſe him, his lordſhip ſaid, what were the proper ſteps for him to take, in order to have the opinion of the houſe of lords.

The defendant was remanded.

The rules were drawn up in theſe words——

† (18th June 1768.)

† *Saturday* next after fifteen days from the day of the *Holy Trinity*, in the eighth year of king *George* the third.

Middleſex, the king againſt John Wilkes, Eſq.

The defendant being brought here into court in cuſtody of the Marſhal of the *Marſhalſea* of this court, by virtue of a rule of this court, and being convicted of certain treſpaſſes contempts and grand miſdemeanours, in printing and publiſhing a ſeditious and ſcandalous libel, intitled ‘ the *North Briton*, No. 45.’ whereof he is impeached, it is ordered that he the ſaid defendant, for his offences aforeſaid, do pay a fine to our ſovereign lord the king, of five hundred pounds of lawful money of *Great Britain:* and it is further ordered, that he the ſaid defendant be impriſoned in the cuſtody of the ſaid Marſhal for the ſpace of ten calendar months now next enſuing. And it is laſtly ordered, that the ſaid defendant be now remanded to the cuſtody of the ſaid Marſhal, to be by him kept in ſafe cuſtody, in execution of the judgment aforeſaid, and until he ſhall have paid the ſaid fine.

On the motion of Mr. Attorney-general.

By the court.

The ſame againſt the ſame.

The defendant being brought here into court, in cuſtody of the Marſhal of the *Marſhalſea* of this court, by virtue of a rule of this court; and being convicted of certain treſpaſſes contempts and grand miſdemeanours, in printing and publiſhing an obſcene and impious libel, intitled ‘ An Eſſay on Woman,’ and other impious libels in the information in that behalf ſpecified, whereof he is impeached; and having alſo been convicted of certain other treſpaſſes contempts and miſdemeanours, for printing and publiſhing a certain other libel, intitled ‘ the *North Briton*, No. 45.’ for which he hath this day been ſentenced, and ordered by this court to pay a fine of five hundred pounds, and to be impriſoned in the cuſtody of the ſaid Marſhal for the ſpace of ten calendar months; it is now ordered by this court, that the ſaid defendant, for his treſpaſſes contempts and miſdemeanours firſt abovementioned, in printing and publiſhing the ſaid obſcene and impious libels, do pay a further fine to our ſovereign lord the king, of five hundred pounds of lawful money of *Great Britain*; and that the ſaid defendant be further impriſoned in the cuſtody of the ſaid Marſhal, for the ſpace of twelve calendar months, to be computed from and after the determination of his aforeſaid impriſonment for printing and publiſhing the ſaid other libel intitled ‘ the *North Briton*, No. 45.’ And it is further ordered, that he the ſaid defendant ſhall give ſecurity for his good behaviour for the ſpace of ſeven years, to be computed from and after the end and expiration of the ſaid twelve calendar months to be computed as aforeſaid; to wit, himſelf, the ſaid defendant, in the ſum of one thouſand pounds, with two ſufficient ſureties, in five hundred pounds each. And it is laſtly ordered, that he the ſaid defendant be now remanded to the cuſtody of the ſaid Marſhal, to be by him kept in ſafe cuſtody, in execution of this judgment, and until he ſhall have paid the ſaid fine and given ſuch ſecurity as aforeſaid.

On the motion of Mr. Attorney-general.

By the court.

Afterwards, a writ of error was brought, returnable in parliament, upon each judgment: and both judgments were affirmed, as follows—

Die Lunæ 16° *January* 1769.

Counſel having been fully heard to argue the errors aſſigned in theſe cauſes, the following queſtions were put to the judges—

‘ Whether an information filed by the king's *ſolicitor*-general, during ‘ the vacancy of the office of the king's attorney-general, is good in law.’

‘ Whether, in ſuch a caſe, it is neceſſary in point of law, to *aver* upon ‘ the record, that the attorney-general's office *was vacant.*’

Upon the ſecond record—

‘ Whether a judgment of impriſonment againſt a defendant, to *com-* ‘ *mence from and after the determination of an impriſonment* to which he was ‘ before ſentenced for another offence, is good in law.’

Whereupon the lord chief juſtice of the court of *Common Pleas*, having conferred with the reſt of the judges preſent, delivered their unanimous opinion upon the ſaid queſtions, with their reaſons.

To the firſt queſtion—that an information filed *&c. is* good in law.

To the ſecond—that in ſuch a caſe, it is *not neceſſary.*

To the third—that a judgment of impriſonment *&c. is* good in law.

Then ordered and adjudged that the judgments of the court of *King's Bench* be affirmed.

On *Wedneſday* the 7th of *February* 1770,

Mr. *Davenport* moved that the defendant might be brought up, either into court within this term, or before a judge at chambers after the end of it, to enter into the recognizance required of him by the abovementioned rule of court: for, his impriſonment will end upon a day which does not fall within any term; namely, upon *Eaſter Tueſday* next.

The court told him, they had thought of this already; and they conceived the beſt method would be, to make a rule for his entering into the recognizance before the Marſhal, or ſome other juſtice of the peace for the county of *Surrey.*

And accordingly, they ordered ſuch a rule to be drawn up: which was done, in theſe words—

Ordered, that at the expiration of the impriſonment of the defendant, by virtue of the judgment of this court pronounced againſt him in this cauſe on *Saturday* next after fifteen days from the day of the *Holy Trinity* in the eighth year of the reign of his preſent majeſty, the ſecurity required by the ſaid judgment to be given by him the ſaid defendant for his good behaviour for the ſpace of ſeven years, to wit, himſelf the ſaid defendant in the ſum of 1000*l.* with two ſufficient ſureties in 500*l.* each, may be taken by and before any juſtice of the peace of and for the county of *Surrey.*

No. VI. *The Caſe of* Braſs Croſby, *Eſq. Lord-Mayor of* London, *on a Commitment by the Houſe of Commons. Court of* Common-Pleas, Eaſter Term, 11 Geo. III. 1771.

[*This caſe is from Mr. Serjeant* Wilſon's Reports, 3 Wilſ. 188 *The hiſtory of the tranſaction of which this caſe was a branch, with the proceedings of the houſe of commons, the reader may poſſeſs himſelf of, by reſorting to the* Annual Regiſter *for* 1771, *and Mr.* Almon's Debates *of the commons in the ſame year. Upon refuſal of the court of* Common-Pleas *to diſcharge the Lord-Mayor, the court of* Exchequer *was moved for a* habeas corpus; *and the caſe was argued by counſel on a like return to that court: but the application there alſo failed of ſucceſs, and the Lord-Mayor was remanded.*]

THE lieutenant of the *Tower* of *London* was commanded to have before the juſtices of the bench here, the body of *Braſs Croſby*, eſq. lord-mayor of *London*, by him detained in the king's priſon, in the *Tower* of *London*, by whatſoever name he was called, together with the day, and cauſe of his caption and detention, on *Monday* next, after three weeks from *Eaſter-day*; that the ſaid juſtices ſeeing the cauſe, might do *that* which of right, and according to the law and cuſtom of *England*, ought to be done; and further, to do and receive what the ſame juſtices here ſhould then conſider in that behalf. And now here, at this day, (to wit) *Monday* * next, after three weeks from *Eaſter-day*, in this term cometh the ſaid *Braſs Croſby*, in his proper perſon, under the cuſtody of *Charles Rainſford*, eſq. deputy-lieutenant of the *Tower of London*, brought to the bar here; and the ſaid deputy-lieutenant then here returneth, that before the coming of the ſaid writ, (to wit) on the 27th day of *March* laſt, the ſaid *Braſs Croſby* was committed to the *Tower* of *London*, by virtue of a certain warrant under the hand of ſir *Fletcher Norton*, knight, ſpeaker of the houſe of commons, which follows in theſe words: ‘ *Whereas the houſe of commons have this* ‘ *day adjudged, that* Braſs Croſby, *eſq. lord-mayor of* London, *a member of* ‘ *this houſe, having ſigned a warrant for the commitment of the meſſenger of* ‘ *the houſe, for having executed the warrant of the ſpeaker, iſſued under the order* ‘ *of the houſe, and held the ſaid meſſenger to bail, is guilty of a breach of privilege* ‘ *of the houſe; and whereas the ſaid houſe hath this day ordered, that the ſaid* ‘ Braſs Croſby, *eſq. lord-mayor of* London, *and a member of this houſe,* ‘ *be for his ſaid offence committed to the* Tower *of* London: *theſe are there-* ‘ *fore to require you to receive into your cuſtody the body of the ſaid* Braſs Croſ- ‘ by, *eſq. and him ſafely keep during the pleaſure of the ſaid houſe, for which* ‘ *this ſhall be your ſufficient warrant. Given under my hand, the twenty-fifth* ‘ *day of* March, *one thouſand ſeven hundred and ſeventy-one.*’ And that this was the cauſe of the caption and detention of the ſaid *Braſs Croſby* in the priſon aforeſaid; the body of which ſaid *Braſs Croſby* he hath here ready, as by the ſaid writ he was commanded, *&c.* Whereupon, the premiſes being ſeen, and fully examined and underſtood by the juſtices here, it ſeemeth to the ſaid juſtices here, that the aforeſaid cauſe of commitment of the ſaid *Braſs Croſby*, eſq. to the king's priſon of the *Tower* of *London* aforeſaid, in the return above ſpecified, is good and ſufficient in law to detain the ſaid *Braſs Croſby*, eſq. in the priſon aforeſaid: therefore the ſaid *Braſs Croſby*, Eſq. is by the court here remanded to the *Tower* of *London*, *&c.*

* April 22, 1771.

The argument for the diſcharge of the priſoner.

Serjeants *Glynn* and *Jephſon* argued, that it appeared by the return of this *habeas corpus*, that the cauſe of commitment of the lord-mayor to the *Tower* of *London* was inſufficient in law for the detention of him there; and therefore this court ought to diſcharge him out of the cuſtody of the lieutenant of the *Tower* of *London*.

Here follows the ſubſtance of ſerjeant *Glynn*'s argument, after the writ and return were filed.

Serjeant *Glynn*.—The queſtion now before the court, is, whether it does not appear by the return of this writ, that the lord-mayor ought to be diſcharged; and it is a very important and conſtitutional queſtion indeed.

The return ſtates, that the impriſonment of his lordſhip is by virtue of a certain warrant under the hand of ſir *Fletcher Norton*, knight, ſpeaker of the houſe of commons, reciting, that whereas the houſe had adjudged, that his lordſhip having ſigned a warrant for the commitment of a meſſenger of the houſe, for having executed the warrant of the ſpeaker, iſſued under the order of the houſe, and held that meſſenger to bail, is guilty of a breach of privilege of the houſe; and alſo reciting, that the houſe had ordered, that his lordſhip, a member of the houſe, ſhould for his ſaid offence be committed. So that it appears what *that* breach of privilege is.

When any perſon is brought to this bar by the king's writ of *habeas corpus*, the judges muſt look into, ſee and conſider the cauſe of his detention, and are bound to do *that* which of right, and according to the law and cuſtom of *England*, ought to be done.

Acts done by the higheſt authority are ſubject to the inquiry of the courts in *Weſtminſter-hall*; whoſe juriſdiction extends not only to inquire into, controul and correct the acts of inferior, but alſo of co-ordinate and ſuperior powers.

A breach of privilege of the houſe of commons is ſtated, and alſo in what manner, and by what fact their privilege was broken; therefore this court muſt determine, whether the fact charged is by law a contempt or breach of privilege. When it is returned, that a perſon was committed by any other court in this Hall, for a contempt generally, without ſpecifying the fact or nature of the contempt, this court cannot inquire into the matter, but muſt remand the priſoner. Every court of juſtice of record in the Hall, muſt neceſſarily have abſolute power to enforce obedience to their own orders, or juſtice could not poſſibly be adminiſtered to the king's ſubjects. The houſe of commons is not a court of juſtice of record, for it cannot adminiſter an oath: it has a certain limited juriſdiction; and this court muſt judge, whether it has not tranſgreſſed, and gone beyond the bounds of its juriſdiction, and muſt pronounce upon it. If the king doth exerciſe any power which is not conformable to law, this court will remedy it. The old writ *de homine replegiando* did not comprehend the mandates of the king; but the *habeas corpus* extends to them, and to all acts of power not conformable to law. If the court of *Chancery*, which is a ſuperior court in civil cauſes, ſhould exceed its juriſdiction, and interfere by injunction in criminal caſes, the inferior court would determine againſt the court of *Chancery*, and would diſcharge any one from impriſonment whom that court ſhould commit for diſobedience to ſuch injunction.

This court muſt inquire, whether the houſe of commons has not exceeded its lawful juriſdiction. The lord-mayor is charged with a contempt. The queſtion is, whether he is guilty of a contempt; that is to ſay, whether the fact charged upon him amounts by law to a contempt. The houſe of commons makes an order for committing a printer, and that order expreſſes who ſhall take him into cuſtody, namely, the ſerjeant, or deputy ſerjeant at arms of the houſe. The printer is taken into cuſtody by a meſſenger, within the city of *London*; he complains to the lord-mayor; who examines into his complaint, proceeds judicially, and according to law; and after ſuch examination, according to the beſt of his judgment, is of opinion, that the warrant of ſir *Fletcher Norton* does not juſtify the taking the printer into cuſtody by a meſſenger of the houſe, in the city of *London*. How does this interfere with the lawful juriſdiction of the houſe of commons; and how does it exceed the lawful juriſdiction of the lord-mayor, within the city of *London?* The juriſdiction of the houſe muſt be limited to ſome particular objects: the claim of an unlimited power in this country is abſurd, and deſtroys itſelf. In the great queſtion, in *Aſhby* and *White*, about the *Aylſbury* men, we find, that in a conference between the lords and commons, it was agreed, that the commons cannot, by any vote or reſolution of their own, aſſume or acquire any new juriſdiction or privilege. Here is a warrant under the hand of ſir *Fletcher Norton*, ſpeaker. Sir *Fletcher Norton* has no perſonal authority to commit whom he pleaſes. The ſpeaker, as ſuch, has no official authority. Whatever authority he can have, muſt be merely as the inſtrument of the houſe of commons: his act can be valid only by the order of the houſe. But that the warrant is made contrary to the order of the houſe, appears to this court by the return of the *habeas corpus*; conſequently, the ſpeaker having no authority of his own, and the warrant being contrary to the order, the ſame is invalid. The meſſenger executed the warrant in the city: the ſpeaker had no authority to impower him to execute it in the city of *London*. The houſe of commons have not an unlimited juriſdiction; the lord-mayor was therefore obliged to examine, whether the act of power exerted by them within the city, was within their juriſdiction. The printer had been charged with printing the ſpeeches of ſome members of the houſe, for which he was ordered to be taken into cuſtody. The lord-mayor thought the houſe of commons had no right to order the printer to be taken into cuſtody by their meſſenger in the city of *London*, and that the printer ought not to be committed for the act with which he was charged. There is nothing to be pretended in favour of this proceeding of the houſe of commons, but their aſſumed tranſcendent power. Now it would totally deſtroy all the benefit, and the very end of the *habeas corpus*, if the tranſcendency of any power whatever could blind the eyes of a court of juſtice, and prevent their inquiry into its acts. Such a deciſion by judges ſworn to adminiſter faithfully the laws, would be fatal to every thing that is worth preſerving in our boaſted conſtitution, and would leave the unhappy ſubjects of this country in a ſtate much worſe than a ſtate of ſavage nature. The great chief juſtice *Holt* was clearly of opinion, and held it for good law, that if it appeared upon the face of the return of a *habeas corpus*, that what the houſe of commons called a contempt, was not by law a contempt, the perſon committed for it muſt be diſcharged; that the privileges of the houſe of commons are part of the law of the land, and therefore the courts here muſt take notice of them incidentally: and though this was the opinion of a ſingle judge againſt three others, yet it was agreed to and ſupported by the houſe of lords, who, in thoſe days, remembered that they were the hereditary guardians of the people. Again—*Holt* held, that the order of the houſe of commons forbidding any one to ſeek or purſue a legal remedy

2 Ld. Raym. 938.

remedy againſt their orders, was illegal and naught; and boldly ſaid ſo: and accordingly he was of opinion, that the perſons com-
2 Ld. Raym. 1112. mitted for contempt of that order ought to have been diſcharged; though the three other judges were of a contrary opinion; and the perſons were remanded to *Newgate.* Upon petition to the queen, a writ of error was allowed, and brought; and before it was argued, the parliament for good reaſons was diſſolved: but I will venture to ſay, if it had been argued, there would have been judgment given by the houſe of lords according to *Holt*'s opinion. If the *lex et conſuetudo parliamenti*, of which we hear ſo much and know ſo little, be indeed a part of the law of the land, the judges are bound to take notice of it, and to decide upon it, as they do upon every other part of the law. It has been ſaid, that lord chief juſtice *Holt* was ſingle in his opinion; nevertheleſs, I may venture to ſay, that his opinion, in the judgment of every honeſt and unprejudiced mind, will not be found light in the ſcale, againſt *that* of the three other judges. He was ſingle: but he had truth and integrity with him, as well as the ſtrongeſt arguments on his ſide, which the conference with the lords demonſtrated; arguments which have never yet been, and which cannot now be anſwered. The other three judges differing in opinion from him, there was a writ of error (as I ſaid before) granted, returnable in parliament; and if the temper of the times would have permitted it to have been proceeded in, and the parliament had not been then diſſolved, it may eaſily be collected, from the arguments above referred to, that it would have had from the lords a moſt ſolemn and juſt deciſion.

Lord chief juſtice *De Grey.*—Brother *Glynn*, that writ of error, you mention, was never brought before the lords.

Serjeant *Glynn.*—It is true, my lord, it was never brought directly in queſtion before them; becauſe doubts were ſtarted, whether it was a writ of right, or of favour, which might be refuſed by the particular officer. This occaſioned a petition to the queen, who in anſwer to the petition ſaid, ſhe was come to a reſolution to grant a writ of error, becauſe ſhe was deſirous to have the matter of law ſettled, for the good of her ſubjects: but unhappily for us, the particular circumſtances of thoſe times prevented it; and the parliament was diſſolved.

Lord chief juſtice *De Grey.*—In all caſes, except treaſon and felony, I think a writ of error is grantable of right. The two houſes addreſſed the queen for different purpoſes. The lords ſaid, it was time enough to decide upon the writ of error, when it came before them.

Serjeant *Glynn.*—My lord, it is for that reaſon I ſaid, I collect it from other arguments which make it very reaſonable to ſuppoſe, that the ſubject would have had ſatisfaction and redreſs from the deciſion of the houſe of lords.

The queſtion at preſent is, whether this court has not power to examine into the juriſdiction of the houſe of commons? I ſubmit it, with deference to the court, that you have lawful power to enquire, whether the houſe of commons had any juriſdiction in this caſe, and that their privileges are not to be ſuppoſed ſo tranſcendent and myſtical, as to exclude all enquiry. My lord, I deny that the mayor's act is a breach of privilege of the houſe of commons. The lord-mayor was in full poſſeſſion of juriſdiction in the caſe; he was obliged to decide upon the queſtion before him; he was obliged to form an opinion upon a caſe within his juriſdiction. Shall his opinion be adjudged a contempt? Is this the law of the land; that when different courts, having juriſdiction of the ſame nature, differ in their deciſions, they are guilty of contempts one againſt the other, and may be puniſhed for ſuch contempts? It is no contempt in me, a private man, to have an opinion different from the greateſt authorities in this kingdom. It was the lord-mayor's opinion upon the caſe before him; he was bound by his oath to act purſuant to that opinion; it was his bounden duty to act accordingly: he would have been perjured, if, out of reſpect for any perſons, he had not obeyed the call of his conſcience. It was no crime for him to entertain the opinion. Entertaining it, he was bound to declare it, and it was his duty to act in conſequence of it. The conſcientious act of a magiſtrate, within the limits of his juriſdiction, can never be a contempt, or puniſhable. Unleſs a magiſtrate acts wrong from corrupt motives, he cannot be puniſhed. But ſuppoſe for a moment, the lord-mayor did not act from his opinion, but from ſome corrupt motive, it is not the houſe of commons, but a jury, that muſt judge of it. The duty of a magiſtrate differs widely from that of an officer. From the latter, a full and ready obedience is required to be paid to the orders of the court whoſe officer and miniſter he is; and ſuch orders, rightly purſued and executed by him, are his ſufficient juſtification: but the magiſtrate is bound by his oath, and has an opinion and judgment of his own which he muſt follow; and he is anſwerable to the law, and cannot be juſtified for the breach of his oath and the law, by any order or reſolution of the greateſt authority.

Your lordſhips are now called upon to ſay, whether the lord-mayor of *London*, in a caſe where he had indiſputable juriſdiction, acting by his opinion, and according to his oath, is guilty of a contempt of the houſe of commons, and can by law be impriſoned.

Serjeant *Jephſon.*—My lords, as I ſhall not have an opportunity of anſwering any argument from the bench, nor can poſſibly know the objections your lordſhips may have to diſcharging the lord-mayor out of cuſtody, I ſhall endeavour to anticipate and anſwer ſuch objections againſt diſcharging him, as occur to me, and may poſſibly be made by the court.

The queſtion is, whether ſufficient cauſe appears to the court upon the return of this writ, to impriſon the lord-mayor? If no legal cauſe appears for detaining him in cuſtody, he muſt be diſcharged.

I ſhall conſider the nature, the return, and the conſequence of the writ of *habeas corpus.* It is a prerogative writ of right, to inquire into the cauſe of the impriſonment of any of the king's ſubjects. If a legal cauſe of detention doth not appear upon the return of the writ, the ſubject muſt be diſcharged, and ſet at liberty: therefore, if a legal cauſe does not appear upon the return of this writ, the lord-mayor muſt be diſcharged out of cuſtody. This poſition cannot be denied.

It appears from the caſes of ſir *William Thickneſſe*, 4 *Inſt.* 434. Sir *William Chauncey*, 12 *Rep.* 83. and from *Buſhel*'s *caſe*, *Vaugh.* 135, *&c.* that the cauſe of impriſonment ought to be as ſpecifically returned to thoſe who judge upon the writ of *habeas corpus*, as it did to thoſe who firſt committed the party. Again, *Bethell*'s *Caſe*, 1 *Salk.* 348. where the commitment is not to the legal and immediate officer, it is naught.

Again, *Search*'s *caſe*, 1 *Leon.* 70, where the queen had taken a perſon into her protection, who, notwithſtanding, was arreſted; and the perſon arreſting committed, and on a *habeas corpus* was diſcharged. See again *Doctor Alphonſo's caſe*, 2 *Bulſt.* 259. where the return was bad, no cauſe being therein ſhewed; alſo *Thomas Barkham*'s *caſe*, *Cro. Car.* 507. the like *caſe*, *ibid.* 579. 1 *Roll. Rep.* 192. 218. *Apſley's caſe*, and *Ruſwell*'s *caſe*, *ibid.* 245. *Codde*'s *caſe.* The determination in all the caſes the ſame: if the legal charge is not returned, the perſon muſt be diſcharged. The court muſt judge of the cauſe of commitment returned: If not, why ſhould the writ command the return of the cauſe? The cauſe is returned, that the court may judge, whether the perſon is intitled to his liberty, or not. It is no objection in this caſe, to ſay, that the houſe of commons having a power to commit, therefore this court muſt not judge of the cauſe of commitment returned; for this would prove too much; becauſe it would go to every other court having juriſdiction to commit. Suppoſe the court of *King's Bench*, which is equal, and perhaps ſuperior in ſome reſpect to this court, ſhould commit a perſon; and the perſon committed ſhould be brought here by *habeas corpus*; this court would certainly take notice, and inquire into the cauſe returned; and if this court thought it not a ſufficient cauſe, would diſcharge the perſon; otherwiſe, how would the end of bringing the writ of *habeas corpus* be anſwered?

It is no objection in this caſe, to ſay, that the court cannot examine the cauſe as ſtated in the return, becauſe the court would then determine upon the privileges of the houſe of commons: the court muſt, and doth frequently determine upon the privileges of parliament, when they come incidentally before them. See the earl of *Banbury*'s *caſe*, 2 *Ld. Raym.* 1247. *Salk.* 512. 2 *Stra.* 987. 8. This court made no ſort of heſitation to determine in *Wilkes*'s caſe, upon the privilege of parliament. 2 *Wilſon* 151. Why then ſhould they not now enter into this queſtion, touching the privilege of parliament? In lord *Shafteſbury*'s and Mr. *Murray*'s *caſes*, the returns were general, for contempts of the houſe, without ſtating the particular facts; but the facts of the ſuppoſed contempt in this caſe appear, which we contend cannot by any legal conſtruction amount to a contempt, and therefore that the lord-mayor muſt be diſcharged. The houſe of commons having determined it to be a contempt, does not alter the caſe: a fact does not become a contempt by being recited to be ſuch. The court muſt conſider, whether the warrant for my lord-mayor's commitment is the warrant of the ſpeaker as ſpeaker of the houſe of commons, as ſir *Fletcher Norton* may act in a double capacity.

Lord chief juſtice *De Grey.*—Sir *Fletcher Norton* ſigns himſelf *ſpeaker.*

Serjeant *Jephſon.*—His ſigning himſelf *ſpeaker* will not help the warrant, if the cauſe is not ſufficient; and the court may rather ſuppoſe the miſtake committed by ſir *Fletcher Norton* in his private capacity, than by the houſe of commons. Suppoſe ſome future ſpeaker, of ſome future houſe of commons, ſhould recite in his warrant, that the houſe of commons had adjudged it a breach of privilege, and contempt, to ſue out a ſtatute of bankrupt againſt one of their members, which by act of parliament any one is permitted to do; and ſhould in conſequence commit a perſon for ſuch legal act: if the perſon was brought by writ of *habeas corpus* before this court, would not the court take cognizance of the commitment? Would they not determine it no breach of privilege? Are acts of parliament of leſs force than ſuch a recital in a ſpeaker's warrant? Suppoſe a perſon is committed by a ſimilar warrant, for proceeding according to act of parliament againſt a member of the houſe in an action of debt; ſhall he have no remedy from the law, which led him into the ſuppoſed tranſgreſſion? Suppoſe a juſtice of peace ſhould commit a member of the houſe of commons for treaſon, felony, or breach of the peace, and the ſpeaker's warrant ſhould recite it to be a contempt; will this court ſay, they can take no cognizance of ſuch a commitment by the houſe of commons? Suppoſe all the officers of this court ſhould be recited in the ſpeaker's warrant to be in contempt, for executing the proceſs of this court, will this court give no remedy; and muſt this and every other court of juſtice be annihilated, whenever the ſpeaker's warrant declares all its officers in contempt? How is it poſſible to diſtinguiſh the preſent caſe from thoſe I have mentioned, if you muſt not examine the cauſe returned, but ſay it is ſufficient if a contempt is charged? Serjeant *Hawkins*, in his 2 vol. 110. gives us clear enough his thoughts upon this ſubject. He ſays there, (among other things) that if a ſubject ſhould be committed by either of the houſes of parliament, it cannot be imagined that the law, which favours nothing more than the liberty of the ſubject, ſhould give us a remedy againſt commitments by the king himſelf, appearing to be illegal, and give us no manner of redreſs againſt a commitment by our fellow-ſubjects, equally appearing to be unwarranted.

I think I have now ſufficiently cleared this caſe from all the objections that can be brought againſt its being inquired into. The queſtion therefore is, whether on the return there appears ſufficient cauſe of detention? Three cauſes are mentioned, and all urged as breaches of privilege. 1. For diſcharging a printer; 2. for having ſigned a warrant for the commitment of the meſſenger; and, 3. for holding him to bail.

To make the lord-mayor guilty of the firſt ſuppoſed contempt, it ought ſurely to appear to the court, that *Miller* the printer was in the legal cuſtody of the meſſenger. Now, *Miller* never was in the legal cuſtody of the meſſenger; for the warrant to take up *Miller* was directed to the ſerjeant at arms of the houſe of commons, or his deputy, and not to the meſſenger; ſo that *Miller* was in the illegal cuſtody of the meſſenger, therefore the lord-mayor did right.—*Miller* was ordered into the cuſtody of the ſerjeant at arms, or his deputy; but the contrary appears upon the return, in the recital of the order: for *that* intimates, that he was taken into cuſtody by the meſſenger, by virtue of the warrant of the ſpeaker of the houſe, iſſued under the order of the houſe. *Miller* was taken into cuſtody by the meſſenger in the city of *London*, neither the ſerjeant at arms or his deputy being preſent. The meſſenger, I ſay, was guilty of falſe impriſonment, having no warrant directed to himſelf, nor acting in aid and aſſiſtance of the ſerjeant at arms, or his deputy, to whom the warrant to take up *Miller* was directed, for neither of them were preſent; ſo that if an action of falſe impriſonment was to be brought againſt the meſſenger, he could not juſtify what he has done: and if he cannot juſtify in an action of falſe impriſonment, how could he juſtify before the lord-mayor? As for the other ſuppoſed contempt, of ſigning a warrant againſt the meſſenger, and holding him to bail; the meſſenger had been guilty of an aſſault and falſe impriſonment, in taking *Miller* the printer into cuſtody, in the city of *London*, without any legal warrant or authority: what contempt is it to ſign a warrant againſt the meſſenger?

Gould, juſtice.—The meſſenger was committed for having executed a warrant of the ſpeaker.

In the return, it is a warrant for the commitment of the meſſenger.

Serjeant *Jephſon.*—That does not appear; your lordſhips cannot know *that*; for the return only ſays, for ſigning *a warrant againſt the meſſenger.* For theſe reaſons, I pray the lord-mayor may be diſcharged out of the cuſtody of the lieutenant of the *Tower* of *London*.

Opinion of the court.

Lord chief juſtice *De Grey.*—If either myſelf, or any of my brothers on the bench, had any doubt in this caſe, we ſhould certainly have taken ſome time to conſider, before we had given our opinions; but the caſe ſeems ſo very clear to us all, that we have no reaſon for delay.

The writ by which the lord-mayor is now brought before us, is a *habeas corpus* at common law, for it is not ſigned *per ſtatutum*. It is called a prerogative writ for the king; or a remedial writ: and this writ was properly adviſed by the counſel for his lordſhip, becauſe all the judges (including *Holt*) agreed, that ſuch a writ as the preſent caſe required, is not within the ſtatute. This is a writ by which the ſubject has a right of remedy to be diſcharged out of cuſtody, if he hath been committed, and is detained contrary to law; therefore the court muſt conſider, whether the authority committing, is a legal authority. If the commitment is made by thoſe who have authority to commit, this court cannot diſcharge or bail the party committed; nor can this court admit to bail, one charged or committed in execution. Whether the authority committing the lord-mayor, is a legal authority or not, muſt be adjudged by the return of the writ now before the court. The return ſtates the commitment to be by the houſe of commons, for a breach of privilege, which is alſo ſtated in the return; and this breach of privilege or contempt is, as the counſel has truly deſcribed it, threefold; diſcharging a printer in cuſtody of a meſſenger by order of the houſe of commons; ſigning a warrant for the commitment of the meſſenger, and holding him to bail; that is, treating a meſſenger of the houſe of commons as acting criminally in the execution of the orders of that houſe. In order to ſee whether that houſe has authority to commit, ſee *Co.* 4 *Inſt.* 23. Such an aſſembly muſt certainly have ſuch authority; and it is legal, becauſe neceſſary. Lord *Coke* ſays they have a judicial power; each member has a judicial ſeat in the houſe: he ſpeaks of matters of *judicature* of the houſe of commons, 4 *Inſt.* 23. The houſe of commons, without doubt, have power to commit perſons examined at their bar touching elections, when they prevaricate or ſpeak falſly; ſo they have for breaches of privilege; ſo they have in many other caſes. *Thomas Long* gave the mayor of *Weſtbury* 4*l.* to be elected a burgeſs: he was elected, and the mayor was fined and impriſoned, and *Long* removed. *Arthur Hall*, a member, was ſent to the *Tower*, for publiſhing the conferences of the houſe. 4 *Inſt.* 23. This power of committing muſt be inherent in the houſe of commons, from the very nature of its inſtitution, and therefore is part of the law of the land. They certainly always could commit in many caſes. In matters of elections, they can commit ſheriffs, mayors, officers, witneſſes, *&c.* and it is now agreed that they can commit generally for all contempts. All contempts are either puniſhable in the court contemned, or in ſome higher court. Now the parliament has no ſuperior court; therefore the contempts againſt either houſe can only be puniſhed by themſelves. The *ſtat.* 1 *Jac.* I. *cap.* 13. *ſect.* 3. ſufficiently proves that they have power to puniſh: it is in theſe words: *viz.* 'Provided always, that this act, or any thing therein con-'tained, ſhall not extend to the diminiſhing of any puniſhment to be 'hereafter by cenſure in parliament inflicted upon any perſon which 'hereafter ſhall make, or procure to be made, any ſuch arreſt as is afore-'ſaid.' So that it is moſt clear, the legiſlature have recognized this power of the houſe of commons. In the caſe of the *Ayleſbury* men, the counſel admitted, lord chief juſtice *Holt* owned, and the houſe of lords acknowledged, that the houſe of commons had power to commit for contempt and breach of privilege. Indeed, it ſeems, they muſt have power to commit for any crime, becauſe they have power to impeach for any crime. When the houſe of commons adjudge any thing to be a contempt, or a breach of privilege, their adjudication is a conviction, and their commitment in conſequence, is execution; and no court can diſcharge or bail a perſon that is in execution by the judgment of any other court. The houſe of commons therefore having an authority to commit, and that commitment being an execution, the queſtion is, what can this court do? It can do nothing when a perſon is in execution by the judgment of a court having a competent juriſdiction: in ſuch caſe, this court is not a court of appeal.

It is objected, 1. That the houſe of commons are miſtaken, for that they have not this power, this authority; 2. That ſuppoſing they have, yet in this caſe they have not uſed it rightly and properly; and 3. That the execution of their orders was irregular. In order to judge, I will conſider the practice of the courts in common and ordinary caſes. I do not find any caſe where the courts have taken cognizance of ſuch execution, or of commitments of this kind: there is no precedent of *Weſtminſter-hall* interfering in ſuch a caſe. In ſir *J. Paſton*'s caſe, 13 *Rep.* there is a caſe cited from the year-book, where it is held that every court ſhall determine of the privilege of that court: beſides, the rule is, that the court of remedy muſt judge by the ſame as the court which commits. Now this court cannot take cognizance of a commitment by the houſe of commons, becauſe it cannot judge by the ſame law; for the law by which the commons judge of their privileges is unknown to us. If the court of *Common-Pleas* ſhould commit a perſon for a contempt, the court of *King's-Bench* would not inquire into the legality or particular cauſe of commitment, if a contempt was returned; yet in ſome caſes the court of *King's-Bench* is a court of inquiry, but in this caſe is only co-ordinate with this court. In the caſe of *Chambers*, *Cro. Car.* 168. *Chambers* was brought up by *habeas corpus* out of the *Fleet*; and it was returned, that he was committed by virtue of a decree in the *Star-Chamber*, by reaſon of certain words he uſed at the council-table, *&c.* for which he was cenſured to be committed to the *Fleet*, till he made his ſubmiſſion at the council-table, and paid a fine of 2000 *l.* and at the bar he prayed to be delivered, becauſe the ſentence was not warranted by any law or ſtatute: for the *ſtatute* 3 *Hen.* VII. which is the foundation of the court of *Star-Chamber*, doth not give them any authority to puniſh for words only. But all the court informed him, that the court of *Star-Chamber* was not erected by the *ſtat.* 3 *Hen.* VII. but was a court many years before, and one of the moſt high and honourable courts of juſtice; and to deliver one who was committed by the decree of one of the courts of juſtice, was not the uſage of this court; and therefore he was remanded. The courts of *B. R.* or *C. B.* never diſcharged any perſon committed for contempt, in not anſwering in the court of *Chancery*, if the return was for a contempt. If the *Admiralty* court commits for a contempt, or one be taken up and committed on an *excommunicato capiendo*, this court never diſcharges the perſons committed. Formerly, when many abuſes were committed, and the people could not obtain a remedy, the ſubject was not contented with the ancient *habeas corpus*, but did not complain of the courts for refuſing them what they could not by law grant them: inſtead of *that*, they ſought redreſs by petition to the throne. In chief juſtice *Wilmot*'s time, a perſon was brought by *habeas corpus* before this court, who had been committed by the court of *Chancery* of *Durham*. That court being competent, and having juriſdiction, the man was not diſcharged, but recommitted. How then can we do any thing in the preſent caſe, when the law by which the lord-mayor is committed, is different from the law by which he ſeeks to be relieved? He is committed by the law of parliament, and yet he would have redreſs from the common law. The law of parliament is only known to parliament-men, by experience in the houſe. Lord *Coke* ſays, every man looks for it, but few can find it. The houſe of commons only know how to act within their own limits. We are not a court of appeal. We do not know certainly the juriſdiction of the houſe of commons. We cannot judge of the laws and privileges of the houſe, becauſe we have no knowledge of thoſe laws and privileges. We cannot judge of the contempts thereof: we cannot judge of the puniſhment thereof.

I wiſh we had ſome code of the law of parliament; but till we have ſuch a code, it is impoſſible we ſhould be able to judge of it. Perhaps a contempt in the houſe of commons, in the *Chancery*, in this court, and in the court of *Durham*, may be very different; therefore we cannot judge of it, but every court muſt be ſole judge of its own contempts. Beſides, as the court cannot go out of the return of this writ, how can we enquire into the truth of the fact, as to the nature of the contempt? We have no means of trying whether the lord-mayor did right or wrong. This court cannot ſummon a jury to try the matter. We cannot examine into the fact. Here are no parties in litigation before the court. We cannot call in any body. We cannot hear any witneſſes, or depoſitions of witneſſes. We cannot iſſue any proceſs. We are even now hearing *ex parte*, and without any counſel on the contrary ſide. Again, if we could determine upon the contempts of any other court, ſo might the other courts of *Weſtminſter-Hall*; and what confuſion would then enſue! none of us knowing the law by which perſons are committed by the houſe of commons. If three perſons were committed for the ſame breach of privilege, and applied ſeverally to different courts, one court perhaps would bail, another court diſcharge, a third re-commit.

Two objections have been made, which I own have great weight; becauſe they hold forth, if purſued to all poſſible caſes, conſequences of moſt important miſchief. 1*ſt*, It is ſaid, that if the rights and privileges of parliament are legal rights, for that very reaſon the court muſt take notice of them, becauſe they are legal. And 2*dly*, If the law of parliament is part of the law of the land, the judges muſt take cognizance of one part of the law of the land, as well as of the other. But theſe objections will not prevail. There are two ſorts of privileges which ought never to be confounded; perſonal privilege, and the privilege belonging to the whole collective body of that aſſembly. For inſtance, it is the privilege of every individual member, not to be arreſted. If he was arreſted, before the *ſtat.* 12 *&* 13 *W.* III. the method in *Weſtminſter-Hall* was, to diſcharge him by writ of privilege under the great ſeal, which was in the nature of a *ſuperſedeas* to the proceedings; and as ſoon as it came into the court of *B. R.* and was pleaded there, then it became a record, and the pleading concluded, *ſi curia domini regis placitum prædictum cognoſcere velit aut debeat.* The *ſtat.* 11 *&* 12 *W.* III. has altered this, and there is now no occaſion to plead the privilege of a member of parliament. 2 *Stran.* 985. *Holiday & al'* verſus colonel *Pitt.* There is a great difference between matters of privilege coming incidentally before the court, and being the point itſelf directly before the court. In the firſt caſe, the court will take notice of them, becauſe it is neceſſary, in order to prevent a failure of juſtice. As in lord *Banbury*'s caſe, where the court of *King's-Bench* determined againſt the determination of the houſe of lords: but in that caſe they conſidered the legality and validity of the letters patent, without regarding the other right of a ſeat in the houſe of lords, with which the court did not concern themſelves. The counſel at the bar have not cited one caſe where any court of this Hall ever determined a matter of privilege which did not come incidentally before them. If a queſtion is to be determined in this court touching a deſcent, whereby property is to be determined, and which depends upon *legitimacy*; that is, whether the father and mother were married lawfully; this court muſt determine by the biſhop's certificate. But in ſome caſes, where legitimacy of marriage does not come in queſtion, but cohabitation only for a great length of time, which is evidence of a marriage, comes in queſtion, this court will determine according to the verdict of a jury, although the courts of *Weſtminſter-Hall* go by a different rule from the ſpiritual courts. But the preſent caſe differs much from thoſe which the court will determine; becauſe it does not come incidentally before us, but is brought before us directly, and is the whole point in queſtion; and to determine it, we muſt ſuperſede the judgment and determination of the houſe of commons, and a commitment in execution of that judgment.

Another objection has been made, which likewiſe holds out to us, if purſued in all its poſſible caſes, ſome dreadful conſequences; and that is, the abuſes which may be made by juriſdictions from which there is no appeal, and for which abuſes there is no remedy: but this is unavoidable; and it is better to leave ſome courts to the obligation of their oaths. In the caſe of a commitment by this court or the *King's-Bench*, there is no appeal. Suppoſe the court of *B. R.* ſets an exceſſive fine upon a man for a miſdemeanour, there is no remedy, no appeal to any other court. We muſt depend upon the diſcretion of ſome courts. A man not long ago was ſentenced to ſtand in the pillory, by this court of *Common-Pleas*, for a contempt. Some may think this very hard, to be done without a trial by jury; but it is neceſſary. Suppoſe the courts ſhould abuſe their juriſdiction, there can be no remedy for this: it would be a public grievance; and redreſs muſt be ſought from the legiſlature. The laws can never be a prohibition to the houſes of parliament; becauſe, by law, there is nothing ſuperior to them. Suppoſe they alſo, as well as the courts of law, ſhould abuſe the powers which the conſtitution has given them, there is no redreſs; it would be a public grievance. The conſtitution has provided checks to prevent its happening; it muſt be left at large; it was wiſe to leave it at large: ſome perſons, ſome courts, muſt be truſted with diſcretionary powers; and though it is poſſible, it is in the higheſt degree improbable, that ſuch abuſes ſhould ever happen; and the very ſuppoſal is anſwered by ſerjeant *Hawkins*, in the place cited at the bar. As for the caſe of the *Chancery* committing for crimes, that is a different thing, becauſe the *Chancery* has no criminal juriſdiction; but if that court commits for contempts, the perſons committed will not be diſcharged by any other court. Many authorities may be drawn from the reign of *Charles*, but thoſe were in times of conteſt. At preſent, when the houſe of commons commits for contempt, it is very neceſſary to ſtate what is the particular breach of privilege; but it would be a ſufficient return, to ſtate the breach of privilege generally. This doctrine is fortified by the opinion of all the judges, in the caſe of lord *Shafteſbury*, and I never heard this deciſion complained of till 1704. Though they were times of heat, the judges could have no motive in their deciſion, but a regard to the laws. The houſes diſputed about juriſdiction, but the judges were not concerned in the diſpute, As for the preſent caſe, I am perfectly ſatisfied, that if lord *Holt* himſelf were to have determined it, the lord-mayor would be remanded. In the caſe of Mr. *Murray*, the judges could not heſitate concerning the contempt by a man who refuſed to receive his ſentence in a proper poſture. All the judges agreed, that he muſt be remanded, becauſe he was committed by a court having competent juriſdiction. Courts of juſtice have no cognizance of the acts of the houſes of parliament, becauſe they belong *ad aliud examen*. I have the moſt perfect ſatisfaction in my own mind in that determination. Sir *Martin Wright*, who felt a generous and diſtinguiſhed warmth for the liberty of the ſubject; Mr. juſtice *Deniſon*, who was ſo free from connections and ambition of every kind; and Mr. juſtice *Foſter*, who may be truly called the *magna charta* of liberty of perſons, as well as fortunes; all theſe revered judges concurred in this point: I am therefore clearly and with full ſatisfaction of opinion, that the lord-mayor muſt be remanded.

Gould, juſtice.—I entirely concur in opinion with my lord chief juſtice, that this court hath no cognizance of contempts or breach of privilege of the houſe of commons: they are the only judges of their own privileges; and that they may be properly called judges, appears in 4 *Inſt.* 47. where my lord *Coke* ſays, an alien cannot be elected of the parliament, becauſe ſuch a perſon can hold no place of judicature. Much ſtreſs has been laid upon an objection, that the warrant of the ſpeaker is not conformable to the order of the houſe; and yet no ſuch thing appears upon the return, as has been pretended. The order ſays, that the lord-mayor ſhall be taken into the cuſtody of the ſerjeant or his deputy; it does not ſay, by the ſerjeant or his deputy. This court cannot know the nature and power of the proceedings of the houſe of commons: it is founded on a different law: the *lex et conſuetudo parliamenti* is known to parliament-men only. *Trewynnard*'s caſe, *Dier* 59, 60. When matters of privilege come incidentally before the court, it is obliged to determine them to prevent a failure of juſtice. It is true this court did, in the inſtance alluded to by the counſel at the bar, determine upon the privilege of parliament in the caſe of a libel; but then that privilege was promulged and known; it exiſted in records and law-books, and was allowed by parliament itſelf. But even in that caſe, we now know that we were miſtaken; for the houſe of commons have ſince determined, that privilege does not extend to matters of libel. The caſes produced reſpecting the High-Commiſſion Court, *&c.* are not to the preſent purpoſe, becauſe thoſe courts had not a legal authority. The reſolution of the houſe of commons is an adjudication, and every court muſt judge of its own contempts.

Wilkes's caſe, 2 Wilſon 151.

Blackſtone, juſtice.—I concur in opinion, that we cannot diſcharge the lord-mayor. The preſent caſe is of great importance, becauſe the liberty of the ſubject is materially concerned. The houſe of commons is a ſupreme court, and they are judges of their own privileges and contempts, more eſpecially with reſpect to their own members. Here is a member committed in execution by the judgment of his own houſe. All courts, by which I mean to include the two houſes of parliament, and the courts of *Weſtminſter-Hall*, can have no controul in matters of contempt. The ſole adjudication of contempts, and the puniſhment thereof, in any manner, belongs excluſively, and without interfering, to each reſpective court. Infinite confuſion and diſorder would follow, if courts could by writ of *habeas corpus* examine and determine the contempts of others. This power to commit reſults from the firſt principles of juſtice; for if they have power to decide, they ought to have power to puniſh. No other court ſhall ſcan the judgment of a ſuperior court, or the principal ſeat of juſtice. As I ſaid before, it would occaſion the utmoſt confuſion, if every court of this Hall ſhould have power to examine the commitments of the other courts of the Hall for contempts; ſo that the judgment and commitment of each reſpective court, as to contempts, muſt be final, and without controul. It is a confidence that may, with perfect ſafety and ſecurity, be repoſed in the judges, and the houſes of parliament. The legiſlature ſince the Revolution (ſee 9 & 10 *W.* III. *c.* 15.) have created many new contempts. The objections which are brought of abuſive conſequences prove too much, becauſe they are applicable to all courts of *dernier reſort: et ab abuſu ad uſum non valent conſequentia*, is a maxim of law as well as of logic. General convenience muſt always outweigh partial inconvenience. Even ſuppoſing (which, in my conſcience, I am far from ſuppoſing) that in the preſent caſe the houſe has abuſed its power, I know, and am ſure, that the houſe of commons are both able and well inclined to do juſtice. How prepoſterous is the preſent murmur and complaint! The houſe of commons have this power only in common with all the courts of *Weſtminſter-Hall:* and if any perſons may be ſafely truſted with this power, they muſt ſurely be the commons, who are choſen by the people; for their privileges and powers are the privileges and powers of the people. There is a great fallacy in my brother *Glynn*'s whole argument, when he makes the queſtion to be, whether the houſe have acted according to their rights or not? Can any good man think of involving the judges in a conteſt with either houſe of parliament, or with one another? And yet this manner of putting the queſtion would produce ſuch a conteſt. The houſe of commons is the only judge of its own proceedings. *Holt* differed from the other judges in this point; but we muſt be governed by the *eleven*, and not by the *ſingle one*. It is a right inherent in all ſupreme courts. The houſe of commons have always exerciſed it. Little nice objections of particular words and forms, and ceremonies of execution, are not to be regarded in the acts of the houſe of commons. It is our duty to preſume the orders of *that* houſe, and their execution, are according to law. The *habeas corpus* in *Murray*'s caſe was at common law. I concur intirely with my lord chief juſtice.

Nares, juſtice.—I ſhall ever entertain a moſt anxious concern for whatever regards the liberty of the ſubject. I have not the vanity to think I can add any thing to the weight of the arguments uſed by my lord chief juſtice and my brothers. I have attended with the utmoſt induſtry to every caſe and argument that has been produced, and moſt heartily and readily concur with my lord chief juſtice and my brothers.

The lord-mayor was remanded to the *Tower*.

No. VII. *The Caſe of* James Sommerſett, *a Negro, on a* Habeas Corpus, King's Bench, 1771 *and* 1772.

[*The following caſe was firſt printed by the editor of this volume of State Trials ſoon after the court's determination. It is here given from the ſecond edition, which was publiſhed in the year* 1775, *being the ſame as the firſt, except in a ſlight alteration of one of the notes.*

[*In Mr.* Loftt'*s Reports, there is a note of the arguments of all the counſel, and the judgment of the court as delivered by lord* Mansfield; *to which the editor begs leave to refer the Reader.*]

ON the third of *December* 1771, affidavits were made by *Thomas Walklin, Elizabeth Cade,* and *John Marlow*, that *James Sommerſett*, a negro, was confined in irons on board a ſhip called the *Ann and Mary*, *John Knowles* commander, lying in the *Thames*, and bound for *Jamaica*; and lord *Mansfield*, on an application ſupported by theſe affidavits, allowed a writ of *habeas corpus*, directed to Mr. *Knowles*, and requiring him to return the body of *Sommerſett* before his lordſhip, with the cauſe of detainer.

Mr. *Knowles* on the 9th of *December* produced the body of *Sommerſett* before lord *Mansfield*, and returned for cauſe of detainer, that *Sommerſett* was the negro ſlave of *Charles Steuart*, eſq. who had delivered *Sommerſett* into Mr. *Knowles*'s cuſtody, in order to carry him to *Jamaica*, and there ſell him as a ſlave. Affidavits were alſo made by Mr. *Steuart* and two other gentlemen, to prove that Mr. *Steuart* had purchaſed *Sommerſett* as a ſlave in *Virginia*, and had afterwards brought him into *England*, where he left his maſter's ſervice; and that his refuſing to return, was the occaſion of his being carried on board Mr. *Knowles*'s ſhip.

Lord *Mansfield* chuſing to refer the matter to the determination of the court of *King's Bench*, *Sommerſett* with ſureties was bound in a recognizance for his appearance there on the ſecond day of the next *Hillary* term; and his lordſhip allowed till that day for ſettling the form of the return to the *habeas corpus*. Accordingly on that day *Sommerſett* appeared in the court of *King's Bench*, and then the following return was read:

'I *John Knowles*, commander of the veſſel called the *Ann and Mary* in the writ hereunto annexed, do moſt humbly certify and return to our preſent moſt ſerene ſovereign the king; that at the time herein after-mentioned of bringing the ſaid *James Sommerſett* from *Africa*, and long before, there were, and from thence hitherto there have been, and ſtill are great numbers of negro ſlaves in *Africa*; and that during all the time aforeſaid there hath been, and ſtill is a trade, carried on by his majeſty's ſubjects, from *Africa* to his majeſty's colonies or plantations of *Virginia* and *Jamaica* in *America*, and other colonies and plantations belonging to his majeſty in *America*, for the neceſſary ſupplying of the aforeſaid colonies and plantations with negro ſlaves; and that negro ſlaves, brought in the courſe of the ſaid trade from *Africa* to *Virginia* and *Jamaica* aforeſaid, and the ſaid other colonies and plantations in *America*, by the laws of *Virginia* and *Jamaica* aforeſaid and the ſaid other colonies and plantations in *America*, during all the time aforeſaid, have been, and are ſaleable and ſold as goods and chattels, and upon the ſale thereof have become and been, and are the ſlaves and property of the purchaſers thereof, and have been, and are ſaleable and ſold by the proprietors thereof as goods and chattels. And I do further certify and return to our ſaid lord the king, that *James Sommerſett*, in the ſaid writ hereunto annexed named, is a negro, and a native of *Africa*; and that the ſaid *James Sommerſett*, long before the coming of the ſaid writ to me, *to wit* on the tenth day of *March* in the year of our Lord   was a negro ſlave in *Africa* aforeſaid, and afterwards, to wit on the ſame day and year laſt aforeſaid, being ſuch negro ſlave, was brought in the courſe of the ſaid trade as a negro ſlave from *Africa* aforeſaid to *Virginia* aforeſaid, to be there ſold; and afterwards, *to wit* on the firſt day of *Auguſt* in the year laſt aforeſaid, the ſaid *James Sommerſett*, being and continuing ſuch negro ſlave, was ſold in *Virginia* aforeſaid to one *Charles Steuart*, eſq. who then was an inhabitant of *Virginia* aforeſaid; and that the ſaid *James Sommerſett* thereupon then and there became, and was the negro ſlave and property of the ſaid *Charles Steuart*, and hath not at any time ſince been manumitted, enfranchiſed, ſet free, or diſcharged; and that the ſaid *James Sommerſett*, ſo being the negro ſlave and property of him the ſaid *Charles Steuart*, and the ſaid *Charles Steuart* having occaſion to tranſact certain affairs and buſineſs of him the ſaid *Charles Steuart* in this kingdom, he the ſaid *Charles Steuart*, before the coming of the ſaid writ to me, *to wit* on the firſt day of *October* in the year of our Lord 1769, departed from *America* aforeſaid, on a voyage for this kingdom, for the purpoſe of tranſacting his aforeſaid affairs and buſineſs, and with an intention to return to *America*, as ſoon as the ſaid affairs and buſineſs of him the ſaid *Charles Steuart* in this kingdom ſhould be tranſacted; and afterwards, *to wit* on the tenth day of *November* in the ſame year, arrived in this kingdom, *to wit* in *London*, that is to ſay, in the pariſh of *St. Mary le Bow* in the ward of *Cheap*; and that the ſaid *Charles Steuart* brought the ſaid *James Sommerſett*, his negro ſlave and property, along with him in the ſaid voyage, from *America* aforeſaid to this kingdom, as the negro ſlave and property of him the ſaid *Charles Steuart*, to attend and ſerve him, during his ſtay and abiding in this kingdom, on the occaſion aforeſaid, and with an intent to carry the ſaid *James Sommerſett* back again into *America*, with him the ſaid *Charles Steuart*, when the ſaid affairs and buſineſs of the ſaid *Charles Steuart* ſhould be tranſacted; which ſaid affairs and buſineſs of the ſaid *Charles Steuart* are not yet tranſacted, and the intention of the ſaid *Charles Steuart* to return to *America* as aforeſaid hitherto hath continued, and ſtill continues. And I do further certify to our ſaid lord the king, that the ſaid *James Sommerſett* did accordingly attend and ſerve the ſaid *Charles Steuart* in this kingdom, from the time of his ſaid arrival, until the ſaid *James Sommerſett*'s departing and abſenting himſelf from the ſervice of the ſaid *Charles Steuart* herein aftermentioned, *to wit* at *London* aforeſaid in the pariſh and ward aforeſaid; and that before the coming of this writ to me, *to wit* on the firſt day of *October* in the year of our Lord 1771, at *London* aforeſaid, *to wit* in the pariſh and ward aforeſaid, the ſaid *James Sommerſett*, without the conſent, and againſt the will of the ſaid *Charles Steuart*, and without any lawful authority whatſoever, departed and abſented himſelf from the ſervice of the ſaid *Charles Steuart*, and abſolutely refuſed to return into the ſervice of the ſaid *Charles Steuart*, and ſerve the ſaid *Charles Steuart*, during his ſtay and abiding in this kingdom, on the occaſion aforeſaid: whereupon the ſaid *Charles Steuart* afterwards and before the coming of this writ to me, *to wit* on the twenty-ſixth day of *November* in the year of our Lord 1771, on board the ſaid veſſel called the *Ann and Mary*, then and ſtill lying in the river *Thames*, *to wit* at *London* aforeſaid, in the pariſh and ward aforeſaid, and then and ſtill bound upon a voyage for *Jamaica* aforeſaid, did deliver the ſaid *James Sommerſett* unto me, who then was, and yet is maſter and commander of the ſaid veſſel, to be by me ſafely and ſecurely kept and carried and conveyed, in the ſaid veſſel, in the ſaid voyage to *Jamaica* aforeſaid, to be there ſold as the ſlave and property of the ſaid *Charles Steuart*; and that I did thereupon then and there, *to wit* at *London* aforeſaid in the pariſh and ward aforeſaid, receive and take, and have ever ſince kept and detained the ſaid *James Sommerſett* in my care and cuſtody, to be carried by me in the ſaid voyage to *Jamaica* aforeſaid, for the purpoſe aforeſaid. And this is the cauſe of my taking and detaining the ſaid *James Sommerſett*, and whoſe body I have now ready, as by the ſaid writ I am commanded.'

After the reading of the return, Mr. ſerjeant *Davy*, one of the counſel for *Sommerſett* the negro, deſired time to prepare his argument againſt the return; and on account of the importance of the caſe, the court poſtponed hearing the objections againſt the return, till the ſeventh of *February*, and the recognizance for the negro's appearance was continued accordingly. On that day Mr. ſerjeant *Davy* and Mr. ſerjeant *Glynn* argued againſt the return, and the further argument was poſtponed till *Eaſter* term; when Mr. *Mansfield*, Mr. *Alleyne*, and Mr. *Hargrave*, were alſo heard on the ſame ſide. Afterwards Mr. *Wallace* and Mr. *Dunning* argued in ſupport of the return, and Mr. ſerjeant *Davy* was heard in reply to them. The determination of the court was ſuſpended till the following *Trinity* term; and then the court was unanimouſly of opinion againſt the return, and ordered that *Sommerſett* ſhould be diſcharged.

The following argument, on the behalf of the negro, is not to be conſidered as a ſpeech actually delivered: for though the author of it, who was one of the counſel for the negro, did deliver one part of his argument in court without the aſſiſtance of notes; yet his argument, as here publiſhed, is entirely a written compoſition. This circumſtance is mentioned, leſt the author ſhould be thought to claim a merit, to which he has not the leaſt title.

Argument of Mr. Hargrave *for the Negro.*

THOUGH the learning and abilities of the gentlemen, with whom I am joined on this occaſion, have greatly anticipated the arguments prepared by me; yet I truſt, that the importance of the caſe will excuſe me, for diſcloſing my ideas of it, according to the plan and order, which I originally found it convenient to adopt.

Short ſtate of the caſe.

The caſe before the court, when expreſſed in few words, is this. Mr. *Steuart* purchaſes a negro ſlave in *Virginia*, where by the law of the place negroes are ſlaves, and ſaleable as other property. He comes into *England*, and brings the negro with him. Here the negro leaves Mr. *Steuart*'s ſervice without his conſent; and afterwards perſons employed by him ſeize the negro, and forcibly carry him on board a ſhip bound to *Jamaica*, for the avowed purpoſe of tranſporting him to that iſland, and there ſelling him as a ſlave. On an application by the negro's friends, a writ of *habeas corpus* is granted; and in obedience to the writ he is produced before this court, and here ſues for the reſtitution of his liberty.

Importance of the caſe.

The queſtions, ariſing on this caſe, do not merely concern the unfortunate perſon, who is the ſubject of it, and ſuch as are or may be under like unhappy circumſtances. They are highly intereſting to the whole community, and cannot be decided, without having the moſt general and important conſequences; without extenſive influence on private happineſs and publick ſecurity. The right claimed by Mr. *Steuart* to the detention of the negro, is founded on the condition of ſlavery, in which he was before his maſter brought him into *England*; and if that right is here recognized, domeſtic ſlavery, with its horrid train of evils, may be lawfully imported into this country, at the diſcretion of every individual foreign and native. It will come not only from our own colonies, and thoſe of other *European* nations; but from *Poland*, *Ruſſia*, *Spain*, and *Turkey*, from the coaſt of *Barbary*, from the Weſtern and Eaſtern coaſts of *Africa*, from every part of the world, where it ſtill continues to torment and diſhonour the human ſpecies. It will be tranſmitted to us in all its various forms, in all the gradations of inventive cruelty: and by an univerſal reception of ſlavery, this country, ſo famous for public liberty, will become the chief ſeat of private tyranny.

Points which ariſe in the caſe.

In ſpeaking on this caſe, I ſhall arrange my obſervations under two heads. Firſt, I ſhall conſider the right, which Mr. *Steuart* claims in the perſon of the negro. Secondly, I ſhall examine Mr. *Steuart*'s authority to enforce that right, if he has any, by impriſonment of the negro and tranſporting him out of this kingdom. The court's opinion in favour of the negro, on either of theſe points, will entitle him to a diſcharge from the cuſtody of Mr. *Steuart.*

(1ſt.) Point on the right claimed in the negro's perſon.

(1ſt.) The firſt point, concerning Mr. *Steuart*'s right in the perſon of the negro, is the great one, and that which, depending on a variety of conſiderations, requires the peculiar attention of the court. Whatever Mr. *Steuart*'s right may be, it ſprings out of the condition of ſlavery, in which the negro was before his arrival in *England*, and wholly depends on the continuance of that relation; the power of impriſoning at pleaſure here, and of tranſporting into a foreign country for ſale as a ſlave, certainly not being exerciſeable over an ordinary ſervant. Accordingly the return fairly admits ſlavery to be the ſole foundation of Mr. *Steuart*'s claim; and this brings the queſtion, as to the preſent lawfulneſs of ſlavery in *England*, directly before the court. It would have been more artful to have aſſerted Mr. *Steuart*'s claim in terms leſs explicit, and to have ſtated the ſlavery of the negro before his coming into *England*, merely as a ground for claiming him here, in the relation of a ſervant bound to follow wherever his maſter ſhould require his ſervice. The caſe repreſented in this diſguiſed way, though in ſubſtance the ſame, would have been leſs alarming in its firſt appearance, and might have afforded a better chance of evading the true queſtion between the parties. But this artifice, however convenient Mr. *Steuart*'s counſel may find it in argument, has not been adopted in the return; the caſe being there ſtated as it really is, without any ſuppreſſion of facts to conceal the great extent of Mr. *Steuart*'s claim, or any colouring of language to hide the odious features of ſlavery in the feigned relation of an ordinary ſervant.

Slavery the foundation of the claim to the negro.

General obſervations on domeſtic ſlavery.

Before I enter upon the enquiry into the preſent lawfulneſs of ſlavery in *England*, I think it neceſſary to make ſome general obſervations on ſlavery. I mean however always to keep in view ſlavery, not as it is in the relation of a ſubject to an abſolute prince, but only as it is in the relation of the loweſt ſpecies of ſervant to his maſter, in any ſtate, whether free or otherwiſe in its form of government. Great confuſion has enſued from diſcourſing on ſlavery, without due attention to the difference between the deſpotiſm of a ſovereign over a whole people and that of one ſubject over another. The former is foreign to the preſent caſe; and therefore when I am deſcribing ſlavery, or obſerving upon it, I deſire to be underſtood as confining myſelf to the latter; though from the connection between the two ſubjects, ſome of my obſervations may perhaps be applicable to both.

Difficulty of defining ſlavery.

Slavery has been attended in different countries with circumſtances ſo various, as to render it difficult to give a general deſcription of it. The *Roman* lawyer (a) calls ſlavery, *a conſtitution of the law of nations, by which one is made ſubject to another contrary to nature.* But this, as has been often obſerved by the commentators, is miſtaking the law, by which ſlavery is conſtituted for ſlavery itſelf, the cauſe for the effect; though it muſt be confeſſed, that the latter part of the definition obſcurely hints at the nature of ſlavery. *Grotius (b)* deſcribes ſlavery to be, *an obligation to ſerve another for life, in conſideration of being ſupplied with the bare neceſſaries of life.* Dr. *Rutherford (c)* rejects this definition, as implying a right to direct only the labors of the ſlave, and not his other actions. He therefore, after defining *deſpotiſm* to be *an alienable right to direct all the actions of another*, from thence concludes, that *perfect ſlavery* is *an obligation to be ſo directed.* This laſt definition may ſerve to convey a general idea of ſlavery; but like that by *Grotius*, and many other definitions which I have ſeen, if underſtood ſtrictly, will ſcarce ſuit any ſpecies of ſlavery, to which it is applied. Beſides, it omits one of ſlavery's ſevereſt and moſt uſual incidents; the quality, by which it involves all the iſſue in the misfortune of the parent. In truth, as I have already hinted, the variety of forms, in which ſlavery appears, makes it almoſt impoſſible to convey a juſt notion of it in the way of definition. There are however certain properties, which have accompanied ſlavery in moſt places; and by attending to theſe, we may always diſtinguiſh it, from the mild ſpecies of domeſtic ſervice ſo common and well known in our own country. I ſhall ſhortly enumerate the moſt remarkable of thoſe properties; particularly, ſuch as characterize the ſpecies of ſlavery adopted in our *American* colonies, being that now under the conſideration of this court. This I do, in order that a juſt conception may be formed, of the propriety with which I ſhall impute to ſlavery the moſt pernicious effects. Without ſuch a previous explanation, the moſt ſolid objections to the permiſſion of ſlavery will have the appearance of unmeaning, though ſpecious, declamation.

Properties uſually incident to ſlavery.

Slavery always imports an obligation of perpetual ſervice; an obligation, which only the conſent of the maſter can diſſolve.—It generally gives to the maſter, an arbitrary power of adminiſtering every ſort of correction, however inhuman, not immediately affecting the life or limb of the ſlave: ſometimes even theſe are left expoſed to the arbitrary will of the maſter; or they are protected by fines, and other ſlight puniſhments, too inconſiderable to reſtrain the maſter's inhumanity.---It creates an incapacity of acquiring, except for the maſter's benefit.---It allows the maſter to alienate the perſon of the ſlave, in the ſame manner as other property.---Laſtly, it deſcends from parent to child, with all its ſevere appendages.---On the moſt accurate compariſon, there will be found nothing exaggerated in this repreſentation of ſlavery. The deſcription agrees with almoſt every kind of ſlavery, formerly or now exiſting; except only that remnant of the ancient ſlavery, which ſtill lingers in ſome parts of *Europe*, but qualified and moderated in favour of the ſlave by the humane proviſion of modern times.

Bad effects of ſlavery.

From this view of the condition of ſlavery, it will be eaſy to derive its deſtructive conſequences.---It corrupts the morals of the maſter, by freeing him from thoſe reſtraints with reſpect to his ſlave, ſo neceſſary for controul of the human paſſions, ſo beneficial in promoting the practice and confirming the habit of virtue.---It is dangerous to the maſter; becauſe his oppreſſion excites implacable reſentment and hatred in the ſlave, and the extreme miſery of his condition continually prompts him to riſque the gratification of them, and his ſituation daily furniſhes the opportunity.---To the ſlave it communicates all the afflictions of life, without leaving for him ſcarce any of its pleaſures; and it depreſſes the excellence of his nature, by denying the ordinary means and motives of improvement.---It is dangerous to the ſtate, by its corruption of thoſe citizens on whom its proſperity depends; and by admitting within it a multitude of perſons, who, being excluded from the common benefits of the conſtitution, are intereſted in ſcheming its deſtruction.---Hence it is, that ſlavery, in whatever light we view it, may be deemed a moſt pernicious inſtitution: immediately ſo, to the unhappy perſon who ſuffers under it; finally ſo, to the maſter who triumphs in it, and to the ſtate which allows it.

Opinion of ſome modern writers in favour of the utility of ſlavery, but under many reſtrictions.

However, I muſt confeſs, that notwithſtanding the force of the reaſons againſt the allowance of domeſtic ſlavery, there are civilians of great credit, who inſiſt upon its utility; founding themſelves chiefly, on the ſuppoſed increaſe of robbers and beggars in conſequence of its diſuſe. This opinion is favoured by *Puffendorf (d)* and *Ulricus Huberus (e)*. In the diſſertation on ſlavery prefixed to *Potgieſſerus* on the *German* law *de ſtatu ſervorum*, the opinion is examined minutely and defended. To this opinion I oppoſe thoſe ill conſequences, which I have already repreſented as almoſt neceſſarily flowing from the permiſſion of domeſtic ſlavery; the numerous teſtimonies againſt it, which are to be found in antient and modern hiſtory; and the example of thoſe *European* nations, which have ſuppreſſed the uſe of it, after the experience of many centuries and in the more improved ſtate of ſociety. In juſtice alſo to the writers juſt mentioned I muſt add, that though they contend for the advantages of domeſtic ſlavery, they do not ſeem to approve of it, in the form and extent in which it has generally been received, but under limitations, which would certainly render it far more tolerable. *Huberus* in his *Eunomia Romana (f)* has a remarkable paſſage, in which, after recommending a mild ſlavery, he cautiouſly diſtinguiſhes it from that cruel ſpecies, the ſubject of commerce between *Africa* and *America.* His words are, *loquor de ſervitute, qualis apud civiliores populos in uſu fuit*; *nec enim exempla barbarorum, vel quæ nunc ab* Africa *in* Americam *fiunt hominum commercia, velim mihi quiſquam objiciat.*

(a) Dig. lib. 1. tit. 5. l. 4. ſ. 1. *Servitus eſt conſtitutio juris gentium, quâ quis dominio alieno contra naturam ſubjicitur.*

(b) Jur. Bell. lib. 2. *c.* 5. ſ. 27.

(c) Inſt. Nat. L. *b.* 1. *c.* 20. *p.* 474.

(d) Law of Nature and Nations, *b.* 6. *c.* 3. *ſ.* 10.

(e) Prælect. Jur. Civ. *pag.* 16.

(f) See *pag.* 48.

Origin of ſlavery, and its general lawfulneſs conſidered.

The great origin of ſlavery is captivity in war, though ſometimes it has commenced by contract. It has been a queſtion much agitated, whether either of theſe foundations of ſlavery is conſiſtent with natural juſtice. It would be engaging in too large a field of enquiry, to attempt reaſoning on the *general lawfulneſs* of ſlavery. I truſt too, that the liberty, for which I am contending, doth not require ſuch a diſquiſition; and am impatient to reach that part of my argument, in which I hope to prove ſlavery reprobated by the law of *England* as an *inconvenient* thing. Here therefore I ſhall only refer to ſome of the moſt eminent writers, who have examined, how far ſlavery founded on captivity or contract is conformable to the law of nature, and ſhall juſt hint at the reaſons, which influence their ſeveral opinions. The antient writers ſuppoſe the right of killing an enemy vanquiſhed in a juſt war; and thence infer the right of enſlaving him. In this opinion, founded, as I preſume, on the idea of puniſhing the enemy for his injuſtice, they are followed by *Albericus Gentilis (g)*, *Grotius (h)*, *Puffendorf* (*i*), *Bynkerſhoek (j)*, and many others. But in *The Spirit of Laws* (*k*) the right of killing is denied, except in caſe of abſolute neceſſity and for ſelf-preſervation. However, where a country is conquered, the author ſeems to admit the conqueror's right of enſlaving for a ſhort time, that is, till the conqueſt is effectually ſecured. Dr. *Rutherforth (l)*, not ſatisfied with the right of killing a vanquiſhed enemy, infers the right of enſlaving him, from the conqueror's right to a reparation in damages for the expences of the war. I do not know, that this doctrine has been examined; but I muſt obſerve, that it ſeems only to warrant a temporary ſlavery, till reparation is obtained from the property or perſonal labour of the people conquered. The lawfulneſs of ſlavery by contract is aſſented to by *Grotius* and *Puffendorf* (*m*), who found themſelves on the maintenance of the ſlave, which is the conſideration moving from the maſter. But a very great writer of our own country, who is now living, controverts (*n*) the ſufficiency of ſuch a conſideration. Mr. *Locke* (*o*) has framed another kind of argument againſt ſlavery by contract; and the ſubſtance of it is, that a right of preſerving life is unalienable; that freedom from arbitrary power is eſſential to the exerciſe of that right; and therefore, that no man can by compact enſlave himſelf. Dr. *Rutherforth (p)* endeavours to anſwer Mr. *Locke*'s objection, by inſiſting on various limitations to the deſpotiſm of the maſter; particularly, that he has no right to diſpoſe of the ſlave's life at pleaſure. But the misfortune of this reaſoning is, that though the contract cannot juſtly convey an arbitrary power over the ſlave's life, yet it generally leaves him without a ſecurity againſt the exerciſe of that or any other power. I ſhall ſay nothing of ſlavery by birth; except that the ſlavery of the child *muſt* be unlawful, if that of the parent cannot be juſtified; and that when ſlavery is extended to the iſſue, as it uſually is, it *may* be unlawful as to them, even though it is not ſo as to their parents. In reſpect to ſlavery uſed for the puniſhment of crimes againſt civil ſociety, it is founded on the ſame neceſſity, as the right of inflicting other puniſhments; never extends to the offender's iſſue; and ſeldom is permitted to be domeſtic, the objects of it being generally employed in public works, as the galley-ſlaves are in *France*. Conſequently this kind of ſlavery is not liable to the principal objections, which occur againſt ſlavery in general (*q*). Upon the whole of this controverſy concerning ſlavery, I think myſelf warranted in ſaying, that the juſtice and lawfulneſs of every ſpecies of it, *as it is generally conſtituted*, except the limited one founded on the commiſſion of crimes againſt civil ſociety, is at leaſt doubtful; that if in any caſe lawful, ſuch circumſtances are neceſſary to make it ſo, as ſeldom concur, and therefore render a juſt commencement of it barely poſſible; and that the oppreſſive manner in which it has generally commenced, the cruel means neceſſary to enforce its continuance, and the miſchiefs enſuing from the permiſſion of it, furniſh very ſtrong preſumptions againſt its juſtice, and at all events evince the humanity and policy of thoſe ſtates, in which the uſe of it is no longer tolerated.

Univerſality of domeſtic ſlavery amongſt the ancients.

But however reaſonable it may be to doubt the juſtice of domeſtic ſlavery, however convinced we may be of its ill effects, it muſt be confeſſed, that the practice is ancient, and has been almoſt univerſal. Its beginning may be dated from the remoteſt period, in which there are any traces of the hiſtory of mankind. It commenced in the barbarous ſtate of ſociety, and was retained, even when men were far advanced in civilization. The nations of antiquity moſt famous for countenancing the ſyſtem of domeſtic ſlavery were the *Jews*, the *Greeks*, the *Romans*, and the antient *Germans* (*r*); amongſt all of whom it prevailed, but in various degrees of ſeverity. By the antient *Germans* it was continued in the countries they over-run; and ſo was tranſmitted to the various kingdoms and ſtates, which aroſe in *Europe* out of the ruins of the *Roman* empire. At length however it fell into decline in moſt parts of *Europe*; and amongſt the various cauſes, which contributed to this alteration, none were probably more effectual, than experience of the diſadvantages of ſlavery; the difficulty of continuing it; and a perſuaſion that the cruelty and oppreſſion almoſt neceſſarily incident to it were irreconcileable with the pure morality of the chriſtian diſpenſation. The hiſtory of its decline in *Europe* has been traced by many eminent writers, particularly *Bodin* (*s*), *Albericus Gentilis* (*t*), *Potgieſſerus* (*u*), Dr. *Robertſon* (*w*), and Mr. *Millar* (*x*). It is ſufficient here to ſay, that this great change began in *Spain*, according to *Bodin*, about the end of the eighth century, and was become general before the middle of the fourteenth century. *Bartolus*, the moſt famed commentator on the civil law in that period, repreſents ſlavery as in diſuſe; and the ſucceeding commentators hold much the ſame language. However, they muſt be underſtood with many reſtrictions and exceptions; and not to mean, that ſlavery was completely and univerſally aboliſhed in *Europe*. Some modern civilians, not ſufficiently attending to this circumſtance, rather too haſtily reprehend their predeceſſors for repreſenting ſlavery as diſuſed in *Europe*. The truth is, that the antient ſpecies of ſlavery by frequent emancipations became greatly diminiſhed in extent; the remnant of it was conſiderably abated in ſeverity; the diſuſe of the practice of enſlaving captives taken in the wars between chriſtian powers aſſiſted in preventing the future increaſe of domeſtic ſlavery; and in ſome countries of *Europe*, particularly *England*, a ſtill more effectual method, which I ſhall explain hereafter, was thought of to perfect the ſuppreſſion of it. Such was the expiring ſtate of domeſtic ſlavery in *Europe* at the commencement of the ſixteenth century, when the diſcovery of *America* and of the weſtern and eaſtern coaſts of *Africa* gave occaſion to the introduction of a new ſpecies of ſlavery. It took its riſe from the *Portugueſe*, who, in order to ſupply the *Spaniards* with perſons able to ſuſtain the fatigue of cultivating their new poſſeſſions in *America*, particularly the iſlands, opened a trade between *Africa* and *America* for the ſale of negro ſlaves. This diſgraceful commerce in the human ſpecies is ſaid to have begun in the year 1508, when the firſt importation of negro ſlaves was made into *Hiſpaniola* from the *Portugueſe* ſettlements on the weſtern coaſts of *Africa (y)*. In 1540 the emperor *Charles* the fifth endeavoured to ſtop the progreſs of the negro ſlavery, by orders that all ſlaves in the *American* iſles ſhould be made free; and they were accordingly manumitted by *Lagaſca* the governor of the country, on condition of continuing to labour for their maſters. But this attempt proved unſucceſsful, and on *Lagaſca*'s return to *Spain* domeſtic ſlavery revived and flouriſhed as before (*z*). The expedient of having ſlaves for labour in *America* was not long peculiar to the *Spaniards*; being afterwards adopted by the other *Europeans*, as they acquired poſſeſſions there. In conſequence of this general practice, negroes are become a very conſiderable article in the commerce between *Africa* and *America*; and domeſtic ſlavery has taken ſo deep a root in moſt of our own *American* colonies, as well as in thoſe of other nations, that there is little probability of ever ſeeing it generally ſuppreſſed.

Decline of ſlavery in Europe.

Revival of domeſtic ſlavery in America.

The attempt to introduce the ſlavery of negroes into England examined.

Here I conclude my obſervations on domeſtic ſlavery in general. I have exhibited a view of its nature, of its bad tendency, of its origin, of the arguments for and againſt its juſtice, of its decline in *Europe*, and the introduction of a new ſlavery by the *European* nations into their *American* colonies. I ſhall now examine the attempt to obtrude this new ſlavery into *England*. And here it will be material to obſerve, that if on the declenſion of ſlavery in this and other countries of *Europe* where it is diſcountenanced, no means had been deviſed to obſtruct the admiſſion of a *new* ſlavery, it would have been vain and fruitleſs to have attempted ſuperſeding the *antient* ſpecies. But I hope to prove, that our anceſtors at leaſt were not ſo ſhort-ſighted; and that long and uninterrupted uſage has eſtabliſhed rules, as effectual to prevent the revival of ſlavery, as their humanity was ſucceſsful in once ſuppreſſing it. I ſhall endeavour to ſhew, that the law of *England* never recognized any ſpecies of domeſtic ſlavery, except the *antient* one of *villenage* now expired, and has ſufficiently provided againſt the introduction of a *new* ſlavery under the name of *villenage* (*a*) or any other denomination whatever. This propoſition I hope to demonſtrate from the following conſiderations.

Arguments to prove, that the law of England will not admit a new ſlavery.

1. Argument from the manner of making title to a villein.

I. I apprehend, that this will appear to be the law of *England* from the manner of making title to a villein.

The only ſlavery our law-books take the leaſt notice of is that of a villein; by whom was meant, not the mere *tenant by villein ſervices, who might be free in his perſon*, but the villein in *blood* and tenure: and as the *Engliſh* law has no proviſions to regulate any other ſlavery, therefore no ſlavery can be lawful in *England*, except ſuch as will conſiſtently fall under the denomination of villenage.

The condition of a villein.

The condition of a villein had moſt of the incidents which I have before deſcribed in giving the idea of ſlavery in general. His ſervice was uncertain and indeterminate, ſuch as his lord thought fit to require; or, as ſome of our ancient writers (*b*) expreſs it, *he knew not in the evening what he was to do in the morning, he was bound to do whatever he was commanded.* He was liable to beating, impriſonment, and every other chaſtiſement his lord could deviſe, except killing and maiming (*c*). He was incapable of acquiring property for his own benefit, the rule being *quicquid ac-*

(*g*) *De Jur. Gent. cap. de ſervitute.* (*h*) *De Jur. Bell. l.* 3. *c.* 7. *ſ.* 5.

(*i*) Law of Nature and Nations, *b.* 6. *c.* 5. *ſ.* 6. (*j*) *Quæſt. Jur. Publ l.* 1. *t.* 3.

(*k*) *B.* 15. *c.* 2. (*l*) See his Inſt. Nat. Law, *vol.* 2. *p.* 573. and *vol.* 1. *p.* 481.

(*m*) See *Grot. Jur. Bell. l.* 2. *c.* 5. *ſ.* 1, 2. and *Puff.* Law of Nature and Nations, *b.* 6. *c.* 3. *ſ.* 4.

(*n*) See *Blackſt.* Comment. 1ſt *ed. vol.* 1. *p.* 412.

(*o*) See *Locke* on Governm. 8*vo edit. b.* 2. *c.* 4. *p.* 213.

(*p*) See his Inſt. Nat. Law. *vol.* 1. *p.* 480.

(*q*) Some writers there are, who deduce the lawfulneſs of domeſtic ſlavery from the practice of it amongſt the *Jews*, and from ſome paſſages in the Old Teſtament which are thought to countenance it. See *Vinn. in Inſtit. Heinecc. ed. l.* 1. *t.* 3. *p.* 31. There are others who attempt to juſtify ſlavery by the New Teſtament because it contains no direct precepts againſt it. See *Tayl. Elem. Civ. L.* 434.—I ſhall not attempt to examine either of theſe opinions.

(*r*) It appears by *Cæſar* and *Tacitus*, that the ancient *Germans* had a kind of ſlaves before they emigrated from their own country. See *Cæſ. de bell. Gall. lib.* 6. *cap* 13. & *Tac. de mor. German. cap.* 24. & 25. & *Potgieſſ. de ſtat. ſervor. ap. Germ. lib.* 1. *cap.* 1.

(*s*) See his book *De Republicâ, cap.* 5. *de imperio ſervili.*

(*t*) *Jur. Gent. cap. de ſervitute.*

(*u*) *Jur Germ. de ſtatu ſervorum.*

(*w*) Life of the emperor *Charles* the 5th, *vol.* 1.

(*x*) Obſervations on the Diſtinction of Ranks in Civil Society. See alſo *Tayl. Elem. Civ. L.* 434. to 439.

(*y*) Ander. Hiſt. Comm. *v.* 1. *p.* 336.

(*z*) See *Bodin de republic. lib.* 1. *c.* 5.

(*a*) Villenage is uſed to expreſs ſometimes the *tenure* of lands held by villein-ſervices, and ſometimes the *perſonal bondage* of the villein; but throughout this argument it is applied in the latter ſenſe only.

(*b*) See the extracts from them in *Co. Litt.* 116. *b.*

(*c*) See *Termes de la Ley*, ed. of 1567. *voc.* Villenage—Old Tenures, *cap.* Villenage—*Fitzh. Abr. Coron.* 17.—2. Ro. Abr. 1.—2. Inſt. 45.—& *Co. Litt.* 126. & 127.

quiritur ſervo acquiritur domino (d). He was himſelf the ſubject of property; as ſuch ſaleable and tranſmiſſible. If he was a villein regardant, he paſſed with the manor or land to which he was annexed, but might be ſevered at the pleaſure of his lord *(e).* If he was a villein in groſs, he was an hereditament or a chattel real according to his lord's intereſt; being deſcendible to the heir where the lord was abſolute owner, and tranſmiſſible to the executor where the lord had only a term of years in him *(f).* Laſtly, the ſlavery extended to the iſſue, if both parents were villeins, or if the father only was a villein; our law deriving the condition of the child from that of the father, contrary to the *Roman* law, in which the rule was *partus ſequitur ventrem (g).*

The origin of villeins.

The origin of villenage is *principally (h)* to be derived from the wars between our *Britiſh*, *Saxon*, *Daniſh* and *Norman* anceſtors, whilſt they were contending for the poſſeſſion of this country. Judge *Fitzherbert*, in his reading on the 4th of *Edw.* I. ſtat. 1. intitled *Extenta manerii*, ſuppoſes villenage to have commenced at the Conqueſt, by the diſtribution then made of the forfeited lands and of the vanquiſhed inhabitants reſident upon them *(i).* But there were many bondmen in *England* before the Conqueſt, as appears by the *Anglo-Saxon* laws regulating them; and therefore it would be nearer the truth to attribute the origin of villeins, as well to the preceding wars and revolutions in this country, as to the effects of the Conqueſt *(k).*

Decline of villenage.

After the Conqueſt many things happily concurred, firſt to check the progreſs of domeſtic ſlavery in *England*, and finally to ſuppreſs it. The cruel cuſtom of enſlaving captives in war being aboliſhed, from that time the acceſſion of a *new* race of villeins was prevented, and the humanity policy and neceſſity of the times were continually wearing out the *ancient* race. Sometimes, no doubt, manumiſſions were freely granted; but they probably were much oftener extorted during the rage of the civil wars, ſo frequent before the reign of *Henry* the VIIth, about the forms of the conſtitution or the ſucceſſion to the crown. Another cauſe, which greatly contributed to the extinction of villenage, was the diſcouragement of it by the courts of juſtice. They always preſumed in favour of liberty, throwing the *onus probandi* upon the lord, as well in the writ of *homine replegiando*, where the villein was plaintiff, as in the *nativo habendo*, where he was defendant *(l).* Nonſuit of the lord after appearance in a *nativo habendo*, which was the writ for aſſerting the title of ſlavery, was a bar to another *nativo habendo*, and a perpetual enfranchiſement; but nonſuit of the villein after appearance in a *libertate probanda*, which was one of the writs for aſſerting the claim of liberty againſt the lord, was no bar to another writ of the like kind (*m*). If two plaintiffs joined in a *nativo habendo*, nonſuit of one was a nonſuit of both; but it was otherwiſe in a *libertate probanda (n).* The lord could not proſecute for more than two villeins in one *nativo habendo*; but any number of villeins of the ſame blood might join in one *libertate probanda (o).* Manumiſſions were inferred from the ſlighteſt circumſtances of miſtake or negligence in the lord, from every act or omiſſion which legal refinement could ſtrain into an acknowledgment of the villein's liberty. If the lord veſted the ownerſhip of lands in the villein, received homage from him, or gave a bond to him, he was enfranchiſed. Suffering the villein to be on a jury, to enter into religion and be profeſſed, or to ſtay a year and a day in antient demeſne without claim, were enfranchiſements. Bringing ordinary actions againſt him, joining with him in actions, anſwering to his actions without proteſtation of villenage, imparling in them or aſſenting to his imparlance, or ſuffering him to be vouched without counterpleading the voucher, were alſo enfranchiſements by implication of law *(p).* Moſt of the conſtructive manumiſſions I have mentioned were the received law, even in the reign of the firſt *Edward (q).* I have been the more particular in enumerating theſe inſtances of extraordinary favour to liberty; becauſe the anxiety of our anceſtors to emancipate the *ancient* villeins, ſo well accounts for the eſtabliſhment of any rules of law calculated to obſtruct the introduction of a *new ſtock.* It was natural, that the ſame opinions, which influenced to diſcountenance the former, ſhould lead to the prevention of the latter.

When villenage expired.

I ſhall not attempt to follow villenage in the ſeveral ſtages of its decline; it being ſufficient here to mention the time of its extinction, which, as all agree, happened about the latter end of *Elizabeth*'s reign or ſoon after the acceſſion of *James (r).* One of the laſt inſtances, in which villenage was inſiſted upon, was *Crouch*'s caſe reported in *Dyer* and other books *(s).* An entry having been made by one *Butler* on ſome lands purchaſed by *Crouch*, the queſtion was, whether he was *Butler*'s villein regardant; and on two ſpecial verdicts, the one in ejectment *Mich.* 9th and 10th *Eliz.* and the other in aſſize *Eaſter* 11th *Eliz.* the claim of villenage was diſallowed, one of the reaſons given for the judgment in both being the want of ſeizin of the villein's perſon within 60 *(t)* years, which is the time limited by the 32d of *Hen.* VIII. chap. 2. in all caſes of hereditaments claimed by preſcription *(u).* This is generally ſaid to have been the laſt caſe of villenage; but there are four ſubſequent caſes in print. One was in *Hillary* 18th of *Elizabeth (w)*; another was a judgment in *Eaſter* 1ſt of *James (x)*; the third, which was never determined, happened in *Trinity* 8th of *James (y)*; and the fourth was ſo late as *Hillary* 15th of *James (z).* From the 15th of *James* the firſt, being more than 150 years ago, the claim of villenage has not been heard of in our courts of juſtice; and nothing can be more notorious, than that the race of perſons, who were once the objects of it, was about that time completely worn out by the continual and united operation of deaths and manumiſſions.

But though villenage itſelf is obſolete, yet fortunately thoſe rules, by which the claim of it was regulated, are not yet buried in oblivion. Theſe the induſtry of our anceſtors has tranſmitted; nor let us their poſterity deſpiſe the reverend legacy. By a ſtrange progreſs of human affairs, *the memory of ſlavery expired now furniſhes one of the chief obſtacles to the introduction of ſlavery attempted to be revived*; and the venerable reliques of the learning relative to villenage, ſo long conſigned to gratify the inveſtigating curioſity of the antiquary, or uſed as a ſplendid appendage to the ornaments of the ſcholar, muſt now be drawn forth from their faithful repoſitories for a more noble purpoſe; to inform and guide the ſober judgment of this court, and as I truſt to preſerve this country from the miſeries of domeſtic ſlavery.

(d) *Co. Litt.* 117. *a.*——The words, in pleading ſeizin of villein-ſervice, are very expreſſive of the lord's power over the villein's property. In 1 *E.* 2. 4. it is pleaded, that the lord was ſeized of the villein and his anceſtors *come affaire rechat de char & de ſank & de fille marier & de eux tailler haut & bas, &c.* The form in 5 E. 2. 15. is, *come de nos vileynes en feſant de luy notre provoſt en pnant de luy rechat de char & de ſaunk & redemption pur fill' & fitz marier de luy & de ces aunc & a tailler haut & bas a notre volente.* In the firſt of the above forms there is evidently a miſprint; and the reading ſhould be *a faire rechat* inſtead of *affaire rechat.* As to the word *provoſt* in the ſecond form, it ſeems to ſignify *plunder*, and perhaps the print ſhould be *proie* or *proye* inſtead of *provoſt.* I was led to this conjecture by the following proverb in *Cotgrave's French* Dictionary, *qui a le vilain il a ſa proye.* See *Cotgr.* ed. of 1673. *voc. proye.* However, in the *Latin* Entries the word *provoſt* is tranſlated *propoſitum*, which in a barbarous ſenſe of the word may be conſtrued to ſignify *will* or *pleaſure*, and will make the paſſage intelligible. In ſome Entries *provoſt* is tranſlated *præpoſitus*; but this word cannot be underſtood in any ſenſe that will make this uſe of it intelligible.

The forms of pleading ſeizin of villein-ſervices in the *Latin* Entries are very ſimilar to thoſe I have extracted from the year-books. See *Raſt.* Entr. 401. *a.*

(e) *Litt. ſect.* 181. (f) *Bro.* Abr. Villenage, 60.—*Co. Litt.* 117. (g) *Co. Litt.* 123. Antiently our law ſeems to have been very uncertain in this reſpect. See *Glanv. lib.* 5. *c.* 6. *Mirr. c.* 2. *ſ.* 38. *Britt. c.* 31. But the writers in the reign of *Henry* the 6th agree, that our law was as here repreſented; and from the plea of baſtardy, which was held to be a peremptory anſwer to the allegation of villenage ſo early as the reign of *Edward* the 3d. I conjecture, that the law was ſettled in the time of his father. See *Forteſc. laud. leg. Angl. c.* 42. *Litt. ſect.* 187.—43 *E.* 3. 4. & *Bro.* Abr. Villenage, 7. (h) I do not ſay *wholly*, becauſe probably there were ſome ſlaves in *England* before the firſt arrival of the *Saxons*; and alſo they and the *Danes* might bring ſome few from their own country. (i) See the extract from *Fitzherbert*'s reading in *Barringt.* Obſervations on Ant. Stat. 2d edit. *p.* 237. (k) See *Spelm. Gloſſ. voc. Lazzi & Servus. Somn.* on *Gavelk.* 65. and the index to *Wilk. Leg. Saxon. tit. Servus.*

(l) See *Lib. Intrat.* 176. *a.* 177. *b.* & *Bro.* Abr. Villenage, 66. It ſeems however, that if after a *nativo habendo* brought by the lord, the villein, inſtead of waiting for the lord's proceeding upon it, ſued out a *libertate probanda* to remove the queſtion of villenage for trial before the juſtices in eyre, on the return of it he was to produce ſome proof of his free condition; and that if he failed, he and his pledges were amerced. But this failure did not entitle the lord to any benefit from his *nativo habendo*, and therefore, if he proceeded in it, and could not prove the villenage, the judgment was for the villein; or if the lord did not proceed, a nonſuit, which was equally fatal to the lord's claim, was the neceſſary conſequence. See 47 *H.* 3. *It. Dev. Fitz.* Abr. Villenage, 39. In truth, the requiſition of proof from the villein on the *libertate probanda*, and the amercement for want of it, ſeem to have been mere form; for, as *Fitzherbert* ſays, in explaining the effect of the *libertate probanda*, 'the record ſhall be ſent before the juſtices in 'eyre, and the lord ſhall declare thereupon, and the villein ſhall make his defence 'and plead thereunto, and the villein ſhall not declare upon the writ *de libertate* '*probanda*, nor ſhall any thing be done thereupon; for that writ is but a *ſuper-* '*ſedeas* to ſurceaſe for the time, and to adjourn the record and the writ of *nativo* '*habendo* before the juſtices in eyre.' *Fitz. Nat. Br.* 77. *D.* Upon the whole therefore it may I think be ſafely aſſerted, that in all caſes of villenage the *onus probandi* was laid upon the lord.

The ſeveral remedies againſt and for one claimed as a villein are now ſo little underſtood, that perhaps a ſhort account of them may be acceptable; more particularly as, by a right conception of them, it will be more eaſy to determine on the force of the argument drawn againſt the revival of ſlavery from the rules concerning villenage.

The lord's remedy for a fugitive villein was, either by ſeizure, or by ſuing out a writ of *nativo habendo*, or *neifty*, as it is ſometimes called.

1. If the lord ſeized, the villein's moſt effectual mode of recovering liberty was by the writ of *homine replegiando*; which had great advantage over the writ of *habeas corpus.* In the *habeas corpus* the return cannot be conteſted by pleading againſt the truth of it, and conſequently on a *habeas corpus* the queſtion of liberty cannot go to a jury for trial; though indeed the party making a falſe return is liable to an action for damages, and puniſhable by the court for a contempt; and the court will hear affidavits againſt the truth of the return, and if not ſatisfied with it reſtore the party to his liberty. Therefore, if to a *habeas corpus* villenage was returned as the cauſe of detainer, the perſon for whom the writ was ſued at the utmoſt could only have obtained his liberty for the time, and could not have had a regular and final trial of the queſtion. But in the *homine replegiando* it was otherwiſe; for if villenage was returned, an *alias* iſſued directing the ſheriff to replevy the party on his giving ſecurity to anſwer the claim of villenage afterwards, and the plaintiff might declare for *falſe impriſonment* and lay *damages*, and on the defendant's pleading the villenage had the ſame opportunity of conteſting it, as when impleaded by the lord in a *nativo habendo.* See *Fitzh. N. Br.* 66. *F.* & *Lib. Intrat.* 176. *a.* 177. *b.*

2. If the lord ſued out a *nativo habendo*, and the villenage was denied, in which caſe the ſheriff could not ſeize the villein, the lord was then to enter his plaint in the county court; and as the ſheriff was not allowed to try the queſtion of villenage in his court, the lord could not have any benefit from the writ, without removing the cauſe by the writ of *pone* into the *King's Bench* or *Common Pleas.* [For the count pleading and judgment in the *nativo habendo* after the removal, ſee *Raſt.* Entr. 436, 437.] It is to be obſerved, that the lord's right of ſeizure continued notwithſtanding his having ſued out a *nativo habendo*, unleſs the villein brought a *libertate probanda.* This writ, which did not lie except upon a *nativo habendo* previouſly ſued out, was for removal of the lord's plaint in the *nativo habendo* for trial before the juſtices in eyre or thoſe of the *King's Bench*, and alſo for protecting the villein from ſeizure in the mean time. This latter effect ſeems to have been the chief reaſon for ſuing out the *libertate probanda*; and therefore after the 25th of *Edw.* 3. ſtat. 5. *c.* 18. which altered the common law, and gives a power of ſeizure to the lord, notwithſtanding the pendency of a *libertate probanda*, that writ probably fell much into diſuſe, though ſubſequent caſes, in which it was brought, are to be found in the year-books. See *Fitzh. Nat.* 77. to 79. & 11 *Hen.* 4. 49.

(m) *Co. Litt.* 139. (n) *Co. Litt.* 139. (o) *Fitzh. Nat. Br.* 78. *C. D.* (p) See *Litt. ſect.* 202 to 209. & 2. Ro. Abr. 735, 736, & 737. (q) See *Britt. cap.* 31. & *Mirr. cap.* 2. *ſect.* 38. (r) See Sir *Thomas Smith*'s Commonwealth, *b.* 2. *c.* 10. and *Barringt.* Obſerv. on Ant. Stat. 2d. ed. p. 252. (s) See *Dy.* 266. *pl.* 11. & 283. *pl.* 32. (t) Accord. *Bro.* Read. on the Stat. of Limitat. 32 *Hen.* 8. *page* 17. (u) Before this ſtatute of *Hen.* the 8th. the time of limitation ſeems to have been the coronation of *Hen.* 3. as appears by the form of the *nativo habendo*; though in other writs of right the limitation by 31 *E.* 1. *c.* 39. was from the commencement of the reign of *Rich.* the 1ſt. (w) See *Co.* Entr. 406. *b.* (x) *Yelv.* 2. (y) This caſe is only to be found in *Hughes*' Abridgment, *tit.* Villenage, *pl.* 23. (z) *Noy*, 27.

Manner of making title to a villein explained.

Littleton (a) ſays, *every villein is either a villein by title of preſcription, to wit that he and his anceſtors have been villeins time out of memory, or he is a villein by his own confeſſion in a court of record.* And in another place (b), his deſcription of a villein regardant and of a villein in groſs ſhews, that title cannot be made to either without preſcription or confeſſion. *Time whereof no memory runs to the contrary*, is an inſeparable incident to every preſcription (c); and therefore, according to *Littleton*'s account of villenage, the lord muſt *prove* the ſlavery *antient* and *immemorial*; or the villein muſt ſolemnly *confeſs* it to be ſo in a court of juſtice. A ſtill earlier writer lays down the rule in terms equally ſtrong. *No one*, ſays *Britton* (d), *can be a villein except of antient nativity, or by acknowledgment.* All the proceedings in caſes of villenage, when conteſted, conform to this idea of *remote antiquity* in the ſlavery, and are quite irreconcileable with one of *modern* commencement.

1. The villein in all ſuch ſuits (e) between him and his lord was ſtiled *nativus* as well as *villanus*; our antient (f) writers deſcribe a female ſlave by no other name than that of *neif*; and the technical name of the only writ in the law for the recovery of a villein is equally remarkable, being always called the *nativo habendo*, or writ of *neifty*. This peculiarity of denomination, which implies that villenage is a *ſlavery by birth*, might perhaps of itſelf be deemed too ſlight a foundation for any ſolid argument; but when combined with other circumſtances more deciſive, ſurely it is not without very conſiderable force.

2. In pleading villenage where it had not been confeſſed on ſome former occaſion, the lord always founded his title on *preſcription*. Our year-books, and books of entries, are full of the forms uſed in pleading a title to villeins regardant. In the *homine replegiando*, and other actions where the plea of villenage was for the purpoſe of ſhewing the plaintiff's diſability to ſue, if the villein was regardant, the defendant alledged, that he was ſeized of ſuch a manor, and that the plaintiff *and his anceſtors* had been villeins belonging to the manor *time out of mind*, and that the defendant and his anceſtors, and all thoſe whoſe eſtate he had in the manor, had been ſeized of the plaintiff and *all his anceſtors* as of villeins belonging to it (g). In the *nativo habendo* the form of making title to a villein regardant was in ſubſtance the ſame (h). In fact, regardancy neceſſarily implies preſcription, being where one and his anceſtors have been annexed to a manor *time out of the memory of man* (i). As to villeins in groſs, the caſes relative to them are very few; and I am inclined to think, that there never was any great number of them in *England*. The author of the *Mirroir* (k), who wrote in the reign of *Edward* the IId, only mentions villeins regardant; and ſir *Thomas Smith*, who was ſecretary of ſtate in the reign of *Edward* the VIth, ſays, that in his time he never knew a villein in groſs throughout the realm (l). However, after a long ſearch I do find places in the year-books, where the form of alledging villenage in groſs is expreſſed, not in full terms, but in a general way; and in all the caſes I have yet ſeen, the villenage is alledged in the *anceſtors* of the perſon againſt whom it was pleaded (m), and in one of them the words *time beyond memory* (n) are added. But if precedents had been wanting, the authority of *Littleton*, according to whom the title to villenage of each kind, unleſs it has been confeſſed, *muſt* be by preſcription, would not have left the leaſt room for ſuppoſing the pleading of a preſcription leſs neceſſary on the claim of villeins in groſs than of thoſe regardant.

3. The kind of evidence, which the law required to prove villenage, and allowed in diſproof of it, is only applicable to a ſlavery in *blood* and *family*, one *uninterruptedly* tranſmitted through a long line of anceſtors to the perſon againſt whom it was alledged. On the lord's part, it was neceſſary that he ſhould prove the ſlavery againſt his villein by other villeins of the *ſame blood* (o), ſuch as were deſcended from the ſame common *male* ſtock, and would acknowledge themſelves villeins to the lord (p), or thoſe from whom he derived his title; and at leaſt *two* witneſſes (q) of this deſcription were requiſite for the purpoſe. Nay, ſo ſtrict was the law in this reſpect, that in the *nativo habendo* the defendant was not obliged to plead to the claim of villenage, unleſs the lord at the time of declaring on his title brought his witneſſes with him into court, and they acknowledged themſelves villeins, and ſwore to their conſanguinity with the defendant (r); and if the plaintiff failed in adducing ſuch previous evidence, the judgement of the court was, that the defendant ſhould be *free for ever*, and the plaintiff was amerced for his falſe claim (s). In other actions the production of *ſuit* or witneſſes by the plaintiff, previouſly to the defendant's pleading, fell into diſuſe ſome time in the reign of *Edward* the third; and ever ſince, the entry of ſuch production on the rolls of the court has been mere form, being always with an *&c.* and without naming the witneſſes. But in the *nativo habendo* the actual production of the *ſuit*, and alſo the examination of them, unleſs the defendant releaſed (t) it in court, continued to be indiſpenſable even down to the time when villenage (u) expired.---Such was the ſort of teſtimony, by which only the lord could ſupport the title of ſlavery; nor were the means of defence on the part of the villein leſs remarkable. If he could prove that the ſlavery was not in his *blood* and *family*, he intitled himſelf to liberty. The author of the *Mirroir* (w) expreſly ſays, that *proof of a free ſtock* was an effectual defence againſt the claim of villenage; and even in the time of *Henry* the ſecond the law of *England* was in this reſpect the ſame, as appears by the words of *Glanville*. In his chapter of the trial (x) of liberty, he ſays, that the perſon claiming it ſhall produce *plures de proximis et conſanguineis de eodem ſtipite unde ipſe exierat exeuntes*; *per quorum libertates, ſi fuerint in curia recognitæ et probatæ, liberabitur à jugo ſervitutis qui ad libertatem proclamatur.* But the ſpecial defences which the law permitted againſt villenage are ſtill more obſervable; and prove it beyond a contradiction to be, what the author of the *Mirroir* emphatically ſtiles it (y), a ſlavery *of ſo great an antiquity that no free ſtock can be found by human remembrance.* Whenever the lord ſued to recover a villein by a *nativo habendo*, or alledged villenage in other actions as a diſability to ſue, the perſon claimed as a villein might either plead *generally* that he was of free condition, and on the trial of this general iſſue avail himſelf of every kind of defence which the law permits againſt villenage; or he might plead *ſpecially* any ſingle fact or thing, which if true was of itſelf a legal bar to the claim of villenage, and in that caſe the lord was compellable to anſwer the ſpecial matter. Of this ſpecial kind were the pleas of *baſtardy* and *adventif*. The former was an allegation by the ſuppoſed villein that either himſelf or his father, grand-father or other *male* anceſtor, was born out of matrimony; and this plea, however remote the anceſtor in whom the baſtardy was alledged, was *peremptory* to the lord; that is, if true it deſtroyed the claim of villenage, and therefore the lord could only ſupport his title by denying the fact of baſtardy. This appears to have been the law from a great variety of the moſt antient authorities. The firſt of them is a determined caſe ſo early as the 13th of *Edward* the ſecond (z), and in all the ſubſequent caſes (a) the doctrine is received for law without once being drawn into queſtion. In one of them (b) the reaſon why baſtardy is a good plea in a bar againſt villenage is expreſſed in a very peculiar manner; for the words of the book are, *when one claims any man as his villein, it ſhall be intended always that he is his villein by reaſon of ſtock, and this is the reaſon that there ſhall be an anſwer to the ſpecial matter where he alledges baſtardy; becauſe if his anceſtor was a baſtard, he can never be a villein, unleſs by ſubſequent acknowledgment in a court of record.* The force of this reaſon will appear fully on recollection, that the law of *England* always derives the condition of the iſſue from that of the father, and that the father of a baſtard being in law uncertain (c), it was therefore impoſſible to prove a baſtard a ſlave by *deſcent*. In reſpect to the plea of *adventif*, there is ſome little confuſion in the explanation, our year-books give us, of the perſons to whom the deſcription of *adventif* is applicable; but the form of the plea will beſt ſhew the preciſe meaning of it. It alledged (d), that either the perſon himſelf who was claimed as a villein regardant to a manor, or one of his anceſtors, was born in a county different from that in which the manor was, and *ſo was free*, which was held to be a neceſſary concluſion to the plea. This in general was the form of the plea, but ſometimes it was more particular, as in the following caſe (e). In treſpaſs, the defendant pleads that the plaintiff is his villein regardant to his manor of *Dale*; the plaintiff replies, that his great-grandfather was born in *C*, in the county of *N*, and from thence went into the county of *S*, and took lands held in bondage within the manor to which the plaintiff is ſuppoſed to be a villein regardant, and *ſo after time of memory his great-grandfather was adventif.* It is plain from this caſe, that the plea of *adventif* was calculated to deſtroy the claim to villenage regardant, by ſhewing that the connection of the ſuppoſed villein and his anceſtors with the manor to which they were ſuppoſed to be regardant, had begun within time of memory; and as holding lands by villein-ſervices was antiently deemed a mark (f), though not a certain one, of *perſonal bondage*, I conjecture that this ſpecial matter was never pleaded, except to diſtinguiſh the *mere tenant by villein ſervices* from the villein in *blood* as well as *tenure*. But whatever might be the caſes proper for the plea of *adventif*, it is one other incontrovertible proof,

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(a) Sect. 175. (b) Sect. 181, 182, & 185. (c) *Litt.* ſect. 170. (d) *Nul ne poit eſtre villeyn forſque de aunciene nativite ou par recognizance.* Britt. Wing. *ed. cap.* 31. *p.* 78. (e) See the form of the writs of *nativo habendo* and *libertate probanda*, and alſo of the *alias homine replegiando*, where on the firſt writ the ſheriff returns the claim of villenage. (f) *Brit.* cap. 31. & *Litt.* ſect. 186. (g) See *Raſt.* Entr. tit. *Homine Replegiando*, 373. & *Lib. Intrat.* 56. (h) See the form in *Lib. Intrat.* 97. & *Raſt.* Entr. 401. (i) This is agreeable to what *Littleton* ſays in ſect. 182. (k) *Mirr. c.* 2. *ſ.* 38. (l) *Smith's* Commonwealth, *b.* 2. *c.* 10. (m) See 1 *E.* 2. 4.—5 *E.* 2. 15.—7 *E.* 2. 242. & 11 *E.* 2. 344. In 13 *E.* 4. 2. b. pl. 4. & 3. b. pl. 11. there is a caſe in which villenage in groſs is pleaded, where one became a villein in groſs by ſeverance from the manor to which he had been regardant. This being the only caſe of the kind I have met with, I will ſtate ſo much of it from the year-book as is neceſſary to ſhew the manner of pleading. In treſpaſs the defendant pleads, that a manor, to which the plaintiff's father was a villein regardant, was given to an anceſtor of the defendant in tail, and that the manor deſcended to *Cecil* and *Catharine*; and that on partition between them, the villein with ſome lands was allotted to *Cecil*, and the manor to *Catherine*; and then the defendant conveyed the villein from *Cecil* to himſelf as heir. (n) 11 *E.* 2. 344. (o) See *Bro.* Abr. Villenage, 66. *Reg. Br.* 87. *a.* Old *Nat. Br.* 43 *b.* *Fitz.* Abr. Villenage, 38, 39. A *baſtard* was not receivable to prove villenage, 13 *E.* 1. *It. Northt* *Fitzh.* Abr. 36 & *Britt. Wing.* edit. 82. *a.* (p) In *Fitzherbert's Natura Brevium*, 79. B. it is ſaid, that the witneſſes muſt acknowledge themſelves villeins to the *plaintiff* in the *nativo habendo*; and there are many authorities which favour the opinion. See *Glanv. lib.* 5. *c.* 4. *Britt. Wing.* ed. 81. *a.* 19 *Hen.* 6. 32. *b.* Old Tenures, chap. Villenage; and the form in which the confeſſion of villenage by the plaintiff's witneſſes is recorded, in *Raſt.* Entr. tit. *Nativo habendo*, 401. *a.* However, it muſt be confeſſed, that in *Fitzherbert* the opinion is delivered with a *quære*; and it is ſo irreconcileable with the lord's right of granting villeins, as it is ſtated by *Littleton*, ſect. 181. that I will not inſiſt upon it here. (q) *Fitzh. Nat. Br.* 78. *H.* & *Fitzh.* Abr. Villenage, 36 & 37.—Alſo *Britton* ſays, *un maſle ſauns pluſurs neſt mie receivable.* *Britt. Wingate's* ed. p. 82. It is remarkable that *females*, whether ſole or married, were not receivable to prove villenage againſt men. *Saunk de un home ne puit ne doit eſtre trie par femmes.* *Britt. Wing.* ed. p. 82. The reaſon aſſigned is more antient than polite. It is ſaid to be *pur lour fraylte*, and alſo becauſe a man *eſt pluis digne perſon que une feme.* 13 *E.* 1. *Fitzh.* Abr. Villenage, 37. (r) *Fitzh. Nat. Br.* 78. H. *Fitzh.* Abr. Villenage, 32. *Lib. Intrat.* 97. *Raſt.* Entr. 401. *Reg. Br.* 87. (s) In *Fitzh.* Abr. Villenage, 8. there is an inſtance of ſuch a judgment, merely for the plaintiff's failure in the production of his witneſſes at the time of declaring on his title. (t) See 19 *H.* 6. 32. *b.* a caſe in which the defendant releaſes the examination of the *ſuit.* (u) The laſt entry in print of the proceedings in a *nativo habendo* contains the names of the *ſecta* or *ſuit* produced, and their acknowledgment of villenage on oath. See the caſe of *Jerney* againſt *Finch*, Hill. 18 *Eliz.* *C. B. Co.* Entr. 406. *b.* (w) *Mirr. c.* 2. *ſ.* 28. (x) *Glanv. lib.* 5. *c. cap.* 4. (y) *Eſt ſubjection iſſuant de cy grand antiquite, que nul franke ceppe purra eſtre trove per humane remembrance.* *Mirr.* c. 2. ſ. 28. (z) 13 *E.* 2. 408. (a) Hill. 19 *E.* 2. *Fitzh.* Abr. Villenage, 32.—39 *E.* 3. 36.—43 *E.* 3. 4.—19 *Hen.* 6. 11. & 12.—19 *Hen.* 6. 17.—Old Tenures, chap. Villenage.—*Co. Litt.* 123. *a.* In the caſe 19 *H.* 6. 17. there is ſomething on the trial of baſtardy in caſes of villenage, explaining when it ſhall be tried by the biſhop's certificate and when by a jury. See on the ſame ſubject *Fitzh.* Abr. Villenage, 32. & *Lib. Intrat.* 35. *a.* which latter book contains the record of a caſe where the trial was by the biſhop. (b) 43 *E.* 3. 4. (c) *Co. Litt.* 123. *a.* (d) 13 *E.* 1. *It. North.* *Fitz.* Abr. Villenage 36. 19 *E.* 2. *Fitz.* Abr. Villenage 32. 33 *E.* 3. *Fitz.* Abr. Viſne 2.—39 *E.* 3. 36.—41 *E.* 3. *Fitz.* Abr. Villenage 7.—43 *E.* 3. 31.—50 *E.* 3. *Fitz.* Abr. Villenage, 24.—19 *H.* 6. 11.—19 *H.* 6. 17. (e) 31 *E.* 3. *Fitz.* Abr. Viſne 1. (f) Fitzherbert ſays, *if a man dwells on lands which have been held in villenage time out of mind, he ſhall be a villein, and it is a good preſcription; and againſt this preſcription it is a good plea to ſay that his father or grandfather was adventif, &c.* Fitz. Abr. Villenage 24.

It

in addition to the proofs already mentioned, that no ſlavery having had commencement *within time of memory* was lawful in *England*; and that if one anceſtor could be found whoſe blood was unpolluted with the ſtain of ſlavery, the title of villenage was no longer capable of being ſuſtained.

How it is that the rules of law concerning villenage exclude a *new* ſlavery.

Such were the ſtriking peculiarities in the manner of making title to a villein, and of conteſting the queſtion of liberty; and it is ſcarce poſſible to attend to the enumeration of them, without anticipating me in the inferences I have to make.—The law of *England* only knows ſlavery by *birth*; it requires *preſcription* in making title to a ſlave; it receives on the lord's part *no* teſtimony except ſuch as proves the ſlavery to have been *always in* the *blood* and *family*, on the villein's part *every* teſtimony which proves the ſlavery to have been *once out of* his *blood* and *family*; it allows *nothing* to ſuſtain the ſlavery except what ſhews its commencement *beyond* the time of memory, every thing to defeat the ſlavery which evinces its commencement *within* the time of memory. But in our *American* colonies and other countries ſlavery may be by *captivity* or *contract* as well as *by birth*; no *preſcription* is requiſite; nor is it neceſſary that ſlavery ſhould be in the *blood* and *family*, and *immemorial*. Therefore the law of *England* is not applicable to the ſlavery of our *American* colonies, or of other countries.—If the law of *England* would permit the introduction of a ſlavery commencing out of *England*, the rules it preſcribes for trying the title to a ſlave would be applicable to ſuch a ſlavery; but they are not ſo; and from thence it is evident that the introduction of ſuch a ſlavery is not permitted by the law of *England*.—The law of *England* then excludes *every ſlavery not commencing in* England, *every ſlavery though commencing there not being antient and immemorial.* Villenage is the only ſlavery which can poſſibly anſwer to ſuch a deſcription, and that has been long expired by the deaths and emancipations of all thoſe who were once the objects of it. Conſequently there is now no ſlavery which can be lawful in *England*, until the legiſlature ſhall interpoſe its authority to make it ſo.

This is plain, unadorned, and direct reaſoning; it wants no aid from the colours of art, or the embelliſhments of language; it is compoſed of neceſſary inferences from facts and rules of law, which do not admit of contradiction; and I think, that it muſt be vain to attempt ſhaking a ſuperſtructure raiſed on ſuch ſolid foundations.

As to the other arguments I have to adduce againſt the revival of domeſtic ſlavery, I do confeſs that they are leſs powerful, being merely preſumptive. But then I muſt add, that they are ſtrong and violent preſumptions; ſuch as furniſh more certain grounds of judicial deciſion, than are to be had in many of the caſes which become the ſubjects of legal controverſy. For

2d. Argument againſt a *new* ſlavery from the fact of there never having been any ſlavery but villenage, and from the extinction of that ſlavery.

2dly. I infer that the law of *England* will not permit a *new* ſlavery, from the fact of there never yet having been any ſlavery but villenage, and from the actual extinction of that *antient* ſlavery. If a *new* ſlavery could have lawfully commenced here, or lawfully have been introduced from a foreign country, is there the moſt remote probability, that in the courſe of ſo many centuries a *new* ſlavery ſhould never have ariſen? If a *new* race of ſlaves could have been introduced under the denomination of villeins, if a *new* ſlavery could have been from time to time engrafted on the *antient* ſtock, would the laws of villenage have *once* become obſolete for want of objects, or would not a ſucceſſive ſupply of ſlaves have continued their operation to the preſent times? But notwithſtanding the vaſt extent of our commercial connections, the fact is confeſſedly otherwiſe. The *antient* ſlavery has once expired; neither natives nor foreigners have yet ſucceeded in the introduction of a *new* ſlavery; and from thence the ſtrongeſt preſumption ariſes, that the law of *England* doth not permit ſuch an introduction.

3d. Argument againſt a *new* ſlavery from the rules of law againſt ſlavery by contract.

3dly. I inſiſt, that the unlawfulneſs of introducing a *new* ſlavery into *England*, from our *American* colonies or any other country, is deducible from the rules of the *Engliſh* law concerning contracts of ſervice. The law of *England* will not permit any man to *enſlave* himſelf by contract. The utmoſt, which our law allows, is a contract to ſerve for life; and ſome perhaps may even doubt the validity of ſuch a contract, there being no determined caſes directly affirming its lawfulneſs. In the reign of *Henry* the fourth *(g)*, there is a caſe of debt, brought by a ſervant againſt the maſter's executors, on a retainer to ſerve for term of life in peace and war for one hundred ſhillings a-year; but it was held, that debt did not lie for want of a ſpeciality; which, as was agreed, would not have been neceſſary in the caſe of a common labourer's ſalary, becauſe, as the caſe is explained by *Brooke* in abridging it, the latter is bound to ſerve by ſtatute *(h)*. This caſe is the only one I can find, in which a contract to ſerve for life is mentioned; and even in this caſe, there is no judicial deciſion on the force of it. Nor did the nature of the caſe require any opinion upon ſuch a contract; the action not being to eſtabliſh the contract againſt the ſervant, but to enforce payment againſt the maſter's executors for arrears of ſalary in reſpect of ſervice actually performed; and therefore this caſe will ſcarce bear any inference in favour of a contract to ſerve for life. Certain alſo it is, that a ſervice for life in *England* is not uſual, except in the caſe of a military perſon; whoſe ſervice, though in effect for life, is rather ſo by the operation of the yearly acts for regulating the army, and of the perpetual act for governing the navy, than in conſequence of any expreſs agreement. However, I do not mean abſolutely to deny the lawfulneſs of agreeing to ſerve for life; nor will the inferences I ſhall draw from the rules of law concerning ſervitude by contract, be in the leaſt affected by admitting ſuch agreements to be lawful. The law of *England* may perhaps give effect to a contract of ſervice for life; but that is the *ne plus ultra* of ſervitude by contract in *England*. It will not allow the ſervant to inveſt the maſter with an arbitrary power of correcting imprisoning *(i)* or alienating him; it will not permit him to renounce the capacity of acquiring and enjoying property, or to tranſmit a contract of ſervice to his iſſue *(k)*. In other words, it will not permit the ſervant to incorporate into his contract the ingredients of ſlavery. And why is it that the law of *England* rejects a contract of ſlavery? The only reaſon to be aſſigned is, that the law of *England*, acknowledging only the *antient* ſlavery which is now expired, will not allow the introduction of a *new* ſpecies, even though founded on conſent of the party. The ſame reaſon operates with double force againſt a *new* ſlavery founded on captivity in war, and introduced from another country. Will the law of *England* condemn a *new* ſlavery commencing by *conſent* of the party, and at the ſame time approve of one founded on *force*, and moſt probably on *oppreſſion* alſo? Will the law of *England* invalidate a new ſlavery commencing in this country, when the title to the ſlavery may be fairly examined; and at the ſame time give effect to a *new* ſlavery introduced from another country, when diſproof of the ſlavery muſt generally be impoſſible? This would be rejecting and receiving a *new* ſlavery at the ſame moment; rejecting ſlavery the *leaſt* odious, receiving ſlavery the *moſt* odious: and by ſuch an inconſiſtency, the wiſdom and juſtice of the *Engliſh* law would be compleatly diſhonoured. Nor will this reaſoning be weakened by obſerving that our law permitted villenage, which was a ſlavery confeſſed to originate from force and captivity in war; becauſe that was a ſlavery coeval with the firſt formation of the *Engliſh* conſtitution, and conſequently had a commencement here prior to the eſtabliſhment of thoſe rules which the common law furniſhes againſt ſlavery by contract.

Examination of the caſes on the ſubject of ſlavery ſince or juſt before the extinction of villenage.

Having thus explained the three great arguments which I oppoſe to the introduction of domeſtic ſlavery from our *American* colonies, or any foreign country, it is now proper to enquire, how far the ſubject is affected by the caſes and judicial deciſions ſince or juſt before the extinction of villenage.

The firſt caſe on the ſubject is one mentioned in Mr. *Ruſhworth*'s Hiſtorical Collections *(l)*; and it is there ſaid, *that in the eleventh of* Elizabeth, *one* Cartwright *brought a ſlave from* Ruſſia, *and would ſcourge him*; *for which he was queſtioned*; *and it was reſolved, that* England *was too pure an air for a ſlave to breathe in.* In order to judge what degree of credit is due to the repreſentation of this caſe, it will be proper to ſtate from whom Mr. *Ruſhworth* reports it. In 1637, there was a proceeding by information in the *Star-Chamber* againſt the famous *John Lilburne*, for printing and publiſhing a libel; and for his contempt in refuſing to anſwer interrogatories, he was by order of the court impriſoned till he ſhould anſwer, and alſo whipped, pilloried, and fined. His impriſonment continued till 1640, when the Long Parliament began. He was then releaſed, and the houſe of commons impeached the judges of the *Star-Chamber* for their proceedings againſt *Lilburne*. In ſpeaking to this impeachment, the managers of the commons cited the caſe of the *Ruſſian* ſlave. Therefore the truth of the caſe doth not depend upon *John Lilburne*'s aſſertion, as the learned Obſerver on the Antient Statutes *(m)* ſeems to apprehend; but reſts upon the credit due to the managers of the commons. When this is conſidered, and that the year of the reign in which the caſe happened is mentioned, with the name of the perſon who brought the ſlave into *England*; that not above 72 or 73 years had intervened between the fact and the relation of it; and alſo that the caſe could not be ſuppoſed to have any influence on the fate of the impeachment againſt the judges; I ſee no great objection to a belief of the caſe. If the account of it is true, the plain inference from it is, that the ſlave was become free by his arrival in *England*. Any other conſtruction renders the caſe unintelligible, becauſe ſcourging, or even correction of a ſeverer kind, was allowed by the law of *England* to the lord in the puniſhment of his villein; and conſequently, if our law had recognized the *Ruſſian* ſlave, his maſter would have been juſtified in ſcourging him.

The firſt caſe in our printed Reports is that of *Butts* againſt *Penny (n)*, which is ſaid to have been adjudged by the court of *King's Bench* in *Trinity* term, 29th of *Charles* the ſecond. It was an action of *trover* for 10 *(o)* negroes; and there was a ſpecial verdict, finding, that the negroes were infidels, ſubjects to an infidel prince, and uſually bought and ſold in *India* as merchandize by the cuſtom amongſt merchants, and that the plaintiff had bought them, and was in poſſeſſion of them; and that the defendant took them out of his poſſeſſion. The court held, that negroes *being uſually bought and ſold amongſt merchants in* India, *and being infidels (p)*, there might be a property in them ſufficient to maintain the action; and it is ſaid that judgment *niſi* was given for the plaintiff, but that on the prayer of the counſel for the defendant to be further heard in the caſe, time was given till the next term. In this way our Reporters ſtate the caſe; and if nothing further appeared, it might be cited as an authority, though a very feeble one, to ſhew that the maſter's property in his negro ſlaves continues after their arrival in *England*, and conſequently that the negroes are not emancipated by being brought here. But having a ſuſpicion of ſome defect in the ſtate of the caſe, I deſired an examination of the *roll (q)*; and according to the account of it given to me, though the declaration is for negroes *generally* in *London*, without any mention of *foreign* parts, yet from the ſpecial verdict it appears, that the action was really brought to recover the value of negroes, of which the plaintiff had been poſſeſſed, not in *England*, but in *India*. Therefore this caſe would prove nothing in favour of ſlavery in *England*, even if it had received the court's judgment, which however it never did receive, there being only an *ulterius conſilium* on the roll.

(g) 2 H. 4. 14. (h) *Bro.* Abr. Dett. 53. (i) Lord *Hobart* ſays, *the body of a freeman cannot be made ſubject to diſtreſs or impriſonment by contract, but only by judgment.* Hob. 61. I ſhall have occaſion to make uſe of this authority again in a ſubſequent part of this argument. (k) Mr. Molloy thinks, that ſervants may contract to ſerve for life; but then he adds, *but at this day there is no contract of the anceſtor can oblige his poſterity to an hereditary ſervice*; *nor can ſuch as accept thoſe ſervants exerciſe the ancient right or dominion over them, no not ſo much as to uſe an extraordinary rigour, without ſubjecting themſelves to the law.* Moll. de Jur. Marit. 1ſt. *ed. b.* 3. *c.* 1. *ſ.* 7. *p.* 388.

(l) *Ruſhw. v.* 2. *p.* 468. (m) *Barr.* Obſerv. on Ant. Stat. 2d edit. p. 241.

(n) 2 *Lev.* 201. & 3. *Keb.* 785. See Hill. 29 *Char.* II. *B. R.* rot. 1116. (o) According to *Levinz*, the action was for 200 negroes; but it is a miſtake, the record only mentioning 10. (p) According to this reaſoning, it is lawful to have an infidel ſlave, but not a Chriſtian one. This diſtinction, between perſons of oppoſite perſuaſions in religion, is very antient. Amongſt the Jews, the condition of the *Hebrew* ſlave had many advantages over that of a ſlave of foreign extraction. [See *ſect.* 37. of the diſſertation on ſlavery prefixed to *Potgieſſer. Jus Germ. de Stat. Serv.*] Formerly too the *Mahometans* pretended, that their religion did not allow them to enſlave ſuch as ſhould embrace it; but, as *Bodin* ſays, the opinion was little attended to in practice. (See *Bodin. de Republica, lib.* 1. *cap.* 5. *de imperio ſervili.*) A like diſtinction was made in very early times amongſt Chriſtians; and the author of the *Mirroir* in one place expreſſes himſelf, as if the diſtinction had been adopted by the law of *England*. (See the *Mirr. c.* 2. *ſ.* 28.) But our other antient writers do not take the leaſt notice of ſuch a diſtinction, nor do I find it once mentioned in the year-books; which are therefore ſtrong preſumptive evidence againſt the reception of it in our courts of juſtice as *law*, however the opinion may have prevailed amongſt divines and others in *ſpeculation*. See *Barr.* Obſerv. Ant. Stat. 2d edit. p. 239.

The next caſe of *trover* was between *Gelly* and *Cleve* in the *Common-Pleas*, and was adjudged in *Michaelmas* term 5th of *William* and *Mary*. In the report of this caſe *(r)*, the court is ſaid to have held, that *trover* will lie for a negro boy, becauſe *negroes are heathens*; and therefore a man may have property in them, and the court without averment will take notice that they are heathens. On examination of the *roll (s)*, I find that the action was brought for various articles of merchandize as well as the negro; and I ſuſpect, that in this caſe, as well as the former one of *Butts* and *Penny*, the action was for a negro in *America*; but the declaration being laid *generally*, and there being no ſpecial verdict, it is now too late to aſcertain the fact. I will therefore ſuppoſe the action to have been for a negro in *England*, and admit that it tends to ſhew the lawfulneſs of having negro ſlaves in *England*. But then if the caſe is to be underſtood in this ſenſe, I ſay that it appears to have been adjudged without ſolemn argument; that there is no reaſoning in the report of this caſe to impeach the principles of law, on which I have argued againſt the revival of ſlavery in *England*; that unleſs thoſe principles can be controverted with ſucceſs, it will be impoſſible to ſuſtain the authority of ſuch a caſe; and further, that it ſtands contradicted by a ſubſequent caſe, in which the queſtion of ſlavery came *directly* before the court.

The only other reported caſe of *trover* is that of *Smith* againſt *Gould*, which was adjudged *Mich.* 4 *Ann* in the *King's Bench*. In *trover (t)* for ſeveral things, and among the reſt for a negro, *not guilty* was pleaded, and there was a verdict for the plaintiff with *ſeveral* damages, 30 *l.* being given for the negro; and after argument on a motion in arreſt of judgment, the court held, that *trover* did not lie for a negro. If in this caſe the action was for a negro in *England*, the judgment in it is a direct contradiction to the caſe of *Gelly* and *Cleve*. But I am inclined to think, that in this, as well as in the former caſes of *trover*, the negroes for which the actions were brought, were *not* in *England*; and that in all of them the queſtion was *not* on the lawfulneſs of having negro ſlaves in *England*, but merely whether *trover* was the proper kind of action for recovering the value of a negro unlawfully detained from the owner in *America* and *India*. The things, for which *trover* in general lies, are thoſe in which the owner has an abſolute property, without limitation of the uſe of them; whereas the maſter's power over the ſlave doth not extend to his life, and conſequently the maſter's property in the ſlave is in ſome degree *qualified* and *limited*. I am willing to ſuppoſe, that the caſes of *trover* were determined on this diſtinction, and therefore I will not inſiſt upon any benefit from them in argument; though the laſt of them, if it will bear any material inference, is certainly an authority againſt ſlavery in *England*.

The next caſe I ſhall ſtate is a judgment by the *King's Bench* in *Hillary* 8th and 9th of *William* the IIId. *Treſpaſs vi et armis* was brought by *Chamberlain (u)* againſt *Harvey*, for taking a negro of the value of 100 *l.* and by the ſpecial verdict it appears, that the negro, for which the plaintiff ſued, had been brought from *Barbadoes* into *England*, and was here baptized without the plaintiff's conſent, and at the time when the treſpaſs was alledged, was in the defendant's ſervice, and had 6 *l.* a-year for wages. In the argument of this caſe, three queſtions were made. One was, whether the facts in the verdict ſufficiently ſhewed that the plaintiff had ever had a veſted property in the negro *(x)*: another was, whether that property was not deveſted by bringing the negro into *England*: and the third was, whether *treſpaſs* for taking a man of the value of 100*l.* was the proper action. After ſeveral arguments, the court gave judgment againſt the plaintiff. But I do confeſs, that in the Reports we have of the caſe, no opinion on the great queſtion of ſlavery is mentioned; it becoming unneceſſary to declare one, as the court held, that the action ſhould have been an action to recover damages for the *loſs* of the *ſervice*, and not to recover the *value* of the *ſlave*. Of this caſe, therefore, I ſhall not attempt to avail myſelf.

But the next caſe, which was an action of *indebitatus aſſumpſit* in the *King's Bench* by *Smith* againſt *Browne* and *Cowper (xx)*, is more to the purpoſe. The plaintiff declared for 20*l.* for a negro ſold by him to the defendants in *London*; and on motion in arreſt of judgment, the court held, that the plaintiff ſhould have averred in the declaration, that *the negro at the time of the ſale was in* Virginia, *and that negroes by the laws and ſtatutes of* Virginia *are ſaleable (y)*. In theſe words there is a *direct* opinion againſt the ſlavery of negroes in *England*: for if it was lawful, the negro would have been ſaleable and transferable here, as well as in *Virginia*; and ſtating, that the negro at the time of the ſale was in *Virginia*, could not have been eſſential to the ſufficiency of the *declaration*. But the influence of this caſe, on the queſtion of ſlavery, is not by mere inference from the court's opinion on the plaintiff's mode of declaring in his action. The language of the judges, in giving that opinion, is remarkably ſtrong againſt the ſlavery of negroes, and every other *new* ſlavery attempted to be introduced into *England*. Mr. juſtice *Powell* ſays, *In a villein the owner has a property; the villein is an inheritance; but the law takes no notice of a negro.* Lord chief juſtice *Holt* is ſtill more explicit; for he ſays, that *one may be a villein in* England; but that *as ſoon as a negro comes into* England, *he becomes free.* The words of theſe two great judges contain the whole of the propoſition, for which I am contending. They admit property in the *villein*; they deny property in the *negro*. They aſſent to the *old* ſlavery of the villein: they diſallow the *new* ſlavery of the negro.

I beg leave to mention one other caſe, chiefly for the ſake of introducing a ſtrong expreſſion of the late lord chancellor *Northington*. It is the caſe of *Shanley* and *Hervey*, which was determined in *Chancery* ſome time in *March* 1762. The queſtion was between a negro and his former maſter, who claimed the benefit of a *donatio mortis cauſâ* made to the negro by a lady, on whom he had attended as ſervant for ſeveral years by the permiſſion of his maſter. Lord *Northington*, as I am informed by a friend who was preſent at the hearing of the cauſe, diſallowed the maſter's claim with great warmth, and gave coſts to the negro. He particularly ſaid, *As ſoon as a man puts foot on* Engliſh *ground, he is free: a negro may maintain an action againſt his maſter for ill uſage, and may have a habeas corpus, if reſtrained of his liberty (z).*

Objections likely to be made to the arguments againſt the preſent lawfulneſs of ſlavery in England, ſtated and anſwered.

Having obſerved upon all the caſes, in which there is any thing to be found relative to the preſent lawfulneſs of ſlavery in *England*; it is time to conſider the force of the ſeveral objections, which are likely to be made, as well to the inferences I have drawn from the determined caſes, as to the general doctrine I have been urging.

1. It may be aſked, Why it is that the law ſhould permit the *ancient* ſlavery of the *villein*, and yet diſallow a ſlavery of *modern* commencement?

To this I anſwer, that *villenage* ſprung up amongſt our anceſtors in the early and barbarous ſtate of ſociety; that afterwards more humane cuſtoms and wiſer opinions prevailed, and by their influence rules were eſtabliſhed for checking the progreſs of ſlavery; and that it was thought moſt prudent to effect this great object, not *inſtantaneouſly* by declaring every ſlavery unlawful, but *gradually* by excluding a *new* race of ſlaves; and encouraging the voluntary emancipation of the *ancient* race. It would have ſeemed an arbitrary exertion of power, by a retroſpective law to have annihilated property, which, however *inconvenient*, was *already* veſted by lawful means; but it was policy without injuſtice to reſtrain future acquiſitions.

2 It may be ſaid, that as there is nothing to hinder perſons of free condition from becoming ſlaves by *acknowledging* themſelves to be villeins, therefore a *new* ſlavery is not contrary to law.

The force of this objection ariſes from a ſuppoſition, that *confeſſion* or *acknowledgment* of villenage is a legal mode of *creating* ſlavery; but on examining the nature of the *acknowledgment*, it will be evident, that the law doth not permit villenage to be acknowledged for any *ſuch* purpoſe. The term itſelf imports ſomething widely *different* from *creation*; the *acknowledgment*, or *confeſſion* of a thing, implying that the thing acknowledged or confeſſed has a *previous* exiſtence; and in all caſes, criminal as well as civil, the law *intends*, that no man will confeſs an untruth to his own diſadvantage, and therefore never requires proof of that which is admitted to be true by the perſon intereſted to deny it. Beſides, it is not allowable to inſtitute a proceeding for the *avowed* and *direct* purpoſe of acknowledging villenage; for the law will not allow the confeſſion of it to be received, except where villenage is alledged in an *adverſe* way; that is, only (*a*) when villenage was pleaded by the lord *againſt* one whom he claimed as his villein; or by the villein *againſt* ſtrangers, in order to excuſe himſelf from defending actions to which his lord only was the proper party; or when *one* villein was produced to prove villenage againſt *another* of the *ſame blood* who *denied* the ſlavery. If the *acknowledgment* had been permitted as a *creation* of ſlavery, would the law have required, that the confeſſion ſhould be made in a mode ſo *indirect* and *circuitous* as a ſuit profeſſedly commenced for a *different* purpoſe? If confeſſion is a *creation* of ſlavery, it certainly muſt be deemed a *creation* by conſent; but if confeſſion had been adopted as a *voluntary* creation of ſlavery, would the law have reſtrained the courts of juſtice from receiving confeſſion, except in an *adverſe* way? If confeſſion had been allowed as a *mode* of *creating* ſlavery, would the law have received the confeſſion of *one* perſon as good evidence of ſlavery in *another* of the *ſame blood* merely becauſe they were deſcended from the ſame *common anceſtor*? This *laſt* circumſtance is of itſelf deciſive; becauſe it *neceſſarily* implied, that a ſlavery confeſſed was a ſlavery by *deſcent*.

On a conſideration of theſe circumſtances attending the acknowledgment of villenage, I think it impoſſible to doubt its being merely a *con-*

(q) The roll was examined for me by a friend. *(r)* 1. *L. Raym.* 147. *(s)* See Trin. 5 *W.* & *M.* C. B. Roll. No. 407. *(t)* 2. *Salk.* 666.—See alſo, 1. *L. Raym.* 147. *(u)* 1. *L. Raym.* 146. *Carth.* 396. & 5. Mod. 186. *(x)* The facts which occaſioned this queſtion, I have omitted in the ſtate of the caſe; becauſe they are not material to the queſtion of ſlavery in *England*. *(xx)* 2. *Salk.* 666. The caſe is not reported in any other book; and in *Salkeld* the time when the caſe was determined is omitted. But it appears to have been in the *King's Bench*, by the mention of Lord Ch. J. *Holt* and Mr. J. *Powell*. *(y)* The reporter adds, that the court directed, that the plaintiff ſhould *amend* his declaration. But after verdict it cannot ſurely be the practice to permit ſo *eſſential* an amendment; and therefore the reporter muſt have miſunderſtood the court's direction. *(z)* In the above enumeration of caſes, I have omitted one, which was ſir *Thomas Grantham's* caſe in the *Common-Pleas, Hillary* 2 & 3 *Jam.* 2. Being ſhort, I ſhall give it in the words of the Report. *He bought a monſter in the* Indies, *which was a man of that country, who had the ſhape of a child growing out of his breaſt as an excreſcency all but his head. This man he brought hither, and expoſed to the ſight of the people for profit. The* Indian *turns Chriſtian and was baptized, and was detained from his maſter, who brought a* homine replegiando. *The ſheriff returned, that he had replevied the body; but doth not ſay the body in which ſir* Thomas *claimed a property; whereupon he was ordered to amend his return, and then the court of* Common-Pleas *bailed him.* 3. Mod. 120.—It doth not appear, that the return was ever argued, or that the court gave any opinion on this caſe; and therefore nothing can be inferred from it. *(a) Co. Litt.* 121. *b.*

feſſion of that *antiquity* in the ſlavery, which was otherwiſe neceſſary to be *proved.* But if a doubt can be entertained, the opinions of the greateſt lawyers may be produced to remove it, and to ſhew, that, in conſideration of law, the perſon *confeſſing* was a villein by *deſcent* and in *blood.* In the year-book of 43 *E.* III. (*b*), it is laid down as a general rule, *that when one claims any man as his villein, it ſhall be intended always that he is his villein by reaſon of ſtock.* Lord chief juſtice *Hobart* conſiders villenage by confeſſion in this way, and ſays (*c*), *the confeſſion in the court of record is not ſo much a creation, as it is in ſuppoſal of law a declaration of rightful villenage before, as a confeſſion in other actions.* Mr. Serjeant *Rolle* too, in his abridgment, when he is writing on villenage by acknowledgment, uſes very ſtrong words to the ſame effect. He ſays in one place *(d)*, *it ſeems intended that title is made that he ſhould be a villein by deſcent*; and in another place (*e*), *it ſeems intended that title is made by preſcription, wherefore the iſſue ſhould alſo be villeins.* The only inſtance I can find, of a *nativo habendo* founded on a previous acknowledgment of villenage, is a ſtrong authority to the ſame purpoſe. In the 19th of *Edward* II. *(f)* the dean and chapter of *London* brought a writ of *neifty* to recover a villein, and concluded their declaration with mentioning his acknowledgment of the villenage on a former occaſion, inſtead of producing their *ſuit*, or witneſſes, as was neceſſary when the villenage had not been confeſſed: but notwithſtanding the acknowledgment, the plaintiffs alledged a *ſeizin* of the villein with *eſplees*, or receipt of profits from him, in the uſual manner. This caſe is another proof, that a *ſeizin previous to the acknowledgment* was the real foundation of the lord's claim, and that the acknowledgment was merely uſed to *eſtop* the villein from conteſting a fact which had been before ſolemnly confeſſed. However, I do admit, that under the *form* of acknowledgment there was a *poſſibility* of *colluſively* creating ſlavery. But this was not practicable without the concurrence of the perſon himſelf who was to be the ſufferer by the fraud; and it was not probable, that *many* perſons ſhould be found ſo baſe in mind, ſo falſe to themſelves, as to ſell themſelves and their poſterity, and to renounce the common protection and benefit of the law for a *bare* maintenance, which, by the wiſe proviſion of the law in this country, may always be had by the moſt needy and diſtreſſed, on terms infinitely leſs ignoble and ſevere. It ſhould alſo be remembered, that ſuch a colluſion could ſcarcely be *wholly* prevented, ſo long as any of the *real* and *unmanumitted deſcendants* from the *antient* villeins remained; becauſe there would have been the ſame poſſibility of defrauding the law on the actual *trial* of villenage, as by a *previous acknowledgment.* Beſides, if colluſions of this ſort had ever become frequent, the legiſlature might have prevented their effect by an *extraordinary* remedy. It ſeems, that antiently ſuch frauds were ſometimes practiſed; and that free perſons, in order to evade the trial of actions brought againſt them, alledged that they were villeins to a ſtranger to the ſuit, which, on account of the great improbability that a confeſſion ſo diſadvantageous ſhould be void of truth, was a plea the common law did not ſuffer the plaintiff to deny. But a remedy was ſoon applied, and the ſtatute of *(g)* 37 *E.* III. was made, giving to the plaintiff a liberty of conteſting ſuch an allegation of villenage. If in theſe times it ſhould be endeavoured to revive domeſtic ſlavery in *England*, by a like *fraudulent confeſſion* of villenage, ſurely ſo unworthy an attempt, ſo groſs an evaſion of the law, would excite in this court the ſtrongeſt diſapprobation and reſentment, and from parliament would receive an *immediate* and effectual remedy; I mean, a law *declaring* that villenage, as is moſt *notoriouſly* the fact, has been *long* expired for want of *real* objects, and therefore making void all precedent confeſſions of it, and *prohibiting* the courts of juſtice from recording a *confeſſion* of villenage *in future.*

3. It may be objected, that though it is not uſual in the wars between chriſtian powers to enſlave priſoners, yet that ſome nations, particularly the ſeveral ſtates on the coaſt of *Barbary*, ſtill adhere to that inhuman practice; and that in caſe of our being at war with them, the law of nations would juſtify our king in retaliating; and conſequently, that the law of *England* has not excluded the *poſſibility* of introducing a *new* ſlavery, as the arguments againſt it ſuppoſe.

But this objection may be eaſily anſwered; for if the arguments againſt a *new* ſlavery in *England* are well founded, they reach the *king* as well as his *ſubjects.* If it has been at all times the policy of the law of *England* not to recognize any ſlavery but the *antient* one of the villein, which is now expired; we cannot conſiſtently attribute to the *executive* power a prerogative of rendering that policy ineffectual. It is true, that the law of *nations* may give a right of retaliating on an enemy, who enſlaves his captives in war; but then the exerciſe of this right may be prevented or limited by the law of any *particular country.* A writer of eminence (*h*) on the *law of nations*, has a paſſage very applicable to this ſubject. His words are, *If the civil law of any nation does not allow of ſlavery, priſoners of war who are taken by that nation cannot be made ſlaves.* He is juſtified in his obſervation not only by the *reaſon* of the thing, but by the *practice* of ſome nations, where ſlavery is as unlawful as it is in *England.* The *Dutch* (*i*) when at war with the *Algerines*, *Tuniſians*, or *Tripolitans*, make no ſcruple of retaliating on their enemies; but ſlavery not being lawful in their *European* dominions, they have uſually ſold their priſoners of war as ſlaves in *Spain*, where ſlavery is ſtill permitted. To this example I have only to add, that I do not know an inſtance, in which a prerogative of having *captive ſlaves in England* has ever been aſſumed by the crown; and it being alſo the policy of our law not to admit a *new* ſlavery, there appears neither reaſon nor fact to ſuppoſe the exiſtence of a royal prerogative to introduce it.

4. Another objection will be, that there are *Engliſh* acts of parliament, which give a ſanction to the ſlavery of negroes; and therefore that it is *now* lawful, whatever it might be *antecedently* to thoſe ſtatutes.

The ſtatutes in favour of this objection are the 5 *Geo.* II. *c.* 7. *(k)* which makes negroes in *America* liable to all debts, ſimple-contract as well as ſpecialty, and the ſtatutes regulating the *African* trade, particularly the 32 *Geo.* II. *c.* 31. which in the preamble recites, that the trade to *Africa* is advantageous to *Great Britain*, and neceſſary for ſupplying its *colonies* with negroes. But the *utmoſt* which can be ſaid of theſe ſtatutes is, that they *impliedly* authorize the ſlavery of negroes in *America*; and it would be a ſtrange thing to ſay, that permitting ſlavery *there*, includes a permiſſion of ſlavery *here.* By an unhappy concurrence of circumſtances, the ſlavery of negroes is thought to have become neceſſary in *America*; and therefore in *America* our legiſlature has permitted the ſlavery of negroes. But the ſlavery of negroes is unneceſſary in *England*, and therefore the legiſlature has not extended the permiſſion of it to *England*; and not having done ſo, how can this court be warranted to make ſuch an extenſion?

5. The ſlavery of negroes being admitted to be lawful *now* in *America*, however queſtionable its *firſt* introduction there might be, it may be urged, that the *lex loci* ought to prevail, and that the maſter's property in the negro as a ſlave, having had a lawful commencement in *America*, cannot be juſtly varied by bringing him into *England.*

I ſhall anſwer this objection by explaining the limitation, under which the *lex loci* ought always to be received. It is a general rule *(l)*, that the *lex loci* ſhall not prevail, if *great inconveniences* will enſue from giving effect to it. Now I apprehend, that no inſtance can be mentioned, in which an application of the *lex loci* would be *more inconvenient*, than in the caſe of ſlavery. It muſt be agreed, that where *the lex loci* cannot have effect without introducing the thing prohibited in a degree either as great, or nearly as great, as if there was no prohibition, *there* the *greateſt inconvenience* would enſue from regarding the *lex loci*, and conſequently it ought not to prevail. Indeed, by receiving it in a caſe ſo circumſtanced, the end of a prohibition would be fruſtrated, either entirely or in a very great degree; and ſo the prohibition of things the moſt pernicious in their tendency would become vain and fruitleſs. And what *greater inconveniences* can we imagine, than thoſe, which would neceſſarily reſult from ſuch an unlimited ſacrifice of the *municipal* law to the law of a *foreign* country? I will now apply this *general* doctrine to the *particular* caſe of our own law concerning ſlavery. Our law prohibits the *commencement* of domeſtic ſlavery in *England*; becauſe it diſapproves of ſlavery, and conſiders its operation as dangerous and deſtructive to the whole community. But would not this prohibition be *wholly* ineffectual, if ſlavery could be *introduced* from a *foreign* country? In the courſe of time, though perhaps in a progreſs leſs rapid, would not domeſtic ſlavery become as general, and be as completely revived in *England* by *introduction* from our *colonies* and from *foreign countries*, as if it was permitted to revive by *commencement here*; and would not the ſame inconveniences follow? To prevent the revival of domeſtic ſlavery *effectually*, its introduction muſt be reſiſted *univerſally*, without regard to the place of its commencement; and therefore in the inſtance of ſlavery, the *lex loci* muſt yield to the *municipal* law. From the fact of there never yet having been any ſlavery in this country except the *old* and *now expired* one of *villenage*, it is evident, that hitherto *our law* has *uniformly* controlled the *lex loci* in this reſpect; and ſo long as the *ſame policy* of excluding ſlavery is retained by the law of *England*, it *muſt* continue intitled to the *ſame preference.* Nor let it be thought a peculiar want of complaiſance in the law of *England*, that diſregarding the *lex loci* in the caſe of ſlaves, it gives immediate and entire liberty to them, when they are brought here from another country. Moſt of the other *European* ſtates, in which ſlavery is diſcountenanced, have adopted a like policy.

In *Scotland* domeſtic ſlavery is *(m)* unknown, except ſo far as regards the *(n)* coal-hewers and ſalt-makers, whoſe condition, it muſt be confeſſed, bears ſome reſemblance to ſlavery; becauſe all who have once acted in either of theſe capacities are compellable to ſerve, and fixed to their reſpective places of employment during life. But with this ſingle exception, there is not the leaſt veſtige of ſlavery; and ſo jealous is the *Scotch* law of every thing tending to ſlavery, that it has been held to diſallow contracts of ſervice for life, or for a very long term; as, for ſixty years (*o*). However, no particular caſe has yet happened, in which it has been neceſſary to decide, whether a ſlave of another country acquires freedom on his arrival in *Scotland.* In 1757 this queſtion was depending in the Court of *Seſſion* in the caſe of a negro; but the negro happening to die during the pendency of the cauſe, the queſtion was not * determined. But when it is conſidered, that in the time of ſir *Thomas Craig*, who wrote at leaſt 150 years ago, ſlavery was even then a thing unheard of in *Scotland*, and that there are no laws *(p)* to re-

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(*b*) 43 E. 3. 4. (*c*) Hob. 99. *(d)* 2 Ro. Abr. 732. *pl.* 6. *(e)* 2. Ro. Abr. 732. *pl.* 8. *(f)* Fitz. Abr. Villenage 34. *(g)* 37 *E.* 3. *c.* 16. (*h*) *Rutherf. Inſt. Nat. L. v.* 2. *p.* 576. (*i*) *Quia ipſa ſervitus inter Chriſtianos ferè exolevit, eâ quoque non utimur in hoſtes captos. Poſſumus tamen, ſi ita placeat; imo utimur quandoque adverſus eos, qui in nos utuntur. Quare et Belgæ quos Algerienſes, Tunitanos, Tripolenſes, in Oceano aut Mari Mediterraneo capiunt, ſolent in ſervitutem Hiſpanis vendere, nam ipſi Belgæ ſervos non habent, niſi in Aſiâ Africâ et Americâ. Quin anno* 1661, *Ordines Generales Admiralio ſuo mandârunt, piratos captos in ſervitutem venderet. Idemque obſervatum eſt anno* 1664. Bynkerſhoek Quæſt. Jur. Publ. lib. 1. cap. 3.

(k) 5 G. 2. c. 7. *ſ.* 4. *(l)* See the chapter *de conflictu legum diverſarum in diverſis imperiis, in Huber. Prælect.* p. 538. *(m)* See *Crag. Jus Feud. lib.* 1. *dieges.* 11. *ſ.* 32.— *Stair's* Inſtit. *E.* 1. *t.* 2. *ſ.* 11, 12. *(n) Forb.* Inſtit. *part* 1. *b.* 2. *t.* 3.—*Macdoual.* Inſtit. *vol.* 1 *p.* 68. *(o) Macdoual.* Inſtit. *vol.* 1. *p.* 68. But I muſt obſerve, that in the caſe relied on by Mr. *Macdoual*, the *term* of ſervice was not the *only* material circumſtance. The contract was between the maſters and the crews of ſome fiſh boats; the latter binding themſelves for a yearly allowance to ſerve in their reſpective boats during three times nineteen years, *ſo that not one of them, during all that time, could remove from a particular village, or ſo much as from one boat to another* See *Dict. Deciſ.* tit. *Pactum illicitum.*

(*) Wall. Inſtit. Law of *Scotl. chap.* on maſter and ſervant. *(p)* Sir *Thomas Craig*, mentioning the *Engliſh* villenage, ſays,—*Nullus eſt apud nos ejus uſus, et inauditum nomen, niſi quod nonnulla in libro* Regiæ Majeſtatis *de nativis et ad libertatem proclamantibus proponantur; quæ et ab Anglorum moribus ſunt recepta, et nunquam in uſum noſtrum deducta.* Crag. Jus Feud. lib. 1. dieges. 11. ſ. 32.

gulate ſlavery, one can ſcarce doubt what opinion the Lords of *Seſſion* would have pronounced, if the negro's death had not prevented a deciſion.

In the *United Provinces* ſlavery having fallen into diſuſe *(q)*, all their writers agree, that ſlaves from another country become free the moment they enter into the *Dutch* territories *(r)*. The ſame cuſtom prevails in ſome of the neighbouring countries, particularly *Brabant*, and other parts of the *Auſtrian Netherlands*; and *Gudelinus*, an eminent civilian, who was formerly profeſſor of law at *Louvain* in *Brabant*, relates from the annals of the ſupreme council at *Mechlin*, that, in the year 1531, an application for apprehending and ſurrendering a fugitive ſlave from *Spain* was on this account rejected *(s)*.

In *France* the law is particularly explicit againſt regarding the *lex loci* in the caſe of domeſtic ſlavery: and though, in ſome of the provinces, a remnant of the antient ſlavery is ſtill to be ſeen in the perſons of the *ſerfs*, or *gens de main-morte*, who are attached to particular lands *(t)*, as villeins regardant formerly were in *England*; yet all the writers on the law of *France* agree, that the moment a ſlave arrives there from another country he acquires liberty, not in conſequence of any written law, but merely by long uſage having the force of law. There are many remarkable inſtances in which this rule againſt the admiſſion of ſlaves from foreign countries has had effect in *France*. Two are mentioned by *(u) Bodin*; one being the caſe of a foreign merchant who had purchaſed a ſlave in *Spain*, and afterwards carried him into *France*; the other being the caſe of a *Spaniſh* ambaſſador, whoſe ſlave was declared free, notwithſtanding the high and independent character of the ſlave's owner. This latter caſe has been objected to by ſome writers *(w)* on the *law of nations*, who do not diſapprove of the *general* principle on which liberty is given to ſlaves brought from foreign countries, but only complain of its application to the *particular* caſe of an ambaſſador. But, on the other hand, *Wicquefort (x)* blames the ſtates of *Holland* for not following the example of the *French*, in a caſe which he mentions. After the eſtabliſhment of the *French* colonies in *South America*, the kings of *France* thought fit to deviate from the ſtrictneſs of the antient *French* law, in reſpect to ſlavery, and in them to permit and regulate the poſſeſſion of negro ſlaves. The firſt edict for this purpoſe is ſaid to have been one in *April* 1615, and another was made in *May* 1685 *(y)*, which is not confined to negroes, but regulates the general police of the *French* iſlands in *America*, and is known by the name of the *Code noir*. But notwithſtanding theſe edicts, if negro ſlaves were carried from the *French American* iſlands into *France*, they were intitled to the benefit of the antient *French* law, and became free on their arrival in *France (z)*. To prevent this conſequence, a third edict was made in *October* 1716, which permits the bringing of negro ſlaves into *France* from their *American* iſlands. The permiſſion is granted under various reſtrictions; all tending to prevent the long continuance of negroes in *France*, to reſtrain their owners from treating them as property whilſt they continue in their mother country, and to prevent the importation of fugitive negroes; and with a like view, a royal declaration was made in *Dec.* 1738 *(a)*, containing an expoſition of the edict of 1716, and ſome additional proviſions. But the antient law of *France* in favour of ſlaves from another country, ſtill has effect, if the terms of the edict of 1716, and of the declaration of 1738 are not ſtrictly complied with; or if the negro is brought from a place, to which they do not extend. This appears from two caſes adjudged ſince the edict of 1716. In one *(b)* of them, which happened in 1738, a negro had been brought from the iſland of Saint *Domingo* without obſerving the terms of the edict of 1716; and in the other *(d)*, which was decided ſo late as in the year 1758, a ſlave had been brought from the *Eaſt Indies*, to which the edict doth not extend: and in both theſe caſes the ſlaves were declared to be free.

Such are the examples drawn from the laws and uſages of other *European* countries; and they fully evince, that wherever it is the policy to diſcountenance ſlavery, a diſregard of the *lex loci*, in the caſe of ſlavery, is as well juſtified by general *practice*, as it is really founded on *neceſſity*. Nor is the *juſtice* of ſuch proceeding leſs evident; for how can it be unjuſt to *deveſt* the maſter's property in his ſlave, when he is carried into a country, in which, for the wiſeſt and moſt humane reaſons, ſuch property is known to be prohibited, and conſequently cannot be lawfully introduced?

6. It may be contended, that though the law of *England* will not receive the negro as a ſlave, yet it may ſuſpend the ſevere qualities of the ſlavery whilſt the negro is in *England*, and preſerve the maſter's right over him in the relation of a ſervant, either by preſuming a contract for that purpoſe, or, without the aid of ſuch a refinement, by compulſion of law grounded on the condition of ſlavery in which the negro was previous to his arrival here.

But inſuperable difficulties occur againſt modifying and qualifying the ſlavery by this artificial refinement. In the preſent caſe, at all events ſuch a modification cannot be allowable; becauſe, in the return, the maſter claims the benefit of the relation between him and the negro in the full extent of the original ſlavery. But for the ſake of ſhewing the futility of the argument of modification, and in order to prevent a future attempt by the maſters of negroes to avail themſelves of it, I will try its force.

As to the preſuming a contract of ſervice againſt the negro, I aſk at what time is its commencement to be ſuppoſed? If the time was before the negro's arrival in *England*, it was made when he was in a ſtate of ſlavery, and conſequently without the power of contracting. If the time preſumed was ſubſequent, the preſumption muſt begin the moment of the negro's arrival here, and conſequently be founded on the mere fact of that arrival, and the conſequential enfranchiſement by operation of law. But is not a ſlavery, determined *againſt* the conſent of the maſter, a ſtrange foundation for preſuming a contract between him and the ſlave? For a moment, however, I will allow the reaſonableneſs of preſuming ſuch a contract, or I will ſuppoſe it to be reduced into writing; but then I aſk, what are the terms of this contract? To anſwer the maſter's purpoſe, it muſt be a contract to ſerve the maſter here; and when he leaves this country to return with him into *America*, where the ſlavery will again attach upon the negro. In plain terms, it is a contract to go into ſlavery whenever the maſter's occaſions ſhall require. Will the law of *England* diſallow the introduction of ſlavery, and therefore emancipate the negro from it; and yet give effect to a contract founded ſolely upon ſlavery, in ſlavery ending? It is impoſſible, that the law of *England* can be ſo inſulting to the negro, ſo inconſiſtent with itſelf.

The argument of modification, independently of contract, is equally deluſive.—There is no known rule by which the court can guide itſelf in a *partial* reception of ſlavery. Beſides, if the law of *England* would receive the ſlavery of the negro in any way, there can be no reaſon why it ſhould not be admitted in the ſame degree as the ſlavery of the villein: but the argument of modification neceſſarily ſuppoſes the contrary; becauſe, if the ſlavery of the negro was received in the ſame extent, then it would not be neceſſary to have recourſe to a *qualification*. But there is one other reaſon ſtill more repugnant to the idea of modifying the ſlavery. If the law of *England* would modify the ſlavery, it would certainly take away its *moſt* exceptionable qualities, and leave thoſe which are *leaſt* oppreſſive. But the modification required will be inſufficient for the maſter's purpoſe, unleſs the law leaves behind a quality the *moſt* exceptionable, odious, and oppreſſive; an *arbitrary* power of reviving the ſlavery in its full extent, by removal of the negro to a place, in which the ſlavery will again attach upon him with all its *original* ſeverity *(e)*.

From this examination of the ſeveral objections in favour of ſlavery in *England*, I think myſelf well warranted to obſerve, that inſtead of being weakened, the arguments againſt ſlavery in *England* have derived an additional force. The reſult is, not merely that negroes become free on being brought into this country, but that the law of *England* confers the *gift* of *liberty intire* and *unincumbered*; not in *name* only, but *really* and *ſubſtantially*; and conſequently, that Mr. *Steuart* cannot have the leaſt right over *Sommerſett* the negro, either in the *open* character of a ſlave, or in the *diſguiſed* one of an ordinary ſervant.

(2) Point on Mr. *Steuart's* authority to enforce his right to the negro by tranſporting him out of *England*.

(2.) In the outſet of the argument I made a ſecond queſtion on Mr. *Steuart*'s authority to enforce his right, if he has any, by tranſporting the negro out of *England*. Few words will be neceſſary on this point, which my duty as counſel for the negro requires me to make, in order to give him *every poſſible* chance of a diſcharge from his confinement, and not from any doubt of ſucceſs on the queſtion of ſlavery.

If in *England* the negro continues a ſlave to Mr. *Steuart*, he muſt be content to have the negro ſubject to thoſe limitations which the laws of villenage impoſed on the lord in the enjoyment of his property in the villein; there being no other laws to regulate ſlavery in this country. But even thoſe laws did not permit that high act of dominion which Mr. *Steuart* has exerciſed; for they reſtrained the lord from forcing the villein out of *England*. The law, by which the lord's power over his villein was thus limited, has reached the preſent times. It is a law * made in the time of the Firſt *William*, and the words of it are, *prohibemus ut nullus vendat hominem extra patriam (f)*.

If Mr. *Steuart* had claimed the negro as a ſervant by contract, and in his return to the *habeas corpus* had ſtated a *written* agreement to leave *England* as Mr. *Steuart* ſhould require, ſigned by the negro, and made after his arrival in *England*, when he had a capacity of contracting, it might then have been a queſtion, whether ſuch a contract in *writing* would have warranted Mr. *Steuart* in compelling the performance of it, by *forcibly* tranſporting the negro out of this country? I am myſelf ſatiſfied, that no contract, however *ſolemnly* entered into, would have juſtified ſuch violence. It is contrary to the genius of the *Engliſh* law, to allow any enforcement of agreements or contracts, by any other compulſion,

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(q) Belgæ ſervos non habent, niſi in Aſia, Africa, et America. *Bynkerſh. Quæſt. Jur. Pub. lib.* 1. *c.* 3. Another great *Dutch* lawyer adds, *Nec cuiquam mortalium nunc liceat ſeſe venundare, aut aliâ ratione ſervitutis jure ſemel alteri addicere.* Voet Commentar. ad Pandect. lib. 1. tit 5. ſ. 3.

(r) Servitus paulatim ab uſu receſſit, ejuſque nomen hodie apud nos exolevit; adeo quidem ut ſervi, qui aliunde huc adducuntur, ſimul ac imperii noſtri fines intrârunt, invitis ipſorum dominis ad libertatem proclamare poſſint: id quod et aliorum Chriſtianârum gentium moribus receptum eſt. Grœnewegen de Leg. Abrogat. in Hollandiâ, &c. p. 5. *John Voet*, in the place cited in the preceding note, expreſſes himſelf to the ſame effect.

(s) Gudelin. *de Jur. Noviſſ. lib.* 1. *c.* 5. *et* Vinn. *in Inſtit. lib.* 1. *tit.* 3. *p.* 32. *edit.* Heinecc. *(t)* See *Inſtit. au droit* Franc. *par M.* Argou, *ed.* 1753, *liv.* 1. *chap.* 1. *p* 4. *(u)* Bodin. *de Republic. lib.* 1. *cap.* 5. *de imperio herili.* See ſeveral other inſtances mentioned in the Negro cauſe in the 13th volume of the *Cauſes Celebres*. *(w) Kirchner. de Legat. lib.* 2. *c.* 1. *num.* 233—and after him *Bynkerſhoek Juge Compet. des Ambaſſad. ed. par Barbeyr. c.* 15. *ſ.* 3. *(x) Wicquefort's* Embaſſador, *Engl. ed. p.* 268. *(y) Deciſions Nouvelles*, par *M. Deniſart, tit. Negres.*—*Deniſart* mentions, that the edict of 1685 is regiſtered with the ſovereign council at *Domingo*, but has never been regiſtered in any of the *French* parliaments.

(z) Nouvelles Deciſions par M. Deniſart, tit. Negres, ſ. 27. *(a) M. Deniſart* obſerves, that the edict of 1716, and the declaration of 1738, do not appear to have been ever regiſtered by the parliament of *Paris*, becauſe they are conſidered as contrary to the common law of the kingdom.—See his *Nouvelles Deciſions, tit. Negres.* *(b)* See *Cauſes Celebres, vol.* 13. *p.* 492. *(d) Nouvelles Deciſions par M. Deniſart, tit. Negres, ſ.* 147.

(e) This anſwer to the argument of modification, includes an anſwer to the ſuppoſition, that an action of *treſpaſs per quod ſervitium amiſit*, will lie for loſs of a negro's ſervice. I am perſuaded, that the caſe, in which that remedy was looſely ſuggeſted, was one in which the queſtion was about a negro *being out of England*. See the caſe of *Smith* and *Gould*. 2. *Salk.* 667.—Another writ, hinted at in the ſame caſe, is the writ of *treſpaſs, quare captivum ſuum cepit*; which is not in the leaſt applicable to the negro, or any other ſlave. It ſuppoſes the plaintiff to have had one of the king's enemies in his cuſtody as a priſoner of war, and to have had a right of detaining him till payment of a ranſom. See *Reg. Br.* 102. *b.* and 2. *Salk.* 667. * *Wilk. Leg Saxon. p.* 229. *et cap.* 65, *Leg. Gulielm.* 1.

(f) This law furniſhes one more argument againſt ſlavery imported from a foreign country. If the law of *England* did not diſallow the admiſſion of ſuch a ſlavery, would it reſtrain the maſter from taking his ſlave out of the kingdom?

than that from our courts of juſtice. The exerciſe of ſuch a power is not lawful in caſes of agreements for *property*; much leſs ought it to be ſo for enforcing agreements againſt the *perſon.* Beſides, is it reaſonable to ſuppoſe, that the law of *England* would permit *that* againſt *the ſervant by contract*, which is denied againſt the *ſlave?* Nor are great authorities wanting to acquit the law of *England* of ſuch an inconſiſtency, and to ſhew, that a contract will not warrant a compulſion by *impriſonment*, and conſequently much leſs by *tranſporting the party out of this kingdom.* Lord *Hobart*, whoſe extraordinary learning judgment and abilities have alſays ranked his opinion amongſt the higheſt authorities of law, expreſsly ſays (g), that the *body of a freeman cannot be made ſubject to diſtreſs or impriſonment by contract, but only by judgment.* There is, however, one caſe, in which it is ſaid that the performance of a *ſervice to be done abroad*, may be compelled without the intervention of a court of juſtice; I mean, the caſe of an *infant-apprentice*, bound by proper indentures to a mariner or other perſon, where the nature of the ſervice imports, that it is to be done out of the kingdom (h), and the party, by reaſon of his *infancy*, is liable to a coercion not juſtifiable in *ordinary* caſes. The *habeas corpus* act (i) goes a ſtep further; and perſons who, *by contract in writing*, agree with a merchant or owner of a plantation, or any other perſon, to be tranſported beyond ſea, and receive earneſt on ſuch agreements, are excepted from the benefit of that ſtatute. I muſt ſay, that the exception appears very *unguarded*; and if the law, as it was *previous* to this ſtatute, did entitle the ſubject to the *habeas corpus* in the caſe which the ſtatute excepts, it can only operate in excluding him in that particular caſe from the *additional* proviſions of the ſtatute, and cannot, I preſume, be juſtly extended to deprive him of the *habeas corpus*, as the common law gave it before the making of the ſtatute.

Concluſion.

Upon the whole, the return to the *habeas corpus* in the preſent caſe, in whatever way it is conſidered, whether by inquiry into the foundation of Mr. *Steuart*'s right to the perſon and ſervice of the negro, or by reference to the violent manner in which it has been attempted to enforce that right, will appear equally unworthy of this court's approbation. By condemning the return, the revival of domeſtic ſlavery will be rendered as impracticable by *introduction* from our colonies and from other countries, as it is by *commencement* here. Such a judgment will be no leſs conducive to the public advantage, than it will be conformable to natural juſtice, and to principles and authorities of law; and this court, by effectually obſtructing the admiſſion of the *new* ſlavery of *negroes* into *England*, will in *theſe times* reflect as much honour on themſelves, as the great judges, their predeceſſors, *formerly* acquired, by contributing ſo uniformly and ſucceſsfully to the ſuppreſſion of the *old* ſlavery of *villenage.*

(g) *Hob.* 61.

(h) *Hob.* 134.

(i) 31 *Cha.* 2. *c.* 2. *ſ.* 13.

No. VIII. *The Caſe of Preſſing Mariners, on the Trial of* Alexander Broadfoot, *for Murder,* Briſtol, Auguſt 30, 1743.

[*This caſe is taken from the ſecond edition of Sir* Michael Foſter'*s* Reports, *publiſhed by his nephew* Michael Dodſon, *Eſq. The additional notes and references by* Mr. Dodſon, *are diſtinguiſhed by being placed between parentheſes.*]

ADVERTISEMENT.

THIS caſe, though already in print, hath been thought to deſerve a place in this collection. It is therefore here inſerted.

If it be aſked, where are the adjudged caſes on which the author groundeth his opinion? he freely confeſſeth, that he hath not met with one, in which the legality of preſſing for the ſea-ſervice hath directly *come in judgment. What* (Kel. 59. 136, 137. Comb. 245). *this is to be imputed to every reader will judge. A few modern caſes there are, from which the legality of the practice may* be inferred. *But the author choſe to ground himſelf on much better authorities than inferences from modern reports.*

AT the gaol-delivery holden for the city and county of the city of *Briſtol, Auguſt* 30, 1743, *Alexander Broadfoot* was indicted for the murder of *Cornelius Calahan,* a ſailor belonging to his majeſty's ſhip the *Mortar Sloop.*

The caſe was thus: captain *Hanway,* commander of the *Mortar Sloop,* had a warrant from the Lords of the Admiralty, grounded on an order of his majeſty in council, impowering him to impreſs, or cauſe to be impreſſed, ſeamen for his majeſty's ſervice. The warrant expreſly directeth, 'That the captain ſhall not intruſt any perſon with the execution of it, 'but a commiſſion-officer; and ſhall inſert the name and office of the 'perſon intruſted on the back of the warrant.'

The lieutenant of the *Mortar Sloop,* (the only commiſſion-officer on board beſides the captain) was deputed by him to impreſs according to the tenor of the warrant.

On the 25th of *April* laſt captain *Hanway,* being at anchor in *Kingroad* within the port and county of *Briſtol,* ordered the ſhip's boat down the channel in order to preſs as they ſhould ſee opportunity. But *the lieutenant ſtaid in* Kingroad, *on board with the captain.*

Towards evening, the boat came up with a merchantman, the *Bremen Factor,* homeward-bound, in that part of the channel which is within the county of the city of *Briſtol, but ſome leagues from* Kingroad; and ſome of the crew went on board, in order to preſs; who being informed that one or two of the *Bremen*'s men were concealed in the hold, *Calahan,* with three others of the boat's crew, went thither in ſearch of them. Whereupon *Broadfoot,* one of the *Bremen*'s men, (who had before provided himſelf with a blunderbuſs and piſtols for his defence againſt the preſs-gang) called out and aſked them what they came for: he was anſwered by ſome of the preſs-gang, 'We come for you and your comrades.' Whereupon he cried out, 'Keep back, I have a blunderbuſs loaded with 'ſwan-ſhot.' Upon this the others ſtopped, but did not retire. He then cried out, 'Where is your lieutenant?' And being anſwered, 'He 'is not far off,' he immediately fired among them. By this ſhot *Calahan* was killed on the ſpot, and one or two more of the preſs-gang wounded.

Mr. Serjeant Foſter. The caſe being thus, the Recorder was of opinion, that the boat's crew having been ſent out with a *general order to impreſs as they ſhould ſee opportunity,* and having, in purſuance of that order, boarded the veſſel without a proper officer, expreſsly againſt the terms of the captain's warrant, every thing they did was to be looked upon as an attempt upon the liberty of the perſons concerned, without any legal warrant: and he accordingly directed the jury to find *Broadfoot* guilty of manſlaughter. But this being a caſe of great expectation, and uncommon pains having been taken to poſſeſs people with an opinion that preſſing for the ſea-ſervice is a violation of *Magna Charta,* and a very high invaſion of the liberty of the ſubject, the Recorder thought proper to deliver his opinion touching the legality of preſſing for the ſea-ſervice; provided the perſons impreſſed are proper objects of the law, and thoſe employed in that ſervice come armed with a proper warrant for that purpoſe.

Captain *Hanway*'s warrant with the indorſement.

By the Commiſſioners for executing the office of Lord High Admiral of *Great Britain* and *Ireland,* &c. and of all his majeſty's plantations, &c.

IN purſuance of his majeſty's order in council dated the 19*th day of* Jan. 1742, *we do hereby impower and direct you to impreſs or cauſe to be impreſſed ſo many ſeamen and ſeafaring men and perſons whoſe occupations and callings are to work in veſſels and boats upon rivers, as ſhall be neceſſary not only to complete the number of men allowed to his majeſty's ſhip under your command, but alſo to mann ſuch others of his majeſty's ſhips as may be in want of men; giving unto each man ſo impreſſed one ſhilling for preſs-money. And in the execution hereof you are to take care that neither yourſelf nor any officer authorized by you do demand or receive any money, gratuity, reward, or other conſideration whatſoever, for the ſparing, exchanging, or diſcharging any perſon or perſons impreſſed, or to be impreſſed, as you will anſwer it at your peril.* You are not to intruſt any perſon with the execution of this warrant but a commiſſion-officer, and to inſert his name and office in the deputation on the other ſide hereof, *and ſet your hand and ſeal thereto. This warrant to continue in force till the* 31*ſt day of* December 1743. *And in the due execution of the ſame and every part thereof, all mayors, ſheriffs, juſtices of the peace, bailiffs, conſtables, headboroughs, and all other his majeſty's officers and ſubjects whom it may concern, are hereby required to be aiding and aſſiſting unto you and thoſe employed by you, as they tender his majeſty's ſervice, and will anſwer the contrary at their perils. Given under our hands and ſeal of the office of Admiralty the* 31ſt *day of* January 1742.

Jo. Cockburne.
Geo. Lee.
J. Trevor.

By command of their
Lordſhips,
Thomas Corbett.

I do hereby depute A. B. *a lieutenant belonging to his majeſty's ſhip the* Mortar Sloop *under my command, to impreſs ſeamen, ſea-faring men, and perſons whoſe occupations and callings are to work in veſſels and boats upon rivers according to the tenor of this warrant. In teſtimony whereof I have hereunto ſet my hand and ſeal this* ——— *day of* ———

The RECORDER's Argument.

This queſtion touching the legality of preſſing mariners for the public ſervice is a point of very great and national importance. On one hand, a very uſeful body of men ſeem to be put under hardſhips inconſiſtent with the temper and genius of a free government. On the other, the neceſſity of the caſe ſeemeth to intitle the public to the ſervice of this body of men, whenever the ſafety of the whole calleth for it.

Before I ſpeak directly to the point, it will be neceſſary to throw out of the caſe every thing which doth not enter into the merits of the preſent queſtion.

We are not at preſent concerned to inquire, whether perſons may be legally preſſed into the land-ſervice, nor whether landmen may be legally preſſed into the ſea-ſervice. The preſent queſtion, I ſay, is not, whether people may be taken from their lawful occupations at home, and ſent againſt their wills into a remote and dangerous ſervice; into a ſervice they are utterly unacquainted with, and poſſibly unfit for: no; the only queſtion at preſent is, whether mariners, perſons who have freely choſen a ſea-faring life, perſons whoſe education and employment have fitted them for the ſervice, and inured them to it,---whether ſuch perſons may not be legally preſſed into the ſervice of the crown, whenever the public ſafety requireth it, *ne quid detrimenti reſpublica capiat.*

For my part, I think they may. I think the crown hath a right to command the ſervice of theſe people, whenever the public ſafety calleth for it. The ſame right that it hath to require the perſonal ſervice * of every man able to bear arms, in caſe of a ſudden invaſion or formidable inſurrection. The right in both caſes is founded on one and the ſame principle, the neceſſity of the caſe in order to the preſervation of the whole.

It would be time very ill ſpent to go about to prove, that this nation can never be long in a ſtate of ſafety, our coaſt defended and our trade protected, without a naval force equal to all the emergencies which may happen. And how can we be ſecure of ſuch a force? The keeping up the ſame naval force in time of peace, which will be abſolutely neceſſary for our ſecurity in time of war, would be an abſurd, a fruitleſs, and a ruinous expence.

The only courſe then left is for the crown to employ upon emergent occaſions the mariners bred up in the merchant's ſervice.

By this means the trade of the nation becometh a nurſery for her navy; and the merchant, while he is increaſing the wealth of the kingdom, is at the ſame time training up the mariner for its defence.

And as for the mariner himſelf, he when taken into the ſervice of the crown only changeth maſters for a time: his ſervice and employment continue the very ſame; with this advantage, that the dangers of the ſea and enemy are not ſo great in the ſervice of the crown, as in that of the merchant.

I am very ſenſible of the hardſhip the ſailor ſuffereth from an impreſs in ſome particular caſes, eſpecially if preſſed homeward-bound after a long voyage. But the merchants who hear me know, that an impreſs on outward-bound veſſels would be attended with much greater inconveniencies to the trade of the kingdom; and yet that too is ſometimes neceſſary. But where two evils preſent, a wiſe adminiſtration, if there be room for an option, will chooſe the leaſt.

War itſelf is a great evil, but it is choſen to avoid a greater. The practice of preſſing is one of the miſchiefs war bringeth with it. But it is a maxim in law, and good policy too, that all private miſchiefs muſt be borne with patience for preventing a national calamity. And as no greater calamity can befal us than to be weak and defenceleſs at ſea in a time of war, ſo I do not know that the wiſdom of the nation hath hitherto found out any method of manning our navy, leſs inconvenient than preſſing; and, at the ſame time, equally ſure and effectual.

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* This perſonal ſervice in caſes of extreme neceſſity is a principal branch of the allegiance every ſubject of *England* oweth to the crown. See 11 *H.* VII. c. 1. and 1 *E.* III. *c.* 5. and 16 and 17 *Car.* I. *c.* 28.

The expedient of a voluntary regiſter, which was attempted in king *William*'s time, had no effect.

And ſome late ſchemes I have ſeen appear to me more inconvenient to the mariner and more inconſiſtent with the principles of liberty, than the practice in preſſing: and, what is ſtill worſe, they are in my opinion totally impracticable.

Thus much I thought proper to ſay upon the foot of reaſon and public utility, before I come to ſpeak directly to the point of law. Which I ſhall now do.

According to my preſent apprehenſion, (and I have taken ſome pains to inform myſelf) the right of impreſſing mariners for the public ſervice is a prerogative inherent in the crown, *grounded upon common-law, and recognized by many acts of parliament.*

A general immemorial uſage not inconſiſtent with any ſtatute, eſpecially if it be the reſult of evident neceſſity, and withal tendeth to the public ſafety, is, I apprehend, part of the common-law of *England*. If not, I am at a loſs to know what is meant by common-law, in contradiſtinction to ſtatute-law. And therefore it is a great miſtake in this caſe, as indeed it would be in any other, to conclude that there is no law, becauſe perhaps there may be no ſtatute that expreſly and in terms impowereth the crown to preſs. For the rights of the crown, and the liberties of the ſubject too, ſtand principally upon the foot of common-law; though both have been in many caſes confirmed, explained, or aſcertained by particular ſtatutes.

As to the point of uſage in the matter of preſſing, I have met with a multitude of commiſſions and mandatory writs to that purpoſe conceived in various forms; and from time to time directed to different officers, as the nature of the ſervice required.

It would be tedious for me to cite one half of them; but I will endeavour to range them under ſome general heads, and then cite a few.

Some are for preſſing ſhips.

Others for preſſing mariners.

And others for preſſing ſhips and mariners.

In ſome, the parties to whom they are directed are required to make a general impreſs upon certain great and emergent occaſions.

In others, they are confined to a certain number of ſhips and mariners for ſpecial ſervices.

And in others, they are ſtill farther confined to certain places on the coaſt.

Some commiſſions, particularly thoſe conferring the admiralty-juriſdiction and the rights of admiralty, warrant an impreſs as often as there ſhall be occaſion.

Others impower commanders of fleets or ſquadrons intended for certain expeditions, to preſs for that particular ſervice.

And others impower maſters of particular ſhips to preſs for manning their reſpective veſſels.

This general view will be ſufficient to let us into the nature of theſe precedents. And though the affair of preſſing ſhips is not now before me, yet I could not well avoid mentioning it; becauſe many of the precedents I have met with and muſt cite go as well to that, as to the buſineſs of preſſing mariners; and taken together, they ſerve to ſhew the power the crown hath conſtantly exerciſed over the whole naval force of the kingdom, as well ſhipping as mariners, whenever the public ſervice required it.

This however muſt be obſerved, that no man ſerved the crown in either caſe at his own expence. Maſters and mariners received full wages, and owners were conſtantly paid a full freight. But whether the pay in either caſe commenced from the time of preſſing, or from the time of actual entry into the ſervice, is not ſo clear.

There is in *Cotton*'s * records a note of a petition of the commons, and of the king's anſwer upon this ſubject, in the 57 *E.* III. which inclineth me to think that the latter was the caſe. The petition, as abridged by *Cotton*, is thus; 'The maſters of ſhips may be 'paid the wages of them and their mariners from the day of 'their being appointed to ſerve the king.' The anſwer is, 'that taking of ſhips ſhall not be but for neceſſity, and 'payment ſhall be reaſonable as *heretofore*.' Cott. 118. No. 28. Rot. Parl. 47 E.III. No. 28.

In the ſame parliament an attempt was made to obtain for owners of ſhips an allowance for wear and tear in the king's ſervice.

The petition is thus abridged: 'The maſters of ſhips re'quire an allowance for the tackling of their ſhips worn by 'the king's ſervice.' Eod. Rot. No. 29 Cott. 118. No. 29.

The anſwer is, "Such allowance hath *not been heretofore made*.'

In the 2 *R.* II. an attempt of the like kind was made and with the like ſucceſs. The petition is, 'That owners of 'ſhips taken up for the king's ſervice, for their loſſes in the 'ſame, may be conſidered; and that mariners may have the 'like wages as archers have.' The anſwer is, '*It ſhall be 'as it hath been uſed.*' Cott. 171. No. 50. Rot. Parl. 2 R. II. Pars ſecunda. No. 50.

Theſe petitions, though ſtiled in the record the petitions of the commons, as having probably begun in that houſe, were really the acts of both houſes; otherwiſe they could not have been offered to the king in a parliamentary way: for the antient method of paſſing bills was, that the matter of the bill was tendered to the crown for the royal aſſent of both houſes in form of petitions; and according to the anſwers from the throne, they paſſed into laws or were rejected.

I cannot but obſerve, that when we ſee every branch of the legiſlature ſpeaking of the ſubject of preſſing in the manner they do in theſe petitions and anſwers, it is not eaſy to conceive, that the legality of the practice was then queſtioned. It is plain at leaſt, that it was in thoſe early times treated in parliament as an antient and well-known uſage.

I come now to the commiſſions and mandatory writs I ſpeak of. I will cite a few from *Rymer's Fœdera*, out of a great number of the like kind which may be met with in that valuable collection of public records.

William Barret, commander of the ſhip *Julian*, had a commiſſion to make choice of and take up in the counties of *Kent*, *Eſſex*, *Surry*, and *Suſſex*, as well within liberties as without, 36 mariners, and to put them on board his ſhip, in order to proceed with the Prince of *Wales* on an expedition to *Gaſcony* †. 29 E. III. (5 Rym. 815.) Ad Eligendum & Capiendum.

The like commiſſions were given at the ſame time to the commanders of ſeven other ſhips for manning their reſpective veſſels for the ſame ſervice. (5 Rym. 816.)

There is a commiſſion to *John Orewell*, one of the King's ſerjeants at arms, to arreſt and take up 60 able mariners in the *Thames* and *Medway* and parts adjacent, as well within liberties as without, and to cauſe them to be at *Sandwich* within 15 days for the King's ſervice. 1 R. II. (7 Rym. 196.) Ad Arreſtandum & Capiendum.

John Elingham, a ſerjeant at arms, is impowered to arreſt and take up in the counties of *Somerſet*, *Glouceſter*, *Briſtol*, *Devon* and *Cornwal*, and in *South Wales*, as well within liberties as without, ſo many ſhips, barges, and other veſſels, and alſo mariners ſufficient for manning them, as ſhould be found ſufficient for an expedition to *Ireland* under the king's uncle the duke of *Glouceſter*. And all ſheriffs, mayors, bailiffs, maſters of ſhips and mariners are required to be aſſiſting to him in that ſervice. 15 R. II. (7 Rym. 718.) (See alſo 7 Rym. 195, 391, 453, 501, 504, 506, 507, 789, 839.)

In the ſame year the like commiſſions iſſued to two other ſerjeants at arms for the ſame ſervice, in *Wales*, *Ireland*, *Lancaſhire*, and *Cheſhire* ‡. (7 Rym. 718.)

John Kingſton, commander of the ſhip *Katharine*, is commiſſioned by himſelf or deputies to arreſt and take up, as well within liberties as without, as many mariners as ſhould be neceſſary for manning his ſhip, and to put them on board for the king's ſervice. And all ſheriffs, mayors, &c. are required to be aſſiſting to him in that ſervice. 3 H. V. (9 Rym. 238.) (See alſo 9 Rym. 91, 104, 144, 310.)

Commiſſions went at the ſame time to ſix commanders of other veſſels, for manning their reſpective veſſels in the ſame manner, and for the ſame ſervice. (9 Rym. 239.)

A mandatory writ iſſued directed to *Thomas College* ſerjeant at arms, and to *Ralph Ingoldeſby*, and to the cuſtomers of the port of *Sandwich*, and of every port from thence to *Southampton*, requiring them to arreſt and take up for the king's ſervice all and ſingular ſhips, barges, and other veſſels capable of tranſporting men or horſes, of what burden ſoever; and alſo all maſters and mariners who could be found in any of the ports mentioned before, and to put the ſaid maſters and mariners on board the ſaid veſſels for an expedition to the dutchy of *Aquitain*; *any royal letters of licence thentofore granted to any perſon or perſons*, or any other matter notwithſtanding: and all ſheriffs, mayors, and other officers are required to be aſſiſting to them in that ſervice. 21 H. VI. (11 Rym. 21.) (See alſo 10 Rym. 449, 685.)

At the ſame time the like writs iſſued to the cuſtomers and other officers of almoſt all the port-towns in the kingdom. (11 Rym. 22.)

There is a commiſſion to the maſter and purſer of the *Mary Grace*, impowering them to arreſt and take up, as well within liberties as without, whereſoever they could be found, as many mariners as ſhould be ſufficient for manning their veſſel, and to put them on board at the king's wages and for his ſervice. 14 E. IV. (11 Rym. 843.) (See alſo 11 Rym. 839.)

At the ſame time the like commiſſions iſſued to four other maſters for manning their reſpective ſhips in the ſame manner. (11 Rym. 843.)

The like commiſſions to maſters of ſix veſſels.
The like to eleven maſters in the ſame form. 15 E. IV. (12 Rym. 4. 5.)

I will now mention a few precedents of another ſort; which, becauſe they relate in great meaſure to one and ſame ſervice, I will place together, to avoid as much as poſſible a needleſs repetition in matters of form. 20 E. IV. (12 Rym. 139, 140.)

Theſe are either ſpecial commiſſions for commanding fleets or ſquadrons intended for certain expeditions mentioned in the commiſſion; or the general commiſſions conferring the whole admiralty-juriſdiction with the rights of admiralty, whether to one perſon under the ſtile of High Admiral, or to two under the character of Admirals of the north and weſt. Which latter was the uſual manner of conferring the admiralty-juriſdiction before the office of Lord High Admiral of *England* came much in uſe.

As to the ſpecial commiſſions, ſir *William Bardolph* was appointed admiral of a fleet then intended to be fitted out; his commiſſion impowereth him among other things to make choice of and take up for the king's ſervice a ſufficient number of mariners and others, and to put them on board the fleet, and to puniſh and chaſtiſe ſuch mariners who ſhould be diſobedient or refractory *in that reſpect*. 8 H. V. (10 Rym. 68.) Eligendi & Capiendi.

The lord *Willoughby de Broke* was appointed commander in chief of the fleet and army then intended for an expedition to *France*; he hath the ſame powers with regard to the manning the fleet as ſir *William Bardolph* had. 5 H. VII. (12 Rym. 455.

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* The citations from *Cotton* have been found to agree with the record.

† See *Madox*'s Hiſt. of the Exchequer 262. *in notis*, *y*, a writ to the ſheriff of *Kent* for the like ſervice; *eligi facias* 50 nautas &c. 9 *E.* II.

‡ See the editor's note at the end of this argument)

8 H. VII. (12 Rym. 484.) Sir *Robert Poyntz* is appointed to command the fleet in the abſence of the lord *Willoughby*, and hath the ſame powers with regard to manning the fleet.

31 Eliz. (16 Rym. 22.) Sir *Martin Frobuſher* had a commiſſion, which, after reciting that the command of a ſmall ſquadron intended againſt the *Spaniards* in the *Weſt Indies* had been given to him, goeth on thus: 'We therefore let you to wit that we have authorized and appointed, and by theſe preſents do give full power and authority unto the ſaid ſir *Martin Frobuſher*, and to his ſufficient deputy or deputies, whereſoever he ſhall have need, to preſs and to take up for our ſervice, to the furniture of ſuch ſhips as are committed to his charge, in any place upon our coaſts of *England* or *Ireland*, any mariners, ſoldiers, gunners, or other needful artificers:" and then requireth all juſtices and other officers to be aſſiſting to him in the premiſes.

I would not be underſtood to ſay, that all commanders of fleets or ſquadrons for ſpecial ſervices have had the ſame powers as thoſe I have mentioned. The truth is, the greater number of theſe ſpecial commiſſions, which I have met with, and thoſe too of the lateſt date, are ſilent as to that point.

I come now to the general commiſſions conferring the whole admiralty-juriſdiction and the rights of admiralty.

And thoſe I have met with, though I apprehend they all agree in ſubſtance with regard to the preſent queſtion, yet differ a little in point of form.

10 E. III. (4 Rym 727.) 12 E. III. (5 Rym 3-6, 83, 84.) Eligendi. In the 10th *E.* III. and in the 12th of the ſame reign, the admirals (for at that time there were two, one for the north, the other for the weſt) are impowered to make choice of, as well within liberties as without, able-bodied men fit for the ſervice, and to put them on board the fleet. The word *Eligendi*, made uſe of in theſe commiſſions, is the word uſed to the ſame purpoſe about that time in all the commiſſions for preſſing for the land-ſervice, which was then likewiſe practiſed. You have the word in relation to the land-ſervice in the ſtatute of the 18 *E.* III. *Stat.* 2. *c.* 7. 'Men of arms, hoblers and archers, *choſen* to go in the king's ſervice out of *England*, ſhall be at the king's wages from the day that they depart out of the counties where they were *choſen*, till their return.'

50 E. III. (7 Rym. 127, 128.) In the 50th *E.* III. the admirals' commiſſions, with regard to this matter, run thus, '*Necnon naves & naviculas guerrinas, quot neceſſariæ, cujuſcumque portagii fuerint, quotiens neceſſe fuerit, congregandi; & marinarios & alios pro navibus & naviculis illis neceſſarios eligendi, capiendi, & in eiſdem ponendi; & hujuſmodi marinarios qui rebelles vel contrarientes fuerint* in hac parte, *debitè compeſcendi & caſtigandi*; & omnia alia, quæ ad officium admiralli pertinent IN HAC PARTE, faciendi & exercendi; prout de jure & ſecundum legem maritimam fuerit faciendum.'

And all ſheriffs, mayors, bailiffs, miniſters, owners of ſhips, maſters and mariners, are required to be aiding and aſſiſting to them in the premiſes.

1 R. II. (7 Rym 171.) The admirals' commiſſions run exactly in the ſame form.

6 H. IV. (8 Rym. 388.) So doth *Thomas* of *Lancaſter*'s commiſſion of high admiral.

40 H. VI. (11 Rym. 679.) So doth the earl of *Warwick*'s commiſſion of high admiral.

17 H. VIII. (14 Rym. 42.) And ſo doth the duke of *Richmond*'s.

1 E. VI. (15 Rym. 127, 128.) The lord *Seymour*'s commiſſion of high admiral expreſſeth the matter a little differently: the words are, *Ac ad nautas & marinarios ac alios, pro omnibus & ſingulis navibus et naviculis conducendum & gubernandum neceſſarios, eligendum, capiendum & apprehendendum, atque eoſdem in dictis navibus & naviculis ponendum & retinendum.*

(15 Rym. 157-163.) In the ſame year the lord *Seymour* had another commiſſion in fuller terms, with all the juriſdictions and rights of admiralty particularly enumerated and ſet forth at large: the words with regard to the preſent matter are, *Et inſuper tam naves & naviculas guerrinas quam quaſcumque alias naves & naviculas ſeu vaſa quæcumque, pro quibuſcumque viagiis et negotiis noſtris vel expeditione eorundem; necnon navigeros ſive pilotas, ac navium magiſtros, nautas, naucleros, vibrellatores ſive bombardiatores et marinarios ac alias perſonas quaſcumque, pro navibus et naviculis ſeu vaſibus hujuſmodi aptos & idoneos, de tempore in tempus quotiens neceſſe fuerit, ubique locorum infra regna & dominia noſtra prædicta, tam infra libertates quam extra, congregandum, deligendum, retinendum, capiendum, areſtandum, deputandum & aſſignandum abſque interruptione ſeu impedimento per quemcumque alium in contrarium, fiendo; cum plenâ juriſdictione & poteſtate ad exequendum omnia alia & ſingula quæ* in eâ parte *per magnum admirallum noſtrum & præfectum generalem claſſis & marium*, jure fieri debent, poſſint, vel ſolent.

3 E. VI. (15 Rym. 194.) The earl of *Warwick* had a commiſſion of high admiral in the ſame form.

And ſo had the duke of *Buckingham**.

16 Jac. I. (17 Rym. 124.) And now, when I conſider theſe precedents, not fetched from dark, remote, and unſettled times, but running uniformly through a courſe of many ages, all, as I conceive, ſpeaking to the ſame purpoſe, though in different forms of expreſſion; ſome for making choice of, others, and thoſe the much greater number and of the lateſt date, for making choice of and taking up, or for arreſting, preſſing and taking up, mariners, and putting them on board for the public ſervice:---when I conſider theſe precedents, with the practice down to the preſent time, I cannot conceive otherwiſe of the point in queſtion, than that the crown hath been always in poſſeſſion of the prerogative of preſſing mariners for the public ſervice. Which prerogative hath been carried into execution, as well by virtue of ſpecial commiſſions, iſſued as the exigency of affairs required, as by the perſons who from time to time have been intruſted with the whole admiralty-juriſdiction.

And indeed the words, touching the manning the fleet, impowering the admirals to do and execute all other matters and things touching that ſervice *which belong to the office of admiral*, ſeem to imply either that thoſe powers were deemed to be inherent in the office, or that they had been conſtantly by expreſs words in the commiſſions annexed to it.

To this purpoſe I will mention a very remarkable tranſaction in the parliament of the 7th and 8th *H.* IV.

Complaint was made in parliament, that the ſea-ſervice had been greatly neglected, and that depredations were daily committed. To remedy this evil a very extraordinary expedient was offered, to which the neceſſity of the king's affairs obliged him *for the preſent* to ſubmit. It was, that the naval force of the kingdom ſhould, for a time, be put under the direction of the merchants themſelves.

Accordingly an act paſſed, that the merchants ſhould have the keeping of the ſeas from the firſt day of *May* 1406 to *Michaelmas* 1407: and to defray the expence of this ſervice they were to be intitled by writs of privy ſeal to certain duties mentioned in the record, as I find it abridged by *Cotton*.

Cott. 452, 453; Rot. Parl. 8 H. IV. No. 19, to No. 26. No. 26. Among other proviſions touching this matter, it was enacted, that the merchants ſhould name two perſons, one for the north and the other for the ſouth, who by commiſſion ſhould have *the like powers as other admirals have had.*

In purſuance of this act, *Nicholas Blackburn* was named by the merchants for the north, and *Richard Cliderow* for the ſouth.

One might reaſonably hope, that no powers deemed illegal or oppreſſive, no powers hurtful to trade or grievous to the mariners, ſhould be inſerted in the commiſſions of admirals nominated by the merchants: but it happeneth that *Blackburn*'s commiſſion is extant, and runneth in the very words of thoſe I have cited from the 50th of *E.* III. to the 17th of *H.* VIII.

8 Rym. 439. You have it in *Rymer*. It reciteth the act of parliament, and that *Blackburn* had been nominated by the merchants for the north, and then goeth on in the uſual form impowering him to make choice of, take up and put on board ſuch mariners and others as ſhall be found neceſſary for the ſervice, and to puniſh and chaſtiſe ſuch as ſhall be diſobedient and refractory in that behalf.

The commiſſion was to continue as long as the merchants ſhould have the keeping of the ſeas; which indeed was not long: for before that parliament roſe, this *novelty* came to an end, the merchants were eaſed of a ſervice they were found to be very unequal to, their admirals' commiſſions dropped, and the whole direction of the marine returned to its proper channel.

8 Rym. 455. (Cott. 462.) I think it may ſafely be inferred from this record, that in the judgment of thoſe times, and in a concern of the merchants themſelves, the practice of manning the navy by the methods mentioned in theſe commiſſions was eſteemed to be neceſſary for the ſervice, and a branch of admiral juriſdiction †.

I come now to the ſtatutes which ſpeak of this matter.

And I do admit, that I know of no ſtatute now in force, which directly and in expreſs terms impowereth the crown to preſs mariners into the ſervice: and admitting that the prerogative is grounded on immemorial uſage, I know of no neceſſity for any ſuch ſtatute; for let it be remembered, that a prerogative grounded upon general immemorial uſage not inconſiſtent with any ſtatute, nor repugnant to the public utility, is as much part of the law of *England*, as ſtatute-law. You will be pleaſed to carry this obſervation too along with you, that the ſtatutes, which mention preſſing as a practice then ſubſiſting and not diſallowed, are at leaſt an evidence of the uſage, if they go no farther, I mean if they do not amount to a tacit approbation of it.

For it is hard to conceive, that the legiſlature ſhould frequently mention a practice utterly illegal, and repugnant to the principles of the conſtitution as ſubſiſting, without ſome mark of diſapprobation.

2 R. II. ſt. 1. c. 4. The firſt ſtatute I have met with is that of the 2 *R.* II. ſtat. 1. c. 4. It is an act againſt mariners deſerting the ſervice; not to be met with in the later editions of the Statutes at Large, which give us only the title of this act, with a note that it is altered by the 18th *H.* VI. and 5th *Eliz.*

It is however ſtill in force, and as ſuch is inſerted by *Raſtal* in his abridgment under title *Mariner* No. 1. My worthy friend Mr. *Cay* hath likewiſe inſerted it in his abridgment under title *Seaman* No. 1. I will give you the words of the act as far as concerneth this point, as I find it in an edition of the Statutes at Large ‡ ending with the laſt year of *H.* VII. '*Item* becauſe that divers mariners after that they be *arreſted and retained* for the king's ſervice upon the ſea in defence of the realm and thereof have received their wages, do flee out of the ſaid ſervice without licence of the admirals or their lieutenants---It is ordained and eſtabliſhed, that all thoſe mariners, which from hence-

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* The earl of *Northumberland*'s commiſſion, in the time of king *Charles* the firſt, is ſilent with regard to theſe powers; and I am inclined to think they were not inſerted in any commiſſion in the latter part of that reign. But that matter is ſufficiently accounted for towards the end of this argument.

The High Admirals ſince the Reſtoration have had all the powers for preſſing conferred upon them, in as full a manner as in any of the commiſſions I have cited; and nearly in the ſame terms as in lord *Seymour*'s ſecond commiſſion. And during ſuch commiſſions, whenever an impreſs hath been ordered, it hath been by warrants from the High Admiral. But when that office hath been put in commiſſion, the ſame ſervice hath been conſtantly carried on by warrants from the Admiralty-board, grounded on orders made from time to time by the king in council, as the exigency of affairs hath required.

† The parliament roll placeth this parliament in the 8th of *H.* IV. whereas *Rymer*, *Dugdale*, and the printed ſtatutes place it in the 7th. It was, to ſpeak in modern language, a parliament of the 7th and 8th of that reign: it began in the 7th and ended in the 8th.

‡ It is likewiſe in a collection of the ſtatutes at large, called *Raſtal*'s ſtatutes, printed 1618, and in an old collection of the ſtatutes called the Great Book of Statutes; and in every edition antecedent to *Pulton*'s in 1618. (It is now printed in ſeveral of the modern editions of the ſtatutes.)

‘ forth ſhall do in ſuch manner,---ſhall be holden to reſtore to our ſaid ‘ ſovereign lord the king the double of that they have taken for their ‘ wages, and nevertheleſs ſhall have one year's impriſonment without ‘ being delivered by mainpriſe, bail, or by other way.’

The act then goeth on to direct how fugitive mariners ſhall be apprehended and dealt with; and concludeth with this clauſe: ‘ And like ‘ puniſhment ſhall be made of ſerjeants of arms, maſters of ſhips and ‘ all others that ſhall be attainted before the admiral or his lieutenant ‘ aforeſaid, that they have any thing taken of the ſaid mariners for to ‘ ſuffer them to go at large out of the ſaid ſervice after that they have ‘ been *arreſted* for the ſame ſervice.’

You will be pleaſed to obſerve, that the word *arreſt*, twice uſed in this act, is made uſe of in the precedents I cited of the 1ſt and 15th of this very reign, and in moſt of thoſe of later date: it is likewiſe uſed in ten other commiſſions in the ſame reign touching this very ſervice, all likewiſe directed for execution to ſerjeants at arms, which for brevity-ſake I have omitted. (7 Rym. 391, 453, 501, 504, 709, 839.)

So that if it be aſked, who are the perſons ſubjected to the penalties of this act, it muſt be anſwered, mariners arreſted and taken into the ſervice by virtue of commiſſions from the crown, in caſe of their deſertion; and ſerjeants at arms, maſters of ſhips and others executing ſuch commiſſions, who for lucre ſhall ſuffer them to go at large after ſuch arreſts.

Mariners indeed were not ſubject to the penalties of this act, unleſs they had received wages. But might not a mariner ſo arreſted have reaſonably ſaid, ‘ I was compelled againſt law into the ſervice, I did my duty ‘ while I continued in it, and dearly earned the wages I received;’ might not a mariner have ſaid this, and much more upon a ſuppoſition of the illegality of an impreſs? Certainly he might. But you ſee mariners, though taken into the ſervice by compulſion, are by this act made liable to pecuniary, and corporal puniſhment too, in caſe of deſertion *. This doth *more than imply* the legality of ſuch compulſion.

It may poſſibly be objected, that the word *retained* is uſed in the act, and that a retainer implieth a mutual contract for ſome ſervice to be done. It may, when it ſtandeth alone, have received that ſenſe in modern language, but in ſtrict propriety it meaneth nothing more than the taking a perſon into ſome ſervice; and is in truth the act only of the perſon retaining or taking. And therefore when I ſee the word *retained* connected with one, which hath no other meaning in the *Engliſh* tongue than what carrieth with it the idea of compulſion, I cannot conceive that the legiſlature, ſpeaking of perſons *arreſted* and *retained*, ſhould mean no other, than perſons taken into the ſervice with their own conſent.

That there was a practice then ſubſiſting of taking mariners into the ſervice by compulſion cannot be denied: the parliament could not be ignorant of it. Is it poſſible then to imagine, that they could uſe a word which manifeſtly ſignifieth compulſion, and yet mean nothing more than a mutual contract? Beſides, it cannot be conceived, that ſerjeants at arms, who, as I before obſerved, were the perſons about that time uſually employed in the ſervice of preſſing, could be expreſly and by name ſubjected to the penalties of the act, if no mariners but ſuch as voluntarily entered into the ſervice were comprehended in it.

2, 3 Ph. & Mar. c. 16. The next act is that of the 2d & 3d *Ph.* and *Mar.* which layeth a penalty on watermen plying between *Graveſend* and *Windſor*, who, to ſpeak in the language of the act, in the time of preſſing by commiſſion for the ſervice of the crown upon the ſea, do willingly and *obſtinately* withdraw, hide and convey themſelves into ſecret places and out-corners; and after, when ſuch time of preſſing is over-paſſed, return to their employments.

This proviſion, it is true, extendeth only to watermen on the *Thames*, and may be conſidered as one of the many wholſome regulations thoſe perſons are brought under by this act: and it is mentioned in that light in an act paſſed in the late queen's time. 4, 5 A. c. 19. ſ. 18. But at the ſame time it ſheweth, that commiſſions for preſſing were then in uſe. And, in my opinion, it likewiſe ſuppoſeth the legality and utility of ſuch commiſſions, and that theſe people are the objects of them: otherwiſe why are they ſubjected even to the ſlighteſt puniſhment, for abſconding at the time of the execution of thoſe commiſſions?

The acts which come next to be conſidered are ſome made ſince the Revolution; a moſt auſpicious period! when the principles of liberty were well underſtood, and moſt glorioſly aſſerted.

Theſe are the 7th & 8th of king *William*, the 2d & 3d, and the 4th & 5th of the late queen.

7 & 8 W. III. c. 21. The firſt is intitled, *An act for the increaſe and encouragement of ſeamen.*

Sect. 15. It enacteth, among other things, that licences may be given, by his majeſty, or the Lord High Admiral, or Commiſſioners of Admiralty, to any landmen willing to enter into the merchants ſervice; which ſhall be to them a protection *againſt being impreſſed for the ſpace of two years.*

Provided ſuch landmen bring two credible perſons to vouch for them. But if any perſon ſhall vouch for any one as a landman, who ſhall afterwards appear to have been a ſeaman, he ſhall forfeit twenty pounds.

2 & 3 A. c. 6. The 2d & 3d of the late queen is intitled, *An act for the increaſe of ſeamen, and better encouragement of navigation and ſecurity of the coal-trade.* To theſe ends it impowereth pariſh-officers to bind out poor boys to ſea in the merchants' ſervice; and enacteth, that Sect. 4, 5. boys ſo bound out ſhall not be compelled or *impreſſed* or permitted to enter into the ſervice of the crown at ſea till they attain their age of eighteen, and that certificates of ſuch binding ſhall be tranſmitted by the collectors of the reſpective ports to the Admiralty; and that thereupon ſuch protections ſhall be made for ſuch apprentices without fee or reward.

Sect. 15. And, for encouraging other perſons to bind themſelves apprentices in the merchants' ſervice, it further enacteth, that perſons ſo binding themſelves ſhall not be *compelled or impreſſed* into the ſervice of the crown *for three years* from the time of ſuch binding, and that, upon certificates of ſuch binding from the Collectors of the reſpective ports, the Admiralty ſhall grant protections without fee or reward.

Sect. 20. And, for encouraging the coal-trade, it farther enacteth, that during the war there ſhall be allowed to every veſſel employed in that trade, beſides the maſter, mate, and carpenter, one able ſeaman for every one hundred tun of the veſſel, not exceeding three hundred tun, *free from impreſſing.*

4, 5 Ann. c. 19. ſ. 17. The 4th & 5th of the late queen reciteth that clauſe in the act of the 2d & 3d, which exempted voluntary apprentices for three years, and ſaith, ‘ Whereas ſuch exemption ‘ for three years, which was intended for the encouragement of landmen ‘ to bind themſelves, hath been *manifeſtly abuſed for the exempting and pro-* ‘ *tecting of ſeamen from the ſervice, to the great hindrance and prejudice of her* ‘ *majeſty's ſea-ſervice:* Be it therefore enacted and declared, that no per- ‘ ſon or perſons of the age of eighteen years ſhall have any exemption ‘ or protection from her majeſty's ſea-ſervice, who ſhall have been in any ‘ ſea-ſervice before the time they bound themſelves, any law or ſtatute ‘ to the contrary notwithſtanding.’ †

Let us now take a ſhort view of theſe acts.

Perſons under certain ſpecial qualifications are exempted from being impreſſed.

To that end, in one caſe, licences are to be granted by his majeſty or from the Admiralty, *but under proper cautions to prevent abuſes.*

In other caſes, certificates are to be returned from the chief officers of the ports, and protections thereupon granted without fee or reward.

And in every caſe theſe exemptions, as they are confined to perſons under certain limited qualifications, ſo are they limited too in point of time, *and withal given by way of encouragement.* And laſtly, the extending the benefit even of a temporary exemption beyond the original intent of the legiſlature is declared to be an abuſe, and an abuſe tending to the great hindrance and prejudice of her majeſty's ſea-ſervice.

Do not theſe things inconteſtibly preſuppoſe the expediency, the neceſſity, and the legality of an impreſs in general? If they do not, one muſt entertain an opinion of the legiſlature acting and ſpeaking in this manner, which it will not be decent for me to mention in this place.

For the very notion of an exemption, when granted by ſtatute to particular perſons, and this too by way of encouragement, implieth, that, without ſuch exemption, the parties intitled to the benefit of it would by law be liable to the duty or burden which is the ſubject-matter of that exemption: otherwiſe the ſtatute doth nothing; it operateth upon nothing, if no legal duty or burden be removed by it. And conſequently the granting exemptions to ſeamen under certain limited qualifications, and for a limited time only, ſuppoſeth that all ſeamen in general, without ſuch exemption, were by law liable to the duty or burden which is the ſubject-matter of that exemption.

And the many proviſions the legiſlature hath made to prevent abuſes with regard to theſe exemptions, attended with a plain, full and expreſs declaration, that ſuch abuſes, *namely the extending the benefit of exemptions beyond the intent of the legiſlature*, tend to the great hindrance and prejudice of the ſea-ſervice, imply, that the duty or burden, which is the object of all this care and caution, is expedient and neceſſary to the ſervice.

And this burden is plainly an impreſs in time of war.

Which, from the authorities I have cited, appeareth to me to be grounded on common and ſtatute-law; in other words, upon a general immemorial uſage, allowed, approved, and recognized by many acts of parliament.

Againſt what I have ſaid it hath been objected, that the practice of preſſing is inconſiſtent with the liberty of the ſubject, and a breach of *Magna Charta.*

I readily admit, that an impreſs is a reſtraint upon the natural liberty of thoſe who are liable to it: but it muſt likewiſe be admitted on the other hand, that every reſtraint upon *natural* liberty is not *eo nomine* illegal, or at all inconſiſtent with the principles of *civil* liberty. And if the reſtraint, be it to what degree ſoever, appeareth to be neceſſary to the good and welfare of the whole, and to be warranted by ſtatute-law, as well as immemorial uſage, it cannot be complained of otherwiſe than as a private miſchief: which, as I ſaid at the beginning, muſt, under all governments whatſoever, be ſubmitted to for avoiding a public inconvenience.

As to *Magna Charta*, it is not pretended that the practice of preſſing mariners for the public ſervice is condemned by expreſs words in that ſtatute: and if it be warranted by common and ſtatute-law, it cannot be ſhewn to be illegal by any conſequences drawn from *Magna Charta*; in like manner as preſſing for the land-ſervice could not be deemed illegal, or inconſiſtent with the principles of our conſtitution, while there were temporary acts (as there were many in the late war) to warrant it.

Beſides, we know that *Magna Charta* hath been expreſly and by name confirmed by many acts of parliament, my lord *Coke* ſaith 32; and yet the practice of preſſing mariners ſtill continued through all ages, and was never, that I know of, once mentioned in any of thoſe acts as illegal or a violation of the Great Charter.

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† See *Statuta de Officio Admiralitatis Angliæ*, publiſhed by Dr. *Simpſon* in the year 1743, at the end of *Clark*'s *Praxis Supremæ Curiæ Admiralitatis*—Articles 10, 37, 39; and the learned doctor's notes on thoſe articles touching ſhips and mariners preſſed into the king's ſervice.

† *N. B.* Other acts to the like purpoſe which did not occur to the author when this argument was delivered are, 1 *Annæ*, *ſeſſ.* 1. *c.* 16. *ſ.* 2. 6 *Annæ*, *c.* 31. *ſ.* 2. 13 *Geo.* II. *c.* 17. *ſ.* 1, 2, 3. and *c.* 28 *ſ.* 5. (See alſo 19 *Geo.* II. *c.* 30.)

4 E. III. ſt. 2. c. 5. 25 E. III ſt. 5. c. 8. In a ſimilar caſe, I mean the practice of preſſing ſoldiers for foreign ſervice, there are ſtatutes of an early date, which I conceive, were intended againſt it; though it was practiſed long afterwards. But thoſe acts extend only to the caſe of preſſing for the land-ſervice, not a word do I find in them touching the ſea-ſervice. One reaſon of the difference, among others, may be, that the land-ſervice was thought to be ſufficiently provided for in ordinary caſes by the military tenures; and extraordinary caſes, caſes of neceſſity, ſuch as that of a foreign invaſion, were expreſly excepted. In thoſe caſes, ſaith the 1 *E.* III. *it ſhall be done as in times paſt*; which we know was by commiſſions of array; whereas no competent proviſion was made by law for the ordinary ſea-ſervice. There were no naval ſervices due to the crown, except thoſe of the cinque ports and a very few others; which, all together, were too inconſiderable to be mentioned, and bore no ſort of proportion to the common exigencies of the public in time of war.

But there is another objection, which deſerveth to be conſidered. It is, that temporary acts have from time to time been made, authorizing the preſſing mariners for the ſea-ſervice; from whence it is argued, that the legiſlature, which is ſuppoſed to do nothing in vain, would not have given thoſe powers for a time, if the king by his prerogative could have provided for the ſervice without the aid of ſuch temporary acts.

1 Vol. 679, in margine. The gentleman who had the care of publiſhing lord chief juſtice *Hale*'s Hiſtory of the Pleas of the Crown referreth to ſeveral temporary acts made in the late queen's time, authorizing, as he ſuppoſeth, the preſſing of ſoldiers and *mariners*. I have looked into all thoſe acts. They are ſolely for preſſing ſoldiers and *marines*; not a ſingle word that concerneth the preſſing of *mariners* do I find in any of them.

4, 5 Annæ, c. 19. There was indeed an act made in that reign for compelling mariners into the ſervice, by methods which, it was then thought, the prerogative alone could not warrant. To that end it authorized and required juſtices of the peace, and other magiſtrates to cauſe privy ſearches to be made from time to time for mariners, who, as the act expreſſeth it, *did lie hid, withdraw, and conceal themſelves*, and to deliver them when apprehended to conductors for the ſervice of the crown: and conſtables and other officers were, by warrants from the magiſtrates, to make privy ſearches by night, and were impowered to enter houſes and open doors in execution of ſuch warrants, and were required to give an account of their proceedings from time to time to the magiſtrates on oath, and, in caſe of negligence or remiſſneſs in the premiſes, were ſubjected to pecuniary puniſhments. This is the ſubſtance of the firſt nine ſections of the act; which ſections, continuing in force only till the firſt of *March* 1706, are not printed in the later editions of the ſtatutes at large.

But it cannot, I conceive, be inferred from the new powers given by this act, that an impreſs by commiſſion from the crown or by admiralty-warrants, which was practiſed at that very time, was illegal. All that can be inferred is, that the ordinary methods then in uſe were found ineffectual; and therefore the legiſlature had, for that time, recourſe to an extraordinary one, for compelling into the ſervice thoſe, who could not be come at by the ordinary methods; thoſe, who, in the language of the act, *lay hid, withdrew, and concealed themſelves.* And to that end, civil magiſtrates and civil officers are required and authorized to do, what, in the judgment of the legiſlature, without the aid of that act, they could not have done, or at leaſt were not compellable to do.

And whoever readeth and conſidereth the 17th and 18th ſections of this act, which I have already cited to another purpoſe, will hardly conceive, that that parliament had any doubts concerning the legality of an impreſs by the ordinary methods of law.

16 & 17 Car. I. c. 5, 23, 26. Indeed the temporary acts of the 16th and 17th of *Car.* I. come directly to the point. They authorized an impreſs by admiralty-warrants for a limited time. And had temporary acts of that kind been frequent, or had the practice of preſſing been diſcontinued from the time of *Charles* I. unleſs when revived by ſubſequent temporary acts, I think what hath been ſaid upon the foot of antient precedents could, after all, have had very little weight. For I freely declare, that antient precedents alone, unleſs ſupported by modern practice, weigh very little with me in queſtions of this nature; I mean, in queſtions touching the prerogative. But we all know, that the practice of preſſing by admiralty-warrants hath continued, now near a century ſince the expiration of thoſe acts of king *Charles* I. without one ſtatute of the like kind to authorize it.

Theſe acts of king *Charles* I. do indeed ſhew, that the prerogative of preſſing mariners into the public ſervice was at that time *doubted of*. And whoever conſidereth the peculiar circumſtances of that time, when the prerogative had in too many inſtances been carried to great lengths, and when the nation was at the very eve of a civil war upon the ſubject of liberty and prerogative, and conſidereth withal that a naval force muſt in all events, as things then ſtood, be provided;—whoever, I ſay, conſidereth theſe things, will not wonder, that the prerogative of preſſing mariners ſhould, at that very critical time, be called in queſtion; or that, in order to procure an univerſal ſubmiſſion to a meaſure *neceſſary at that time*, the authority of parliament ſhould be called in, in aid of the prerogative.

c. 28. There was a temporary act made in this very ſeſſion for preſſing for the land-ſervice. It reciteth that a rebellion was on foot in *Ireland*, and then declareth, almoſt in the words of 1 *E.* III. before cited, *That by law no man is compellable to go out of his county to ſerve as a ſoldier, except in caſe of neceſſity of ſudden coming of ſtrange enemies into the kingdom, or except he was bound thereto by tenure.*

It is worth obſerving, that no ſuch declaration ſaving the rights of the ſubject is to be found in any of the acts of this ſeſſion for preſſing mariners. And the different penning of theſe acts, made in the ſame ſeſſion, and touching caſes of ſo ſimilar a nature, ſtrongly intimateth, that the point was not, even at that critical time, thought equally clear in the one caſe as in the other. The ſame obſervation occurreth with regard to the different penning of all the acts of the late queen for preſſing ſoldiers and marines, and of that for preſſing mariners; the former declare, that it was neceſſary at that time of war that ſoldiers and marines ſhould be raiſed by the methods preſcribed in the acts, 'by common conſent and grant in parliament.' Theſe are the words of the acts, and they are the very words made uſe of to the ſame purpoſe in the 25th *E.* III. already cited. The latter, without any ſuch declaration, barely impowereth and requireth magiſtrates and other peace officers to make ſearch for and apprehend mariners, who then lay hid, withdrew and concealed themſelves, and to ſend them into the ſervice.

1 Vol. 678. Lord chief juſtice *Hale*, in his Hiſtory of the Pleas of the Crown, ſpeaking of the legality of preſſing, which he indeed ſeemeth to doubt of, ſaith, 'He that looks upon the acts enabling preſ'ſing of ſoldiers and mariners for foreign ſervice upon or be'yond the ſea, namely 17 *Car.* I. *c.* 12, 25, 26. may think 'that thoſe times made ſome doubt of it. But of this," ſaith he, "I deliver no opinion." The chapters are miſnumbered, they are 5, 23, 26.

That learned man, you ſee, carrieth the inference from theſe temporary acts no farther than to render the matter doubtful; and ſo he leaveth it. But had he lived to ſee the practice of preſſing mariners continue near a century longer, and eſpecially had he ſeen this practice treated by the legiſlature in the manner the acts made ſince the Revolution treat it, I think what was then but matter of doubt would have now appeared to him in a different light. I confeſs it doth ſo to me. For rights of every kind, which ſtand upon the foot of uſage, gradually receive new ſtrength in point of light and evidence from the continuance of that uſage; as it implieth the tacit conſent and approbation of every ſucceſſive age, in which the uſage hath prevailed. But when the prerogative hath not only this tacit approbation of all ages, the preſent as well as the former on its ſide, but is recognized, or evidently preſuppoſed, by many acts of parliament, as in the preſent caſe I think it is, I ſee no legal objection that can be made to it.

I make no apology for the length of my argument, becauſe I hope the importance of the queſtion will be thought a ſufficient excuſe for me in that reſpect. For it is no more nor leſs than, whether the only effectual method yet found out for manning our navy in time of war, for raiſing that number of mariners *which the legiſlature from time to time declare to be neceſſary* for defending our coaſt and protecting our trade,—whether this method be legal or not. This I ſay is the queſtion. And therefore I could not ſatisfy myſelf without entering as far into the merits of it as I could.

And I have delivered my opinion upon it without any reſerve.

[*N. B.* The authorities for preſſing mariners for the public ſervice, to be found in *Rymer's Fœdera*, are ſo numerous, that the learned author purpoſely left many of them uncited by him. To ſome of thoſe in the reigns of *Richard* II. *Henry* V. *Henry* VI. and *Edward* IV. I have referred in the margin of his argument. But as amongſt the commiſſions and mandatory writs cited in pages 162 and 163, he hath given none which were iſſued in the reign of *Henry* IV. I think it not improper to take particular notice in this place of two commiſſions granted in that king's reign. The firſt of them was iſſued in the 12th year of his reign; and being a remarkably ſtrong authority for the practice, it deſerves to be here tranſcribed. It is in the following form.

8 Rym. 700. *Rex dilecto ſibi Roberto Spellowe ſervienti ſuo ad arma, ſalutem.*

Scias quod aſſignavimus te, tam ad omnes et ſingulas *naves, bargeas, et balingeras, ac alia vaſa portagii triginta doliorum et ultra,* in quibuſcumque portubus et locis regni noſtri Angliæ inveniri poterunt, *quam ad tot magiſtros et marinarios, quot pro gubernatione navium, bargearum, balingerarum et vaſorum prædictorum neceſſarii fuerint, infra libertates et extra, pro denariis noſtris prompte et rationabiliter ſolvendis,* areſtandum et capiendum, *et uſque portum civitatis noſtræ Londoniæ,*

Ad proficiſcendum nobiſcum in propria perſona noſtra in præſenti viagio noſtro verſus partes tranſmarinas;

Duci faciendum,

Et ad omnes illos quos in hac parte contrarios inveneris ſeu rebelles areſtandum et capiendum, et priſonis noſtris mancipandum, in eiſdem moraturos quouſque pro eorum deliberatione aliter duxerimus ordinandum;

Et ideo tibi præcipimus quod circa præmiſſa diligenter intendas, ac ea facias et exequaris in forma prædicta:

Damus autem univerſis et ſingulis vicecomitibus, majoribus, ballivis, conſtabulariis, miniſtris, poſſeſſoribus, magiſtris et marinariis navium, bargearum, et balingerarum, et aliorum vaſorum quorumcumque, ac aliis fidelibus et ſubditis noſtris, tam infra libertates quam extra, tenore præſentium firmiter in mandatis, quod tibi in executione præmiſſorum pareant, obediant, et intendant, prout decet.

In cujus &c.

Teſte Rege apud Weſtmonaſterium Tertio die Septembris.

Per ipſum regem.

8 Rym. 730. By the other, which iſſued in the 13th year of the ſame reign, *John Drax*, a ſerjeant at arms, is impowered, by himſelf and his deputies, to arreſt and take up one hundred mariners in the county of *Suffolk*, one hundred in the county of *Kent*, and thirty in the county of *Eſſex*. And all ſheriffs, mayors and other officers are required to be aſſiſting to him in that ſervice. DODSON.]

AN

ALPHABETICAL TABLE

OF THE

NAMES of the PRISONERS or PRINCIPAL PARTIES in the ſeveral TRIALS.

TO WHICH ARE ADDED,

The DATES of the TRIALS; the CRIMES or CAUSES of ACTION; the COURTS or PLACES of TRIAL; the PUNISHMENTS, JUDGMENTS, or EVENTS of the ſeveral PROSECUTIONS; with REFERENCES to the VOLUMES in which the TRIALS are reſpectively contained.

NAMES.	DATES.	CRIMES or CAUSES of ACTION.	COURTS or PLACES of TRIAL.	PUNISHMENTS, &c.	VOLUMES.
A					
ABINGTON	Sept. 15, 1586	Treaſon	Weſtminſter	Executed	i. - - 134
Acton	Aug. 1, 1729	Murder	Aſſizes	Acquitted	ix. 181, 203, 209, 218
Anderſon	Jan. 17, 1679	Romiſh Prieſt	O. B.	Reprieved	ii. - 993
Anderton	June 3, 1693	Treaſon	O. B.	Executed	viii. - - 63
Andrews,	Aug. 16, 1650	Treaſon	H. C. J.	Beheaded	vii. - 324
Angleſea, Earl	Nov. 11, 1743	Ejectment	Ireland	Verdict for defendant	ix. - - 380
	Aug. 3, 1744	Aſſault	Ireland	Fined	ix. — 336
Anna Boleyn, Queen	May, 1536	Treaſon	High Steward	Beheaded	xi. - 10
Anneſley	July 15, 1742	Murder	O. B.	Chance-medley	ix. - - 315
Appletree	April 4, 1668	Treaſon	O. B.	Pardoned	ii. - 385
Argyle, Earl	Nov. 1681	Treaſon	Scotland	Beheaded	ii. 417 vii. 379
Argyle, Marquiſs	Jan. 23, 1661	Treaſon	Scotland	Beheaded	iii. - 441
Armſtrong, Sir Thomas	June 14, 1684	Treaſon	B. R.	Executed	iii. - - 383
Arnold	March 20, 1723-4	Felonious ſhooting at	Aſſizes	Reprieved	viii. — 290
Aſaph, Saint Biſhop	June 29, 1788	Libel	B. R.	Acquitted	iv. — 304
Arundel, Earl	April 18, 1589	Treaſon	High Steward	Died in priſon	i. 164 xi. 27
Aſhby	Jan. 1703	Breach of Privilege	Parliament		viii. — 89, 124
Aſhley	April, 1752	Perjury	O. B.	Pilloried, impriſoned, and tranſported	x. — 411
Aſhton	Jan. 17, 1690	Treaſon	O. B.	Executed	iv. — 455
Aſtlin	May 2, 1684	Riot	B. R.	Fined	iii. 949, 978
Atkins, Samuel	Feb. 11, 1678	Murder	B. R.	Acquitted	ii. — 792
Atkins, William	Aug. 13, 1679	Romiſh Prieſt	Aſſizes	Sentence for Treaſon	ii. — 968
Atterbury, Biſhop	May, 1723	Treaſonable Conſpiracy	Parliament	Baniſhed	vi. — 335
Audley, Lord	April 25, 1631	Rape and Sodomy	High Steward	Beheaded	i. — 388
Axtel	Oct. 13, 1660	Regicide	O. B.	Executed	ii. — 369
B					
Babington	Sept. 14, 1586	Treaſon	Weſtminſter	Executed	i. — 128
Bacon, Lord	March 19, 1620	Bribery and Corruption	H. L.	Fined and impriſoned	i. — 375
Baillie, David	Feb. 14, 1703-4	Defamation	Scotland	Impriſoned	viii. — 195
Baillie, Robert	Dec. 3, 1684	Treaſon	Scotland	Executed, &c.	iii. — 1095
Ballard	Sept. 14, 1586	Treaſon	Weſtminſter	Executed, &c.	i. — 128
Balmerino, Lord	March 10, 1609	Treaſon	Scotland	Pardoned	vii. — 85
Balmerino, Lord	Dec. 3, 1634	Treaſonable Libel	Scotland	Pardoned	i. — 429
Balmerino, Lord	July, 1746	Treaſon	H. L.	Beheaded	ix. — 587
Bambridge	May 22, 1729	Murder	O. B.		ix. — 145
	Jan 22, 1729-30	Appeal of Murder	G. H.	Acquitted	152
	Dec. 26, 1729	Felony	O. B.		234
Banbury, Earl	January, 1692-3	Murder	B. R.	Arraigned only	viii. — 50
Barbot	Jan. 5, 1753	Murder	Saint Chriſtophers	Executed	x. — 139
Barkſtead, Colonel	April 16, 1662	Regicide	B. R.	Executed	viii. — 369
Barlicorn	May 8, 1701	Piracy	O. B.	Executed	v. — 287
Barnard	May 10, 1758	Threatening Letters	O. B.	Acquitted	x. — 447
Barnardiſton, Sir Samuel	Feb. 14, 1683	Miſdemeanour	G. H.	Fined	iii. — 933
Barnewell	Sept. 14, 1586	Treaſon	Weſtminſter	Executed	i. — 128
Barroverſe, Sir James	March 12, 1388	Treaſon	Parliament	Beheaded	i. — 5
Baſtwick	June 14, 1637	Libel	C. S.	Pilloried, ears cut off, and impriſoned	i. — 481
Bateman	Dec. 9, 1685	Treaſon	O. B.	Executed	iv. — 162
Bates, John	M. Term, 1604	Contempt	Exchequer		xi. — 29
Bates, Thomas	Jan. 27, 1605	Gunpowder Plot	Weſtminſter	Executed	i. — 232
Battray	July 16, 1746	Treaſon	Southwark	Reprieved	ix. — 555
Bayard, Colonel	Feb. 19, 1701	Treaſon	New-York	Reprieved	v. — 419
Baynton	Nov. 25, 1702	Forcible Marriage	B. R.	Reprieved	v. — 464
Baxter, Clerk	May 20, 1685	Libel	G. H.	Fined	x. Ap. — 37
Beadle	April 4, 1668	Treaſon	O. B.	Acquitted	ii. — 585
Beaſley	April 4, 1668	Treaſon	O. B.	Executed	ii. — 585
Beauchamp	March 12, 1388	Treaſon	Parliament	Beheaded	i. — 15
Bedford, Earl	May 29, 1630	Seditious Writing	C. S.	Not proceeded in	xi. — 121
Belknap, Sir R.L.C.J.C.B.	March 2, 1388	Treaſon	Parliament	Baniſhed	i. — 13
Bellamy	Sept. 13, 1536	Treaſon	Weſtminſter	Executed	i. — 134
Bennet, Ralph	May 2, 1684,	Riot	B. R.	Fined	iii. 949, 978
Bernardi, Major	March 25, 1696	Aſſaſſination Plot		Died in priſon	x. Ap. — 64
Berry, Henry	Feb. 10, 1678	Murder	B. R.	Executed	ii. — 760
Berry, John	March 1, 1755	Acceſſary before the Fact	O. B.	Pilloried and impriſoned	x. — 417
Berwick	July 17, 1746	Treaſon	Southwark	Executed	ix. — 559
Bethel	Oct. 5, 1681	Aſſault and Battery	Southwark	Fined	iii. — 413
	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. — 630
Biſhops, Seven	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
Blackmore	E. and M. Terms, 1765	Falſe Impriſonment	C. B.	Damages	xi. — 307
Blackſton, Colonel	Aug. 16, 1649	Treaſon	Aſſizes	Executed	vii. — 322

THE ALPHABETICAL TABLE.

Names.	Dates.	Crimes or Causes of Action.	Courts or Places of Trial.	Punishments, &c.	Volumes.
Blake, King's Counſel	March 3, 1388	Treaſon	Parliament	Executed	i. — 14
Blague	July 13, 1683	Treaſon	O. B.	Acquitted	iii. — 739
Blandy, Mary	Feb. 29, 1752	Parricide	Oxon	Executed	x. — 1
Blunt, Sir Chriſtopher	March 5, 1600	Treaſon	Com. of *Oy* & *Term.*	Beheaded	i. 209 vii. 47
Bolton	June 25, 1662	Refuſing to take the Oaths	O. B.	Impriſoned	ii. — 463
Boleyn Anna, Queen	May, 1536	Treaſon	High Steward	Beheaded	xi. — 10
Bonnet, Major	Oct. 30, 1718	Piracy	Carolina	Executed	vi. — 156
Boroſky	Feb. 28, 1681	Murder	O. B.	Executed	iii. — 466
Bothwell, Earl	April 12, 1567	Regicide	Scotland	Acquitted	i. — 78
Bouchier	Feb. 28, 1703	Treaſon	B. R.	Reprieved	v. — 506
Braddon	Feb. 7, 1683	Miſdemeanour	B. R.	Fined	iii. — 855
Bradſhaw, Deering	June 1, 1688	Murder	O. B.	Acquitted	vii. — 648
———, James	Oct. 27, 1746	Treaſon	Southwark	Executed	ix. — 576
Brambre, Mayor of London	Feb. 3, 1388	Treaſon	H. L.	Executed	i. — 1
Brereton	May, 1536	Treaſon	Commiſſioners	Beheaded	xi. — 10
Brewſter	Feb. 22, 1663	Libel	O. B.	Pilloried, fined, and impriſoned	ii. — 538
Briſtol, Biſhop of	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
Britton	Feb. 24, 1703-4	Conſpiracy	B. B.	Fined	viii. — 178
Broadfoot	Aug. 30, 1754	Murder	Briſtol	Manſlaughter	xi 349
Brodway	June 27, 1631	Rape and Sodomy	B. R.	Executed	i. — 396
Brommich	Aug. 13, 1679	Romiſh Prieſt	Aſſizes	Sentence for treaſon	ii. — 965
Brooke	Nov. 15, 1603	Treaſon	Com. of *Oy.* & *Term.*	Executed	vii. — 63
Brookeſby	Nov. 15, 1603	Treaſon	Com. of *Oy.* & *Term.*	Reprieved	vii. — 63
Brooks	Feb. 22, 1663	Libel	O. B.	Pilloried, fined, and impriſoned	ii. — 528
Buckner	Feb. 7, 1633	Libel	C. S.	Cenſured	i. — 418
Burleigh, Simon de	March 12, 1388	Treaſon	Parliament	Beheaded	i. — 15
Burleigh, Sir William	March 12, 1388	Treaſon	Parliament	Baniſhed	i. — 13
Burton	June 14, 1637	Libel	C. S.	Pilloried, ears cut off, and impriſoned	i. — 481
Buſby	July 25, 1681	Romiſh Prieſt	Aſſizes	Reprieved	iii. — 328
Butler	Oct. 12, 1699	Forgery	O. B.	Fined	v. — 232
Byron, Lord	April 16, 1765	Murder	H. L.	Diſcharged	x. — 498*
C.					
Cambridge univerſity	April, 1687	Contempt		Vice Chancellor deprived	iv. — 254
Cameron, Doctor	May, 17, 1753	Treaſon	B. R.	Executed	x. — 202
Campman	July 15, 1719	Collecting charity	Aſſizes	Fined	x. Ap. — 85
Canning, Eliz.	April, 1754	Perjury	O. B.	Tranſported	x. — 205
Canterbury, Archbiſhop	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
Carew	Oct. 12, 1660	Regicide	O. B.	Executed	ii. — 330
Carey, Sir John, baron of Exchequer	March 2, 1388	Treaſon	Parliament	Baniſhed	i. — 13
Carliel	June 27, 1612	Murder	O. B.	Executed	vii. — 91
Carnegie	July 25, 1728	Murder	Scotland	Acquitted	ix. — 26
Carnwath, earl	Feb. 9, 1715	Treaſon	H. L.	Pardoned	vi. — 1
Carr	July 2, 1680	Libel	G. H.		iii. — 57
Carter	Jan. 16, 1748-9	Murder	Chicheſter	Executed	ix. — 716
Cave	June 1, 1688	Murder	O. B.	Acquitted	vii. — 648
Cavenagh	March 7, 1688	Cow-ſtealing	Ireland	Executed	iv. — 408
Carrington	M. Term, 1765	Seizure of papers	C. B.	Damages	ix. — 313
Cellier, Eliz.	June 11, 1680	Treaſon	B. R.	Acquitted	iii. — 32
	Sept. 1680	Libel	O. B.	Pilloried and fined	iii. — 89
Chadwick	July 16, 1746	Treaſon	Southwark	Executed	ix. — 555
Chambers	1629	Seditious ſpeeches	C. S.	Fined	xi. — 118
Charles, king	Jan. 20, 1648	Treaſon	H. C. J.	Beheaded	i. — 986
Charnel	May 2, 1684	Riot	B. R.	Fined	iii. — 949, 978
Charnock, John	Sept. 15, 1586	Treaſon	Weſtminſter	Executed	i. — 134
Charnock, Robert	Nov. 23, 1682	Miſdemeanour	B. R.	No judgment	iii. — 519
	March 11, 1695	Treaſon	O. B.	Executed	iv. — 562
Chetwynd	Oct. 12, 1743	Murder	O. B.	Pardoned	ix. — 527
Chicheſter, biſhop	March 6, 1388	Treaſon	Parliament	Pardoned	i. — 15
	June 29, 1638	Libel	B. R.	Acquitted	iv. — 304
Churchill	May 8, 1704	Piracy	O. B.	Executed	v. — 287
Clare, earl	May 29, 1630	Seditious writing	C. S.	Not proceeded in	xi. — 121
Clarendon, earl	July 10, 1663	Treaſon	Parliament	Baniſhed	ii. — 554
Clarke	Nov. 15, 1603	Treaſon	Com. of *Oy.* & *Term.*	Executed	vii. — 63
Clement	Oct. 12, 1660	Regicide	O. B.	Executed	ii. — 338
Cobby	Jan. 16, 1748-9	Murder	Chicheſter	Executed	ix. — 716
Cobham, lord	Nov. 15, 1603	Treaſon	High Steward	Impriſonment	vii. — 63
Coke	March 16, 1721	Maiming	Aſſizes	Executed	vi. — 212
Cole	Sept. 2, 1692	Murder	O. B.	Acquitted	iv. — 506
Coleman	Nov. 27, 1678	Treaſon	B. R.	Executed	ii. — 660
Colledge	Aug. 17, 1681	Treaſon	Oxon	Executed	iii. — 341
Conſtable, capt.	Oct. 8, 1702	Deſertion	Court-martial	Shot	v. — 445
Cook, John	Oct. 13, 1660	Regicide	O. B.	Executed	ii. — 341
——, Peter	May 9, 1696	Treaſon	O. B.	Pardoned	iv. — 738
——, Shadrack	April 3, 1696	Sedition	Aſſizes	Cenſured and impriſoned	x. Ap. — 43
Conningſmark, count	Feb. 28, 1681	Murder	O. B.	Acquitted	iii. — 466
Copley	Nov. 13, 1603	Treaſon	Com. of *Oy.* & *Term.*		vii. — 63
Corbet, Miles	April 16, 1622	Regicide	B. R.	Executed	viii. — 369
———, ſir John	Nov. 22, 1627	Hab. Corp.	B. R.	Diſcharged	vii. — 114
Corbett, Richard	Jan. 22, 1729-30	Appeal of murder	*Niſi Prius*	Acquitted	ix. — 152
Corker	July 18, 1679	Treaſon	O. B.	Acquitted	ii. — 917
	Jan. 17, 1679	Romiſh Prieſt	O. B.	Reprieved	ii. — 993
Corniſh	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. — 630
	Oct. 19, 1685	Treaſon	O. B.	Executed	iv. — 130
Cornwallis, lord	1678	Murder	High Steward	Acquitted	ii. — 725
Cotton, Edward	April 4, 1668	Treaſon	O. B.	Executed	ii. — 585
Cotton, Sir Robert	May 29, 1630	Seditious writing	C. S.	Not proceeded in	xi. — 121
Cowper	July 16, 1699	Murder	Aſſizes	Acquitted	v. — 194
Cranburne	April 21, 1696	Treaſon	Weſtminſter	Executed	iv. — 698
Creighton, lord Sanquire	June 27, 1612	Murder	B. R.	Executed	vii. — 86
Crook	June 25, 1662	Not taking oaths	O. B.	Impriſoned	ii. — 463

THE ALPHABETICAL TABLE.

Names.	Dates.	Crimes or Causes of Action.	Courts or Places of Trial.	Puniſhments, &c.	Volumes.
Cromartie, earl	July, 1746	Treaſon	H. L.	Reprieved	ix. — 587
Crompton, bp. of London	Aug. 1686	Contempt	Eccleſ. Com.	Suſpended	iv. — 247
Crone	May 19, 1690	Treaſon	O. B.		x. Ap. - 40
Crook	June 25, 1662	Not taking oaths	O. B.	Impriſoned	ii. - - 463
Croſby,	E. Term, 1694	Treaſon	B. R.	Acquitted	x. Ap. - 42
mayor of London	E. Term, 1771	Hab. Corp.	C. B.	Remanded	xi. — 335
Cuffe	March 5, 1600	Treaſon	Com. *Oy. & Term.*	Executed	i. 209 vii. 47
Curl	M. Term, 1714	Libel	B. R.	Pillioried	x. Ap. - 92
Curtis	1679	Libel	G. H.		ii. — 1042
D.					
Dacres, lord	July 9, 1535	Treaſon	High Steward	Acquitted	xi. — 10
Dagleiſh	June 13, 1567	Treaſon	Scotland	Executed	viii. — 327
Dammaree	April 18, 1710	Treaſon	O. B.	Pardoned	viii. — 218
Danby, earl	Dec. 1678	Treaſon	Parliament	Pardoned	ii. — 731
Darby	Sept. 21, 1647	Forgery	Parliament	Fine and impriſonment	vii. — 47
Darnel, ſir Thomas	Nov. 15, 1627	Hab. Corp.	B. R.	Diſcharged	vii. — 114
Davers, ſir Charles	March 5, 1601	Treaſon	Weſtminſter	Beheaded	i. 209 vii. 47
Davis, ſir John	March 5, 1601	Treaſon	Weſtminſter	Executed	i. 209 vii. 47
Daviſon	March 28, 1587	Miſpriſ. and contempt	C. S.	Fined	vii. — 20
Dawſon	Oct. 19, 1696	Piracy	O. B.	Executed	v. — 1
Deacon	July 17, 1746	Treaſon	Southwark	Executed	ix. — 558
Deagle	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. — 630
Delamere, lord	Jan. 14, 1685	Treaſon	High Steward	Acquitted	iv. — 210
Denew	Feb. 14, 1703	Aſſault and conſpiracy	B. R.	Fined	viii. — 178
Derwentwater, earl	Feb. 9, 1715	Treaſon	H. L.	Beheaded	vi. — 1
Devonſhire, earl	E. Term, 1687	Aſſault	B. R.	Fined 30000l.	xi. — 133
Digby, ſir Everard	Jan. 27, 1605	Gunpowder-plot	Weſtminſter	Executed	i. — 232
Diſney	June 25, 1685	Treaſon	Southwark	Executed	ix. — 558
Donn	Sept. 14, 1586	Treaſon	Weſtminſter	Executed	i. — 128
Dover	Feb. 22, 1663	Libel	O. B.	Pilloried, fined, and impriſoned	ii. — 545
Downes	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. — 396
Dudley, ſir Edward	Aug. 19, 1553	Treaſon	Weſtminſter	Beheaded	xi. — 26
Edmund	July 16, 1509	Treaſon	Northampton	Beheaded	xi. - - 3
E.					
Earl, ſir Walter	Nov. 22, 1627	Habeas Corpus	B. R.	Diſcharged	vii. - 114
Earles	April 4, 1668	Treaſon	O. B.	Acquitted	ii. - - 585
Egan	March 1, 1755	Acceſſary before the fact	O. B.	Pilloried and impriſoned	x. - - 417
Elliot, Edmund	Jan. 17, 1690	Treaſon	O. B.	Not tried	iv. - - 410
Elliot, ſir John	M. Term, 1629	Seditious ſpeeches in Parl.	B. R.	Fined and impriſoned	vii. - 243
Ellis	Aug. 6, 1734	*Quo Warranto*	Aſſizes	Judgment	x. Ap. 127
Elwes, ſir Jervis	Nov. 16, 1615	Murder	G. H.	Executed	i. - - 341
Ely, biſhop	June 29, 1688	Libel	B. R.	Acquitted	iv. - - 304
Empſon, ſir Thomas	July 16, 1509	Treaſon	Northampton	Beheaded	xi. - 3
Eſſex, earl	Feb. 19, 1600	Treaſon	High Steward	Beheaded	i. - - 197
earl and counteſs	1613	Impotency	Delegates	Divorced	i. - - 315
Eviot	Nov. 15, 1600	Treaſon	Scotland	Executed	vii. - 33
F.					
Fagg, ſir John	May, 1675	Appeal to the Lords	H. of Commons	Taken into cuſtody	vii. - 453
Farewell	June 20, 1682	Libels	G. H.	Pilloried and fined	iii. - 505
Farrel	April 4, 1668	Treaſon	O. B.	Acquitted	ii. - 585
Faulconer	July 12, 1652	Perjury	B. S.	Impriſoned	vii. - - 343
Fawkes	Jan. 27, 1605	Gunpowder treaſon	Weſtminſter	Executed	i. - - 232
Fenwick	June 13, 1679	Treaſon	O. B.	Executed	ii. - 829
Fenwick, ſir John	Nov. 1696	Treaſon	Parliament	Beheaded	v. - - 540
Fernley	Oct. 19, 1685	Treaſon	O. B.	Reprieved	iv. - 130
Ferrers, earl	April 16, 1760	Murder	H. L.	Executed	x. - 478
Fielding	Dec. 4, 1706	Bigamy	O. B.	Pardoned	v. - - 610
	June 25, 1707		Doctors Commons	Marriage annulled	v. - - 628
Fiennes, colonel	Dec. 14, 1643	Cowardice	C. of war	Pardoned	i. - 766
Finch, ſir John, lord keeper	Jan. 1640	Treaſon	H. of Commons	Flight	vii. - 309
Fiſher, biſhop of Rocheſter	June 17, 1535	Treaſon	Weſtminſter	Beheaded	xi. — 7
Fitzharris	March 25, 1681	Treaſon	B. R.	Executed	iii. - - 224
Fitzpatrick	June 27, 1631	Rape and ſodomy	B. R.	Executed	i. - - 396
Fleetwood	Oct. 10, 1660	Regicide	O. B.	Reprieved	ii. - 311
Fletcher	July 16, 1746	Treaſon	Southwark	Executed	ix. - 552
Fogg, captain	Oct. 8, 1702	Deſertion	Martial	Shot	v. - - 445
Ford	April 4, 1668	Treaſon	O. B.	Acquitted	ii. - 585
Forteſcue, ſir John	March, 1603	Parl. election	H. of Commons	New writ	vii. - 67
Fowlis, ſir David	H. Term, 1633	Traducing of ſtate	C. S.	Commitment, &c.	xi. - 131
Fowlis, Henry	H. Term, 1633	Traducing of ſtate	C. S.	Commitment, &c.	xi. - 131
Fox	June 30, 1654	Treaſon	H. C. J.	Pardoned	ii. - - 212
Frances	July 16, 1685	Murder	O. B.	Executed	x. Ap. - 34
Francia	Jan. 22, 1716	Treaſon	O. B.	Acquitted	vi. - 58
Franklin, James	Nov. 27, 1615	Murder	B. R.	Executed	i. - - 346
Franklin, Richard	Dec. 3, 1713	Libel	B. R.	Impriſoned and fined	ix. - - 255
Freeman	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. - - 630
Friend, ſir John	March 23, 1695	Treaſon	O. B.	Executed	iv. - 599
Fuller, William	Jan. 19, 1701	Libel	Parliament	Impriſoned, pilloried, &c.	v. - 441
	May 20, 1702	Impoſtor	G. H.	Pilloried, &c.	viii. — 78
Fulthorp, ſir Roger, J. C. B.	March 2, 1388	Treaſon	Parliament	Baniſhed	i. - 13
G.					
Gage	Sept. 15, 1586	Treaſon	Weſtminſter	Executed	i. - 134
Gahagan	March 1, 1755	Acceſſary before the fact	O. B.	Pilloried and impriſoned	x. - 417
Garland	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. - - 398
Garnet	March 28, 1606	Gunpowder plot	G. H.	Executed	i. - 248
Gaſcoigne, ſir Thomas	Feb. 11, 1679	Treaſon	B. R.	Acquitted	iii. - 1
Gates, Henry Gates, ſir John	Aug. 19, 1553	Treaſon	Weſtminſter	Beheaded	xi. - 26
Gavan	June 13, 1679	Treaſon	O. B.	Executed	ii. - 829
Gaunt, Elizabeth	Oct. 19, 1685	Treaſon	O. B.	Beheaded	iv. - 150
Gerhard	June 30, 1654	Treaſon	H. C. J.	Beheaded	ii. - - 212
Germaine	Nov. 24, 1692	Crim. con	B. R.	Damages	viii. - 27
Gibbon, John	Aug. 1734	*Quo Warranto*	Aſſizes	Judgment	ii. - - 183
Gibbons, John	July 18, 1651	Treaſon	H. C. J.	Beheaded	x. Ap. - 118

THE ALPHABETICAL TABLE.

NAMES.	DATES.	CRIMES or CAUSES of ACTION.	COURTS or PLACES of TRIAL.	PUNISHMENTS, &c.	VOLUMES.
Gibbs	Dec. 11, 1662	Treaſon	O. B.	Executed	ii. 478
Gilbert, L. C. B.	July 28, 1719	Contempt	Ireland	Impriſoned	vi. 188
Giles	July 14, 1680	Attempt to murder	O. B.	Pilloried and fined	iii. 65
Goddard	Sept. 1751	Robbery	O. B.	Acquitted	x. 411
Golding and others	Sept. 1693	Piracy	Admiralty	Executed	viii. 73
Goodenough	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. 630
Goodere	March 17, 1740	Murder	Briſtol	Executed	vi. 795
Goodwin, ſir Francis	March, 1603	Parl. election	Houſe of Commons	New writ	vii. 67
Gowrie, earl	Nov. 15, 1600	Treaſon	Scotland	Attainted	vii. 33
Grant	Jan. 27, 1605	Gunpowder plot	Weſtminſter	Executed	i. 232
Gray, lord	Nov. 15, 1603	Treaſon	High Steward	Impriſoned	vii. 63
Greaves, John ——, William	May 2, 1684	Riot	B. R.	Fined	iii. — 949, 978
Green, capt.	March 14, 1704	Piracy	Scotland	Executed	v. 572
Green, Robert	Feb. 10, 1678	Murder	B. R.	Executed	ii. 760
	May 2, 1684	Riot	B. R.	Fined	iii. — 949, 978
Green, William	April 4, 1668	Treaſon	O. B.	Acquitted	ii. 585
Greg	Jan. 19, 1707-8	Treaſon	O. B.	Executed	x. Ap. 77
Gregory, George	May 2, 1684	Riot	B. R.	Fined	iii. — 949, 978
Grey, lord	June 25, 1540	Treaſon	Weſtminſter	Beheaded	xi. 17
	Nov. 23, 1682	Miſdemeanour	B. R.	No judgment	iii. 519
	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. 630
Grey, Iſaac	June 25, 1662	Refuſing oaths	O. B.	Impriſoned	ii. 463
Grove	Dec. 17, 1678	Treaſon	O. B.	Executed	ii. 696
H.					
Hacker	Oct. 15, 1660	Regicide	O. B.	Executed	ii. 382
Hales	Feb. 13, 1588	Sedition	C. S.	Fined and impriſoned	vii. 729
Hales, ſir Edward	June 1, 1686	Not taking oaths	B. R.	Verdict for defendant	vii. 612
Hales, William	Dec. 7, 1728	Forgery	O. B.		x. Ap. 94
	Jan. 20, 1728-9				ix. 67
		Miſdemeanour			ix. 76
		Forgery		Impriſonment	ix. 77
	Jan. 28,	Miſdemeanour	O. B.		ix. 93
		Forgery	O. B.	Fined, pilloried, and died in priſon	ix. 103
Hales, Robert	Jan. 27, 1728-9	Miſdemeanour	B. R.	Pardoned	ix. 68
Halifax, lord	Feb. 15, 1700-1	High crimes	H. L.	Acquitted	v. 339 viii. 512
Hamilton, duke	Feb. 9, 1648	Treaſon	H. C. J.	Beheaded	ii. 1
Hammond	Jan. 16, 1748-9	Murder	Chicheſter	Executed	ix. 716
Hampden, ſir Edmund	Nov. 22, 1627	Hab. Corp.	B. R.	Diſcharged	vii. 114
——, John	T. Term, 1638	Ship-money	Exchequer	Judgment	i. 505
	Feb. 6, 1683	High Crimes	B. R.	Fined	iii. 824
	Dec. 30, 1685	Treaſon	O. B.	Pardoned	iv. 207
Harcourt	June 13, 1679	Treaſon	O. B.	Executed	ii. 829
Harding	July 15, 1719	Collecting charity	Aſſizes	Fined	x. Ap. 86
Harris, Benjamin	Feb. 5, 1679	Libel	G. H.	Pilloried, fined, and impriſoned	ii. 1037
John	Sept. 21, 1647	Forgery	Parliament	Fined and impriſoned	vii. 317
Harriſon, Clerk	T. Term, 1638	Miſdemeanour	B. R.	Fined and impriſoned	i. 720
——, Henry	April 6, 1692	Murder	O. B.	Executed	iv. 448
——, Thomas	Oct. 11, 1660	Regicide	O. B.	Executed	ii. 313
Hartwell	Nov. 25, 1702	Forcible marriage	B. R.	Acquitted	v. 465
Harvey	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. 390
Haſtings corporation	T. Term, 1736	Mandamus	B. R.	Admittance	x Ap. — 138
Hathaway	March 24, 1702	Impoſtor	Aſſizes	Pilloried, &c.	v. 482
	March 26, 1703,	Riot	Aſſizes		v. 504
Haverſham, lord	June 24, 1701	Words ſpoken	H. L.	Charge diſmiſſed	v. 339
Hawkins	March 11, 1668	Felony	Aſſizes	Acquitted	ii. 595
Hay	June 13, 1567	Treaſon	Scotland	Executed, &c.	viii. 327
Hayes	Nov. 21, 1684	Treaſon	B. R.	Acquitted	iii 1067
Heath, Mary	Feb. 8, 1744	Perjury	Ireland	Acquitted	ix. 432
Hendley, Clerk	July 15, 1719	Preaching charity-ſermon	Aſſizes	Fined	x. Ap. 86
Hepburn	June 13, 1567	Treaſon	Scotland	Executed, &c.	viii. — 327
Heveningham	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. 400
Hewet, doctor	June 1, 1658	Treaſon	H. C. J.	Beheaded	ii. 281
Hickford	Feb. 9, 1571	Treaſon	B. R.	Judgment	i. 117
Hicks	July 15, 1719	Collecting charity	Aſſizes	Fined	x. Ap. 86
Hill	Feb. 10, 1678	Murder	B. R.	Executed	ii. 760
Hoe	May 2, 1684	Riot	B. R.	Fined	iii. — 949, 978
Hind	Dec. 11, 1662	Treaſon	O. B.	Reprieved	ii. 478
Hollis, Denzil	M. Term, 1629	Seditious ſpeeches in Parl.	B. R.	Fined and impriſoned	vii. 242
Hollis, ſir John	Nov. 10, 1615	Traducing public juſtice	C. S.	Fined	i, 333
Holloway	April 21, 1684	Treaſon	B. R.	Executed	iii. 943
Holt, ſir John, J. C. B.	March 2, 1388	Treaſon	Parliament	Baniſhed	i. 13
Hone	July 12, 1683	Treaſon	O. B.	Executed	iii. 702
Horne	July 4, 1777	Libel	B. R.	Fined, impriſoned, &c.	xi. 264
Howe	May 8, 1701	Piracy	O. B.	Executed	v. 287
Huggins	May 21, 1729	Murder	O. B.	Acquitted	ix. 112
Hulet	Oct. 15, 1660	Regicide	O. B.	Reprieved	ii. 385
Hurly	May 31, 1701	Perjury and cheat	Ireland	Fined	v. 384
Hutchinſon and Charles	May 2, 1684	Riot	B. R.		iii. 949, 978
I.					
Jackſon	Jan. 16, 1748-9	Murder	Aſſizes	Died in priſon	ix. 716
James	Nov. 14, 1662	Treaſon	B. R.	Executed	ii. 470
Jeffereys, Elizabeth	March, 1752	Murder	Chelmsford	Executed	x. 36
Jekyll	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. 630
Jenkes	June 27, 1676	Seditious ſpeech	Privy Council	Fined	vii. 468
	May 8, 1683	Riot	*Niſi Prius*	Fined	iii, 630
Jenkins	May 8, 1701	Piracy	O. B.	Executed	v. 287
Johnſon,	June 21, 1686	High crimes	B. R.	Impriſoned, pilloried, whipped, and fined	vii. 645
Jones, David	Nov. 23, 1682	Miſdemeanour	B. R.	No judgment	iii. 519
——, Edward	Sept. 15, 1586	Treaſon	Weſtminſter	Executed	i. 134
——, Frances	Nov. 23, 1682	Miſdemeanour	B. R.	No judgment	iii. 519
——, John	Oct. 12, 1660	Regicide	O. B.	Executed	ii. 338

THE ALPHABETICAL TABLE.

Names.	Dates.	Crimes or Causes of Action.	Courts or Places of Trial.	Punishments, &c.	Volumes.
Jones, Rebecca	Nov. 23, 1682	Miſdemeanour	B. R.	No judgment	iii. - 519
——, ſir Thomas, J. B. R.	July, 1689	Breach of privilege	H. of Commons	Taken into cuſtody	viii. - 1
——, Thomas	Sept. 1693	Piracy	Admiralty	Executed	viii. — 73
Ireland, duke	Feb. 3, 1388	Treaſon	H. L.	Eſcaped	i. — 1
——, William	Dec. 17, 1678	Treaſon	O. B.	Executed	ii. — 696
Ivy, lady	June 3, 1684	Tortious entry	B. R.	Ejected	vii. — 571
K.					
Keach	Oct. 8, 1664	Libel	Aſſizes	Pilloried, fined, and impriſoned	ii. — 550
Kelly	May 1723	Treaſonable conſpiracy	Parliament	Impriſoned for life	vi. — 335
Kemiſh	Jan. 17, 1679	Romiſh Prieſt	O. B.	Arraigned only	ii. — 663
Kendal	Oct. 31, 1695	Habeas Corpus	B. R.	Bailed	iv. — 554
Kenn, bp. of Bath and Wells	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
Kenmure, viſcount	Feb. 9, 1715	Treaſon	H. L.	Beheaded	vi. — 1
Kerne	Aug. 4, 1679	Treaſon	Aſſizes	Acquitted	ii. — 961
Key	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. — 630
Keys, Robert	Jan. 27, 1605	Gunpowder plot	Weſtminſter	Executed	i. — 232
——, Thomas	March 11, 1695	Treaſon	O. B.	Executed	iv. — 562
Kidd, capt. and others	May 8, 1701	Murder and piracy	O. B.	Executed	v. — 287
Kilmarnock, Earl	July 1746	Treaſon	H. L.	Beheaded	ix. — 587
King	March 11, 1695	Treaſon	O. B.	Executed	iv. — 562
Kinlock	1746	Treaſon	Southwark	Not tried	ix. — 567
Kirby and others	Oct. 8, 1702	Deſertion	Court-martial	Shot	v. — 445
Knevet, ſir Edmund	June 10, 1441	Striking in the palace	Commiſſioners	Executed	xi. — 16
Knightley, Alexander	May 20, 1696	Treaſon	B. R.	Pardoned	iv. — 777
——, ſir Richard	Feb. 13, 1588	Sedition and libel	C. S.	Fined	vii. — 29
Knowles, C. commonly called earl of Banbury	Jan. 1692-3	Murder	B. R.	Arraigned only	viii. — 50
Knox	Nov. 25, 1679	Miſdemeanour	B. R.	Fined and impriſoned	ii. — 970
Kingſton, ducheſs	April 15, 1776	Bigamy	H. L.	Diſcharged	xi. — 198
L.					
Lake, biſhop of Chicheſter	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
Lalor	H. Term, 1607	Romiſh Prieſt	Ireland	Premunire	xi. — 69
Lamley	May 8, 1701	Piracy	O. B.	Executed	v. — 287
Lane	Nov. 25, 1679	Miſdemeanour	B. R.	Pilloried, fined, and impriſoned	ii. — 970
Langhorne	June 14, 1679	Treaſon	O. B.	Executed	ii. — 878
Latimer	April 4, 1668	Treaſon	O. B.	Pardoned	ii. — 585
Laud, archbiſhop	March 12, 1643	Treaſon	H. L.	Beheaded	i. — 824
Layer	Nov. 21, 1722	Treaſon	B. R.	Executed	vi. — 229
Layton, ſir Thomas	H. Term, 1633	Traduction	C. S.	Commitment, &c.	xi. — 131
Lee, capt.	Nov. 26, 1600	Treaſon	O. B.	Executed	vii. — 44
Leech	Oct. 14, 1682	Contempt	O. B.	Acquitted	x. Ap. — 31
Leighton, doctor	June 4, 1630	Libel	C. S.	Whipped, pilloried, branded, &c.	xi. — 120
Lewis	March 28, 1679	Treaſon	Aſſizes	Executed	xi. — 801
Lilburne, John	Feb. 9, 1637	Libels	C. S.	Pilloried, whipped, impriſoned, fined, & baniſhed	vii. — 286
	Oct. 24, 1649	Treaſon	G. H.	Acquitted	ii. — 19
	July 13, 1653	Return from baniſhment	H. Com.	Acquitted	vii. — 354
——, His Jury	Aug. 20, 1653			Examined	ii. — 81
Lilburne, Robert	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. — 394
Limerick	April 4, 1668	Treaſon	O. B.	Executed	ii. — 585
Lindſay	April 19, 1704	Treaſon		Reprieved	v. — 508
Liſle, lady	Aug. 27, 1685	Treaſon	Winton	Beheaded	iv. — 105
Lloyd, bp. of St. Aſaph	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
——, bp. of Worceſter	Nov. 18, 1702	Breach of privilege	H. Commons	Removed	viii. — 82
——, His Son	Nov. 18, 1702	The like	H. Commons	Proſecution ordered	viii. — 82
Lockton, king's ſerj. at law	March 2, 1388	Treaſon	Parliament	Baniſhed	i. — 13
Loff	May 8, 1701	Piracy	O. B.	Executed	v. — 287
Logan	June, 1609	Treaſon	Scotland	Attainted	vii. — 78
London, biſhop	Aug. 1686	Contempt	Eccleſ. Com.	Suſpended	iv. — 247
London, city	Hil. T. 1683	*Quo Warranto*	B. R.	Charter forfeited	iv. — 769
Lovat, lord	March 9, 1746-7	Treaſon	H. L.	Beheaded	ix. — *621
Love	June 20, 1651	Treaſon	H. C. J.	Beheaded	ii. — 83
Lowick	April 22, 1696	Treaſon	Weſtminſter	Executed	iv. — 718
Lumſden	Nov. 10, 1615	Miſdemeanour	O. B.	Reprieved	ii. — 993
——, Alexander	Jan. 17, 1679	Romiſh Prieſt	C. S.	Fined	i. — 333
M.					
Macclesfield, earl	May 6, 1725	High crimes	H. L.	Fined	vi. — 477
Macdaniel	March 1, 1755	Acceſſary before the fact	O. B.	Pilloried and impriſoned	x. — 417
Macdonald	Dec. 10, 1747	Treaſon	B. R.	Pardoned	ix. — 586
Macgrowther	July 31, 1746	Treaſon	Southwark	Reprieved	ix. — 566
Macguire, lord	Feb. 10, 1644	Treaſon	B. B.	Executed	i. — 949
Magdalen College	June 1637	Contempt	Eccleſiaſtical	Fellows expelled	iv. — 262
Maitland	July 28, 1681	Perjury	Scotland	Acquitted	viii. Ap. — 436
Markham, ſir Griffin	Nov. 15, 1603	Treaſon	Com. of *Oy* & *Term.*	Impriſoned	vii. — 63
Marſhal, William	July 13, 1679	Treaſon	O. B.	Acquitted	ii. — 917
	Jan. 17, 1679	Romiſh Prieſt	O. B.	Reprieved	ii. — 993
Marſon	July 16, 1699	Murder	B. R.	Acquitted	v. — 194
Marten, Harry	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. — 392
Matthews	Oct. 30, 1719	Treaſon	O. B.	Executed	ix. — 680
Mawgridge	July 1, 1706	Murder	O. B.	Executed	ixi 61
Mead, William	Sept. 1, 1670	Tumult	O. B.	Acquitted	ii. — 610
Merriam	Feb. 14, 1703-4	Aſſault, &c.	B. R.	Acquitted	viii. — 178
Merrick, ſir Gilly	March 5, 1600-1	Treaſon	Weſtminſter	Executed	i. 209 vii. 47
Meſſenger	April 4, 1668	Treaſon	O. B.	Executed	ii. — 585
Meyne	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. — 399
Millington	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. — 393
Mills	Jan. 16, 1748-9	Murder	Chicheſter	Executed	ix. — 716
Mitchel	Jan. 7, 1677	Attempt to murder	Scotland	Executed	ii. — 623
Moders, German princeſs	June 3, 1663	Bigamy	O. B.	Acquitted	ii. — 498
Mohun, lord	Jan. 31, 1692	Murder	H. L.	Acquitted	vii. — 510
	March 29, 1699	Murder	H. L.	Acquitted	v. — 180

THE ALPHABETICAL TABLE.

Names.	Dates.	Crimes or Causes of Action.	Courts or Places of Trial.	Punishments, &c.	Volumes.
Moncrief	Nov. 15, 1600	Treaſon	Scotland	Executed	vii. - 33
Money	E. Term, 1765	Falſe Impriſonment	C. B.	Damages	xi. - - 307
Monſon, ſir Thomas	Dec. 1, 1615	Murder	G. H.	Not tried	i. — 347
Mordaunt	June 1, 1658	Treaſon	H. C. J.	Acquitted	ii. — 292
More, lord chancellor	May 7, 1535	Treaſon	Com. of *Oy. & Term.*	Beheaded	i. — 59
Morgan	July 16, 1746	Treaſon	Southwark	Executed	ix. — 561
Morley, lord	April 30, 1666	Murder	High Steward	Diſcharged	vii. — 42
Morris, colonel	Aug. 16, 1649	Forgery	Parliament	Fined and impriſoned	vii. — 320
——, John	Sept. 21, 1747	Treaſon	Aſſizes	Executed	vii. — 317
Moſtyn, governor	T. Term, 1773	Baniſhment	Common Pleas	Damages	xi. — 162
Mullins	May 8, 1701	Piracy	O. B.	Executed	v. — 287
Munſon	July 17, 1679	Romiſh Prieſt	O. B.	Reprieved	ii. — 993
Murphy	Jan. 13, 1753	Forgery	O. B.	Executed	x. — 183
N.					
Nairn, lord	Feb. 9, 1715	Treaſon	H. L.	Pardoned	vi. — 1
Nairn, Katharine	Aug. 5, 1765	Inceſt and murder	Scotland	Eſcaped	x. — 479
Napper	Jan. 17, 1679	Romiſh Prieſt	O. B.	Reprieved	ii. — 993
Naylor	Dec. 1656	Blaſphemy	H. Commons	Whipped, pilloried, branded, &c.	ii. — 265
Nevil, archbiſhop of York	Feb. 3, 1388	Treaſon	H. L.	Eſcaped	i. — 1
Nithiſdale, earl	Feb. 9, 1715	Treaſon	H. L.	Eſcaped	vi. — 1
Norfolk, duke	Dec. 13, 1546	Treaſon	Weſtminſter	Saved	xi. — 18
	Jan. 16, 1571	Treaſon		Beheaded	i. - - 82
———, duke and ducheſs	Jan. 1691	Adultery	H. L.	Marriage diſſolved	viii. — 7
	Feb. 1699		Parliament	Divorced	v. — 239
Norkott	1628	Murder	Aſſizes	Executed	x. Ap. — 29
Norrys	May 1536	Treaſon	Commiſſioners	Beheaded	xi. - 10
Northampton, earl	Aug. 18, 1553	Treaſon	High Steward	Beheaded	xi. - - 26
Northumberland, duke	Aug. 18, 1553	Treaſon	High Steward	Beheaded	xi. — 26
O.					
Oates	June 18, 1684	Scand. mag.	B. R.	Damages	iii. — 987
	May 8, 1685	Perjury	B. R.	Pilloried, whipped, fined, &c.	iv. — 1
	May 9, 1685	Perjury	B. R.	Pilloried, whipped, fined, &c.	iv. — 66
Ogilvie, a Jeſuit	Feb. 28, 1615	Treaſon	Scotland	Executed	vii. — 95
———, Patrick	Aug. 5, 1765	Murder	Scotland	Executed	x. — 479
Okeman	1628	Murder	Aſſizes	Executed	x. Ap. — 29
Okey, colonel	April 16, 1660	Regicide	B. R.	Executed	viii. — 369
Oldcaſtle, lord Cobham	Sept. 23, 1413	Hereſy	Arch. of Canterbury	Hanged and burnt	i. — 36
Oneby	March, 1725-26	Murder	O. B.	Died in priſon	ix. — 14
Owen	May 8, 1701	Piracy	O. B.	Executed	x. Ap. — 196
Owens	July 6, 1752	Libel	G. H.	Acquitted	v. — 287
Orford, earl	Feb. 15, 1700-1	High crimes	H. L.	Acquitted	v. 339 viii. 512
Oxford, earl	June 24, 1717	Treaſon	H. L.	Acquitted	vi. — 102
P.					
Pain	June 20, 1682	Libel	G. H.	Fined	iii. — 505
Palmer, earl of Caſtlemaine	June 23, 1680	Treaſon	B. R.	Acquitted	iii. - 36
	Oct. 26, 1689	Treaſon	H. Commons	Bailed	iv. — 397
———, ſir Thomas	Aug. 19, 1553	Treaſon	Weſtminſter	Beheaded	xi. — 26
Papillon	Nov. 6, 1684	Falſe arreſt	G. H.	Damages, 10,000l.	iii. — 1072
Parham, ſir Edward	Nov. 15, 1603	Treaſon	Winton	Acquitted	vii. - - 63
Parris	Jan. 17, 1679	Romiſh Prieſt	O. B.	Reprieved	ii. — 993
Parrot	May 8, 1701	Piracy	O. B.	Executed	v. — 287
Parry	Feb. 25, 1584	Treaſon	Weſtminſter	Executed	i. — 121
Pemberton, ſir Francis J.K.B	July 1689	Breach of privilege	H. Commons	Impriſoned	viii. — 1
Pembroke, earl	April 4, 1678	Murder	H. L.	Diſcharged	ii. — 641
Penn	Sept. 1, 1670	Tumult	O. B.	Acquitted	ii. — 610
Pennington	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. — 391
Penruddock, colonel	April 19, 1655	Treaſon	Com. of *Oy. & Term.*	Beheaded	ii. - 259
Perkins, ſir William	March 24, 1695	Treaſon	O. B.	Executed	iv. — 627
Perrot, ſir John	April 27, 1592	Treaſon	Weſtminſter	Died in priſon	i. — 188
Perry	1661	Robbery	Aſſizes	Pardoned	x. Ap. 29
		Murder		Executed	x. Ap. 29, 30
Peterborough, biſhop	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
Peters	Oct. 13, 1660	Regicide	O. B.	Executed	ii. — 357
Pickering	Dec. 17, 1678	Treaſon	O. B.	Executed	ii. - 696
Pilkington	May 8, 1683	Riot	G. H.	Fined	ii. - - 630
Phillips	Dec. 11, 1662	Treaſon	O. B.	Executed	ii. — 478
Player, ſir Thomas	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. — 630
Plunket, John	May 1723	Treaſon	B. R.	Executed	iii. — 291
———, Oliver	June 8, 1681	Treaſonable conſpiracy	Parliament	Impriſoned	vi. — 335
Pordage, doctor	Sept. 1654	Inſufficiency	Commiſſioners	Ejected	ii. — 217
Porteous, captain	July 5, 1736	Murder	Scotland	Executed	vi. — 763
Porter	Dec. 10, 1684	Murder	O. B.	Pardoned	x. Ap. 74, n.
Portland, earl	1701	High crimes	H. L.	Acquitted	v. — 339
Potter	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. - 398
Powrie	June 13, 1567	Treaſon	Scotland	Executed,	viii. - 327
Poyntz	Sept. 21, 1647	Forgery	Parliament	Impriſoned and fined	vii. — 317
Prance	June 15, 1686	Perjury	King's Bench	Pilloried, whipped, &c.	viii. — 442, n.
Pratt	July 15, 1719	Collecting charity	Aſſizes	Fined	x. Ap. 86
——, biſhop of Rocheſter	1692	Treaſonable conſpiracy	Privy Council	No proſecution	viii. — 37
Preſſicks	July 24, 1680	Treaſon	Aſſizes	Acquitted	iii. — 79
Preſton, viſcount	Jan. 17, 1690	Treaſon	O. B.	Pardoned	iv. — 410
Price, Anne	Feb. 3, 1679	Subornation of perjury	B. R.	Fined	iii. - 1017
——, John	March 6, 1688	Treaſon	Ireland	Not tried	iv. - 401
Prieſt	Jan. 26, 1615	Sending a challenge	C. S.	Fine, commitment, &c.	xi. — 112
Prynn	Feb. 7, 1633	Libel	C. S.	Fined, mutilated, &c.	i. - 418
	June 14, 1637	Libel	C. S.	Pilloried, ears cut off, and impriſoned	i. - 481
Purchaſe	April 18, 1710	Treaſon	O. B.	Pardoned	viii. — 267
Q.					
Quelch	June 13, 1704	Piracy	New England	Executed	viii. — 205

THE ALPHABETICAL TABLE.

Names.	Dates.	Crimes or Causes of Action.	Courts or Places of Trial.	Punishments, &c.	Volumes.
R.					
Raleigh, ſir Walter	Nov. 17, 1603	Treaſon	Com. of *Oy* & *Term.*	Beheaded	i. - - 212
Rapley	July 20, 1681	Falſe return of writ	Aſſizes		viii. — 94 n.
Ratcliffe	Nov. 21, 1746	Treaſon	). B.	Beheaded	ix. - 582
Rea, lord, and Ramſay	1631	Appeal of treaſon	Chivalry	Duel prevented	xi. - - 124
Reading	April 24, 1679	Miſdemeanour	Com. of *Oy.* & *Term.*	Pilloried, fined, and impriſoned	ii. - - 806
Reaſon	Feb. 3, 1721	Murder	B. R.	Burnt in the hand	vi. - 196
Redding	July 15, 1742	Murder	O. B.		ix. - 315
Riccards, Arthur	May 2, 1684	Riot	B. R.	Fined	iii. - 949, 978
———, Samuel					
Richardſon	April 4, 1668	Treaſon	O. B.	Acquitted	ii. - 585
Ring	Oct. 19, 1685	Treaſon	O. B.	Reprieved	iv. - 130
Rocheſter, Atterbury, biſhop	May, 1723	Treaſonable conſpiracy	Parliament	Baniſhed	vi. - 335
———, Fiſher, biſhop	June 17, 1535	Treaſon	Weſtminſter	Beheaded	xi. - 7
———, Spratt, biſhop	1692	Reſtoration plot	Privy Council	Cleared	viii. - 37
Rocheforde, viſcount	May, 1536	Treaſon	High Steward	Beheaded	xi. - 10
Roe, Owen	Oct 16, 1660	Regicide	O. B.	Reprieved	ii. - 394
——, Richard	Oct. 31, 1695	Hab. Corp.	B. R.	Bailed	iv. - 554
Rogers	July 16, 1699	Murder	Aſſizes	Acquitted	v. - 194
Rookwood, Ambroſe	Jan. 27, 1605	Gunpowder plot	Weſtminſter	Executed	i. - - 232
	April 2, 1696	Treaſon	Weſtminſter	Executed	iv. - - 661
Roſewell	Nov. 18, 1684	Treaſon	B. R.	Pardoned	iii - 997
Rouſe	July 12, 1683	Treaſon	O. B.	Executed	iii. - 731
Rumley	July 18, 1679	Treaſon	O. B.	Acquitted	ii. - 917
Ruſſel, William	Jan. 17, 1679	Romiſh prieſt	O. B.	Reprieved	ii. - 993
——, lord	July 13, 1683	Treaſon	O. B.	Beheaded	iii. - - 700
Ruthven, Alexander	Nov. 15, 1600	Treaſon	Scotland	Attainted, &c.	vii. - 33
———, Henry	Nov. 15, 1600	Treaſon	Scotland	Executed, &c.	vii. - 33
S.					
Sacheverel, doctor	Feb. 27, 1709	High Crimes	H. L.	Silenced	v. - - 641
———, William	May 2, 1684	Riot	B. R.	Fined	iii. — 949
Saintjohn	April 15, 1615	Contempt	C. S.	Fined and impriſoned	xi. - 110
	May 29, 1630	Seditious writings	C. S.	Not proceeded in	xi. - - 121
Saliſbury, ſir John	March 12, 1588	Treaſon	Parliament	Executed	i. - 15
———, Mary	March 12, 1712-13	Murder	Aſſizes	Bailed	ix. - - 1
———, Thomas	Sept. 14, 1586	Treaſon	Weſtminſter	Executed	i. - - 128
Salmon, Francis	May 2 1684	Riot	B. R.	Fined	iii. - 949, 978
———, James	March 1, 1755	Acceſſary before the fact	O. B.	Pilloried and impriſoned	x. - - 417
Sancroft, archbiſhop	June 29, 1688	Libel	B. R.	Acquitted	iv. - 300
Sands, Thomas	M. Term. 1683	Infringement of charter	B. R.	Convicted	vii. - - 493
Sanquire, lord	June 27, 1612	Murder	B. R.	Executed	vii. - 86
Savage	Sept. 13, 1586	Treaſon	Weſtminſter	Executed	i. - - 128
Sayer, Mary	March 12, 1712-13	Petty treaſon	Aſſizes	Bailed	ix. - 1
Scots, queen	Oct. 12, 1586	Traitorous conſpiracy	Com. of *Oy* & *Term.*	Beheaded	i. - - 143
Scot	Oct. 12, 1660	Regicide	O. B.	Executed	ii. - 334
Scroggs, ſir Wm. L. C. J.	Nov. 13, 1680	High crimes	H. of Commons	Removed	iii. 479, 476
Scroop	Oct. 12, 1660	Regicide	O. B.	Executed	ii. - 334
Sedley, ſir Charles	M. Term, 1663	Miſdemeanour	B. R.	Impriſoned	x. Ap. - 94
Selden	1629	Hab. Corp.	B. R.	Fined and impriſoned	vii. - 217
———	May 29, 1630	Seditious writing	C. S.	Not proceeded in	xi. - 121
Sellers	Dec. 11, 1662	Treaſon	O. B.	Reprieved	ii. - - 478
Seymour, ſir Thomas	Feb. 25, 1549	Treaſon	Parliament	Beheaded	vii. - 1
Shafteſbury, earl	June 29, 1677	Hab. Corp.	B. R.	Remanded	ii. - - 616
	Nov. 24, 1681	Treaſon	O. B.	Bill thrown out	iii. - 418
Sherfield	Feb. 6, 1632	Miſdemeanour	C. S.	Fined	i. - 369
Sherwin	May 2, 1684	Riot	B. R.	Fined	.iii - 949, 978
Shirley, doctor	May, 1675	Breach of privilege	H. Com.	Impriſoned	vii. - 453
Shrewſbury, counteſs	T. Term, 1614	Contempt	B. R.	No judgment	xi. - 108
Shute	May 6, 1683	Riot	G. H.	Fined	iii. - 630
Sidney, colonel	Nov. 21, 1683	Treaſon	B. R.	Beheaded	iii. - 7 4
Simons	Dec. 10, 1751	Perjury	B. R.	Acquitted	x. - 411
	March 12, 1752	Miſdemeanour	Aſſizes	Special verdict	x. - 414
	July 12,	Miſdemeanour	Aſſizes	Acquitted	x — 416
Sindercome, alias Fiſh	Feb. 9, 1656	Treaſon	O. B.	Died in priſon	vii. - 371
Slingſby, ſir Henry	May 21, 1658	Treaſon	H. C. J.	Beheaded	ii. - 277
Smeton	May, 1536	Treaſon	Commiſſioners	Executed	xi. - - 10
Smith, Francis	Feb. 7, 1679	Libel	G. H.	Fined	ii. - - 1040
———, Henry	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. - - 395
———, Iſabel	Sept. 21, 1647,	Forgery	Parliament	Fined and impriſoned	vii. - - 317
———, Richard	1608	Aſſizes	B. R.	Diſſeiſed	xi. - 86
———, Richard	May 2, 1684	Riot	B. R.	Fined	iii. - 949, 978
———, Samuel					
———. William					
Snatt	April 3, 1696	Sedition	B. R.	Cenſured and impriſoned	x. Ap. - 43
Soame, ſir William	Nov. 12, 1674	Parl. election	Exchequer	Fine remitted	vii. - 428
	June, 1689		H. L.		
Somers, lord	Feb. 15, 1700-1	High crimes	H. L.	Acquitted	v. 339 viii. 512
Somerſet, duke	Jan 1550-1	Miſdemeanour & treaſon	Parliament	Fined and degraded	vii. - 12
	Dec. 1, 1551	Treaſon and felony	High Steward	Beheaded	vii. - - 15
———, earl	May 25, 1616	Murder	High Steward	Pardoned	i. - 351
	May 29, 1630	Seditious writings	C. S.	Not proceeded in	xi. - - 121
———, counteſs	May 24, 1616	Murder	High Steward	Pardoned	i. - - 348
———, James	1771	Habeas Corpus	B. R.	Diſcharged	xi. - 339
Southampton, earl	Feb. 19, 1600	Treaſon	High Steward	Reprieved	i. - 197
Sparkes	Feb. 7, 1633	Libel	C. S.	Cenſured	i. - 418
Speke	Feb. 7, 1683	Miſdemeanour	B. R.	Fined	iii. - - 855
Spottiſwood, ſir Robert	Nov. 1645	Treaſon	Scotland	Beheaded	v. - - 1
Sprot	Aug. 12, 1608	Treaſon	Scotland	Executed	i. - 310
Spurr	Nov. 25, 1702	Forcible marriage	B. R.	Acquitted	v. - - 465
Squires, Mary	Feb. 21, 1753	Robbery	O. B.	Pardoned	x. - 223
Stafford, viſcount	Nov. 30, 1680	Treaſon	H. L.	Beheaded	iii. — 101
Standsfield	Feb. 6, 1687	Parricide	Scotland	Executed	iv. - - 283
Stanley, ſir William	1494-5	Treaſon		Beheaded	xi. - 1
Stapleton, ſir Miles	June 18, 1681	Treaſon	Aſſizes	Acquitted	iii. — 317
Starkey	Jan. 17, 1679	Romiſh Prieſt	O. B.	Reprieved	ii. - 993
Stayley	Nov. 21, 1678	Treaſon	B. R.	Executed	iii. — 656
Stedman	June 3, 1663	Bigamy	O. B.	Acquitted	ii. — 498
Stephens	July 16, 1699	Murder	Aſſizes	Acquitted	v. — 194
Sterne	Feb. 28, 1681	Murder	O. B.	Executed	iii. — 462
Stevenſon	April 27, 1759	Murder	Aſſizes	Burnt in the hand	x. — 466

THE ALPHABETICAL TABLE.

Names.	Dates.	Crimes or Causes of Action.	Courts or Places of Trial.	Punishments, &c.	Volumes.
Steward, Archibald	June 8, 1747	Neglect of duty	Scotland	Acquitted	ix. — 587
———, James	Sept. 1752	Murder	Scotland	Executed	x. — 40
Stirling	Nov. 15, 1708	Treaſon	Scotland	Acquitted	v. — 630
Strafford, earl	March 22, 1640	Treaſon	H. L.	Beheaded	i. — 723
Streater, capt.	Nov. 1653	Hab. Corp.	U. B.	Diſcharged	ii. — 195
Strickland, Mary	Oct. 12, 1699	Forgery	O. B.	Fined and impriſoned	v. — 232
Stubbs	Dec. 11, 1662	Treaſon	O. B.	Executed	ii. — 478
Sudley, lord	Feb. 25, 1549	Treaſon	Parliament	Executed	vii. - 1
Suffolk, earl	Feb. 3, 1388	Treaſon	H. L.	Eſcaped	i. — 1
Surry, earl	Dec. 13, 1546	Treaſon	Weſtminſter	Beheaded	xi. — 18
Swan	March 1752	Petty Treaſon	Aſſizes	Executed	x. — 36
Swenſden	Nov. 25, 1702	Forcible marriage	B. R.	Executed	v. — 449
Swinock	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. — 630
T.					
Talbot	H. Term, 1614	Popery	C. S.	No judgment	xi. — 116
Tapner	Jan. 16, 1748-9	Murder	Aſſizes	Executed	ix. — 716
Taſborough	Feb. 3, 1679	Subornation of perjury	B. R.	Fined	ii. — 1017
Temple, James ———, Peter	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. — 398
Thompſon, Clerk	Dec. 24, 1680	High crimes	Parliament	Never tried	vii. — 491
————, Nathaniel	June 20, 1682	Libels	G. H.	Pilloried and fined	iii. - 505
Thorpe	July 3, 1407	Hereſy	ABp.	Impriſoned	i. — 16
Throckmorton, ſir Nicholas	April 17, 1554	Treaſon	G. H.	Acquitted	i. — 63
————, his Jury	Nov. 10,	Miſdemeanour	C. S.	Fined	i. — 78
Thwing	July 24, 1680	Treaſon	Aſſizes	Executed	iii. - 79
Tilney	Sept. 15, 1586	Treaſon	Weſtminſter	Executed	i. — 134
Titchburne, Chidiock	Sept. 14, 1586	Treaſon	Weſtminſter	Fxecuted	i. — 128
————, Robert	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. — 394
Tonge	Dec. 11, 1662	Treaſon	O. B.	Executed	ii. — 478
Townley	July 15, 1746	Treaſon	Com. of *Oy.* & *Term.*	Executed	xi. — 543
Tranter	Feb. 3, 1721	Murder	B. R.	Burnt in the hand	vi. — 195
Travers	Sept. 15, 1586	Treaſon	Weſtminſter	Executed	i. — 134
Trelawney, bp. of Rocheſter	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
Treſilian, Lord C. J.	Feb. 3, 1388	Treaſon	H. L.	Executed	i. — 1
Trigge, Thomas	May 2, 1684	Riot	B. R.	Fined	iii. — 948, 978
Turner, Anne	Nov. 7, 1615	Murder	B. R.	Executed	i. — 339
———, Anthony	June 13, 1679	Treaſon	O. B.	Executed, &c.	ii. — 829
———, biſhop of Ely	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
———, col.	Jan. 15, 1663	Burglary	O. B.	Executed	ii. — 502
Turpin, Joſeph	May 2, 1684	Riot	B. R.	Fined	iii. — 949, 978
Tutchin	Nov. 4, 1704	Libel	G. H.	No judgment	v. — 528
Twyn	Feb. 20, 1663	Treaſon	O. B.	Executed	ii. — 528
V.					
Valentine	1629	Hab. Corp.	B. R.	Remanded	vii. — 217
	M. Term, 1629	Sedition	B. R.	Fined and impriſoned	vii. — 242
Vane, ſir Henry	June 2, 1662	Treaſon	B. R.	Beheaded	ii. — 435
Vaughan, capt.	Nov. 6, 1696	Treaſon	O. B.	Executed	v. — 17
Uchiltrie, lord	Nov. 30, 1631	Slander	Scotland	Impriſoned	vii. — 260
Udal	July 24, 1590	Felony	Aſſizes	Pardoned	i. — 168
Vere, duke of Ireland	Feb. 3, 1388	Treaſon	H. L.	Eſcaped	i. - 1
Vincent, capt.	Oct. 8, 1702	Deſertion	Court-martial	Shot	i. — 168
Vowel	June 30, 1654	Treaſon	H. C. J.	Executed	ii. — 2 2
Vratz	Feb. 28, 1681	Murder	O. B.	Executed	iii. — 466
Uſke	March 8, 1388	Treaſon	Parliament	Executed	i. — 14
W.					
Wade, capt.	Oct. 8, 1702	Deſertion	Martial	Shot	v. — 445
Waite	Oct. 16, 1660	Regicide	O. B.	Reprieved	ii. — 398
Wakeman, ſir Geo.	July 18, 1679	Treaſon	O. B.	Acquitted	ii. — 917
Walcot	July 12, 1683	Treaſon	O. B.	Executed	iii. — 684
Waller, ſir Hardreſs	Oct. 10, 1660	Regicide	O. B.	Reprieved	ii. — 308
Walters	June 1, 1688	Murder	O. B.	No judgment	vii. — 648
Ward, ſir Patience	May 19, 1683	Perjury	B. R.	No judgment	iii. — 661
Warwick, earl	Aug. 18, 1553	Treaſon	High Steward	Beheaded	xi. — 26
	March 28, 1699	Murder	H. L.	Diſcharged	v. — 137
Watſon, James	E. Term, 1765	Falſe impriſonment	C. B.	Damages	xi. — 307
———, William	Nov. 15, 1603	Treaſon	Com. of *Oy.* & *Term.*	Executed	vii. — 63
Wedderburne, ſir John	Nov. 4, 1746	Treaſon	Com. of *Oy.* & *Term.*	Executed	ix. — 580
Wells, Suſannah	Feb. 21, 1753	Robbery	O. B.		x. — 224
Wentworth, ſir John	Nov. 10, 1615	Traducing public juſtice	C. S.	Fined, impriſoned, &c.	i. — 333
Weſton, Richard	Oct. 19, 1615	Murder	G. H.	Executed	i. — 324
————, ſir Francis	May 1536	Treaſon	Commiſſioners	Beheaded	xi. — 10
Wharton	Feb. 9, 1637	Libel	C. S.	Fined, pilloried, &c.	vii. — 286
White, bp. of Peterborough	June 29, 1688	Libel	B. R.	Acquitted	iv. — 304
Whitebread	Dec. 17, 1678	Treaſon	O. B.	Jury diſcharged of him	ii. — 696
————	June 13, 1679	Treaſon	O. B.	Executed	ii. — 829
Whitelocke	June 1613	Contempt	C. S.		xi. - 106
Wiat, ſir Thomas	March 13, 1554-5	Treaſon	Weſtminſter	Executed	vii. — 325
Wickham	May 8, 1683	Riot	*Niſi Prius*	Fined	iii. — 630
Wickſtone	Feb. 13, 1588	Sedition	C. S.	Impriſoned and fined	vii. — 29
Widdrington, lord	Feb. 9, 1715	Treaſon	H. L.	Pardoned	vi. — 1
Wilkes	E. Term, 1763	Hab. Corp.	C. B.	Diſcharged	xi. — 302
	M. Term, 1764 H. Term, 1770	Seditious libel Blaſphemous libel	B. R.	Fined, &c.	xi. — 324
Wilks	April 4, 1668	Treaſon	B. R.	Acquitted	ii. — 585
Williams	March 22, 1638	Murder	B. R.		ix. 63, 534, n.
Willis	April 18, 1710	Treaſon	B. R.	Acquitted	viii. — 250
Wilſon, William	May 2, 1684	Riot	B. R.	Fined	iii. — 949, 978
Winter, Robert ———, Thomas	Jan. 27, 1605	Gunpowder plot	Weſtminſter	Executed	i. — 232
Wintoun, earl	March 15, 1715	Treaſon	H. L.	Eſcaped	vi. — 17
Woodburn	March 13, 1721	Maiming	Aſſizes	Executed	iv. — 212
Woodward	April 14, 1668	Treaſon	O. B.	Acquitted	ii. — 585
Worceſter, Lloyd, bp. of	June 29, 1688	Libel	B. R.	Acquitted	iv. — 305
	1702	Breach of privilege	H. Commons	Removed	viii. — 82
Wraynham	E. Term, 1618	Slander	C. S.	Cenſured	vii. — 102
Wright	Jan. 26, 1615	Carrying a challenge	C. S.	Commitment, &c.	xi. — 112
Y.					
York, Archbiſhop	Feb. 3, 1388	Treaſon	H. L.	Eſcaped	i. — 1
Z.					
Zenger	Aug. 4, 1735	Libel	New-York	Acquitted	ix. — 276

A

CHRONOLOGICAL TABLE

OF THE

DATES OF THE TRIALS.

TO WHICH ARE ADDED,

The NAMES of the PRISONERS or PRINCIPAL PARTIES in the ſeveral TRIALS; the CRIMES or CAUSES of ACTION; the COURTS or PLACES of TRIAL; the PUNISHMENTS, JUDGMENTS, or EVENTS of the ſeveral PROSECUTIONS; with REFERENCES to the VOLUMES in which the TRIALS or PROCEEDINGS are reſpectively contained.

Dates.	Names.	Crimes or Cauſes of Action.	Courts or Places of Trial.	Puniſhments, &c.	Volumes.
	RICHARD THE SECOND.				
1388. 11 Rich. II.	Archbiſhop of York	Treaſon	H. L.	Eſcaped	i. — 1
	Duke of Ireland			Eſcaped	
	Earl of Suffolk			Eſcaped	
	L. C. J. of England			Executed	
	Mayor of London & others			Executed	
	HENRY THE FOURTH.				
1407. 8 Hen. IV.	William Thorpe	Hereſy	Archbiſhop	Impriſoned	i. — 16
	HENRY THE FIFTH.				
1413. 1 Hen. V.	Lord Cobham	Hereſy	Archbiſhop	Executed and burnt	i. — 36
	HENRY THE SEVENTH.				
1494-5. 10 Hen. VII.	Sir William Stanley	Treaſon		Beheaded	xi. — 1
	HENRY THE EIGHTH.				
1509. 1 Hen. VIII.	Sir Thomas Empſon Edmund Dudley	Treaſon	Northampton	Beheaded	xi. — 3
1522. 13 Hen. VIII.	Duke of Buckingham	Treaſon	High Steward	Beheaded	xi. — 4
1535. 26 Hen. VIII.	Lord Chancellor More	Treaſon	Commiſſioners	Beheaded	i. — 59
	Biſhop of Rocheſter	Treaſon	Com. of *Oy.* & *Term.*	Beheaded	xi. — 7
	Lord Dacres	Treaſon	High Steward	Acquitted	ix. — 10
1536. 27 Hen. VIII.	Queen Anne Boleyn	Treaſon	High Steward	Beheaded	xi. — 10
	Viſcount Rocheforde	Treaſon	High Steward	Beheaded	xi. — 10
	Henry Norrys	Treaſon	Com. of *Oy.* & *Term.*	Beheaded	xi. — 10
	Mark Smeton			Hanged	
	William Brereton			Beheaded	
	Sir Francis Weſton			Beheaded	
1540. 33 Hen. VIII.	Lord Grey	Treaſon	Weſtminſter	Attainted	xi. — 17
1541. 33 Hen. VIII.	Sir Edmund Knevet	Striking in the palace	Commiſſioners	Pardoned	xi. — 16
1546. 37 Hen. VIII.	Earl Surry	Treaſon	Com. *Oy.* & *Term.*	Executed	xi. — 18
	Duke of Norfolk	Treaſon	Attainted	Saved	xi. — 18
	EDWARD THE SIXTH.				
1549. 2 & 3 Edw. VI.	Lord Sudley	Treaſon	Parliament	Executed	vii. — 1
1550. 3 & 4 Edw. VI.	Duke of Somerſet	Treaſon, &c.	Parliament	Pardoned	vii. — 12
1551. 4 & 5 Edw. VI.		Treaſon and felony	High Steward	Beheaded	vii. — 15
	QUEEN MARY.				
1553. 1 Mary	Duke of Northumberland Marquis of Northampton Earl of Warwick	Treaſon	High Steward	Beheaded	xi. — 26
	Sir John Gates Henry Gates Sir Andrew Dudley Sir Thomas Palmer	Treaſon	Weſtminſter	Beheaded	xi. — 26
	Sir Nicholas Throckmorton	Treaſon	Commiſſioners	Acquitted	i. — 63, 78
1554. 1 Mary	Sir Thomas Wiat	Treaſon	Weſtminſter	Arraigned only	vii. — 325
	QUEEN ELIZABETH.				
1567. 9 Eliz.	William Powrie	Treaſon	Scotland	Executed	viii. — 327
	George Dalgleiſh				viii. — 328
	John Hay				viii. — 329
	John Hepburn			Examined	viii. — 332
	Nicholas Hubert				viii. — 332

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DATES.	NAMES.	CRIMES OR CAUSES OF ACTION.	COURTS OR PLACES OF TRIAL.	PUNISHMENTS, &c.	VOLUMES.
	QUEEN ELIZABETH.				
1567. 9 Eliz.	Earl Bothwell	Treaſon and regicide	Commiſſioners	Acquitted	i. — 78
1571. 14 Eliz.	Duke of Norfolk	Treaſon	High Steward	Beheaded	i. 82 viii. 335
	Robert Hickford	Hereſy	Queen's Bench	No judgment	i. — 117
1584. 26 Eliz.	William Parry, L. D.	Treaſon	Commiſſioners	Executed	i. — 121
1586. 28 Eliz.	Mary Queen of Scots	Traitorous conſpiracy	Commiſſioners	Beheaded	i. — 145
	Anthony Babington	Treaſon	Com. of *Oy.* & *Term.*	Executed	i. — 128
	Chidiock Titchburne				
	Thomas Saliſbury				
	Robert Barnewell				
	John Savage				
	Henry Donn				
	John Ballard				
	Edward Abington	Treaſon	Commiſſioners	Executed	i. — 134
	Charles Tilney				
	Edward Jones				
	John Travers				
	John Charnock				
	Jerome Bellamy				
	Robert Gage				
1587. 30 Eliz.	Daviſon	Contempt	C. S.	Fined	vii. — 19
1588. 31 Eliz.	Sir Richard Knightley	Sedition	C. S.	Fined	vii. — 30
1589. 31 Eliz.	Earl of Arundel	Treaſon	High Steward	Died in priſon	i. 164 xi. 27
1590. 32 Eliz.	John Udall, clerk	Felony	Judges of aſſize	Pardoned	i. — 168
1592. 34 Eliz.	Sir John Perrot	Treaſon	Commiſſioners	Died in priſon	i. — 188
1599. 41 Eliz.	Brains	Appeal of murder	O. B.	Executed	ix. — 536, n.
1600. 43 Eliz.	Earls Eſſex & Southampton	Treaſon	High Steward	Beheaded	i. — 196
	Sir Chriſtopher Blunt	Treaſon	Commiſſioners	Beheaded	i. 209 vii. 47
	Sir Charles Davers			Beheaded	
	Sir John Davis			Executed	
	Sir Gilly Merrick			Executed	
	Henry Cuffe			Executed	
	Earl Gowrie	Treaſon	Edinburgh	Executed	vii. — 33
	Alexander Ruthven				
	Henry Ruthven				
	Hugh Moncrief				
	Peter Eviot				
	Captain Lee	Treaſon	O. B.	Executed	vii. — 44
	JAMES THE FIRST.				
1603. 1 & 2 Jac. I.	Sir Walter Raleigh	Treaſon	Commiſſioners	Beheaded	i. 212 viii. 339
	Sir Griffin Markham	Treaſon		Reprieved	vii. — 63
	Sir Edward Parham		Winton	Acquitted	vii. — 63
	George Brooke			Executed	
	Bartholemew Brookeſby		Commiſſioners	Reprieved	vii: — 63
	Anthony Copley			Executed	vii. — 63
	William Watſon			Executed	
	William Clarke			Executed	
1604. 2 & 3 Jac. I.	Sir Francis Goodwin	Parliamentary election	H. Commons	New writ	vii. - - 67
	Richard Bates	Refuſing to pay duty	Exchequer		ix. — 29
1605. 3 & 4 Jac. I.	Robert Winter	Gunpowder plot	Commiſſioners	Executed	i. - 232
	Thomas Winter				
	Guy Fawkes				
	John Grant				
	Ambroſe Rookwood				
	Robert Keyes				
	Thomas Bates				
	Sir Everard Digby				
1606. 4 & 5 Jac. I.	Henry Garnet	Gunpowder plot	Commiſſioners	Executed	i. — 248
1607. 5 & 6 Jac. I.	Robert Lalor	Romiſh Prieſt	Ireland	Premunire	xi. — 69
1608. 6 & 7 Jac. I.	Richard Smith	An aſſize	B. R.	Diſſeiſin	xi. — 86
	George Sprot	Treaſon	Scotland	Executed	i. — 310
1609. 7 & 8 Jac. I.	Robert Logan	Treaſonable conſpiracy	Scotland	Attainted	vii. — 78
	Lord Balmerino	Treaſon	Scotland	Pardoned	vii. — 85
1612. 10 & 11 Jac. I.	Lord Sanquire	Murder	King's Bench	Executed	vii. — 86
	James Whitelocke	Contempt	C. S.		xi. - 106
	Counteſs of Shrewſbury	Contempt	C. S.		xi. — 108
1613. 11 & 12 Jac. I.	William Talbot	Popery	C. S.		xi. — 116
	Earl and Counteſs of Eſſex	Impotency	Delegates	Divorced	i. — 315, n.
1615. 13 & 14 Jac. I.	Richard Weſton	Murder	Commiſſioners	Executed	i. — 324
	John Ogilvie	Treaſon	Scotland		vii. — 95
	Oliver St. John	Miſdemeanour	C. S.	Fined	xi. — 110
	Sir John Hollis	Traducing public juſtice	Star-chamber	Impriſoned and fined	i. - 333
	Sir John Wentworth				
	Mr Lumſden				
	Sir Jervis Elwes	Murder	G. H.	Executed	i. - - 341
	James Franklin	Murder	King's Bench	Executed	i. - 346
	William Prieſt	Sending a challenge	C. S.	Fined, &c.	xi. - 112
	Sir Thomas Monſon	Murder	King's Bench	Arraigned only	i. — 347
	Richard Wright	Carrying a challenge	C. S.	Fined, &c.	xi. — 112
1616. 14 & 15 Jac. I.	Counteſs of Somerſet	Murder	High Steward	Pardoned	i. — 348
	Earl of Somerſet	Murder	High Steward	Pardoned	i. — 351
1618. 16 & 17 Jac. I.	Wraynham	Slander	C. S.	Cenſured	vii. — 102
1620. 18 & 19 Jac. I.	Lord Chancellor Bacon	Bribery and corruption	Parliament	Fined, &c.	i. — 375

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DATES.	NAMES.	CRIMES or CAUSES of ACTION.	COURTS or PLACES of TRIAL.	PUNISHMENTS, &c.	VOLUMES.
	CHARLES THE FIRST.				
1627. 3 Car. I.	Sir Thomas Darnel Sir John Corbet Sir Walter Earl Sir John Heveningham Sir Edmund Hampden	Hab. Corp.	King's Bench	Remanded	vii. —— 114
1628. 4 Car. I.	Holloway	Murder	O. B.	Executed	ix. — 532,533
1629. 5 Car. I.	William Stroud Walter Long John Selden	Hab. Corp.	King's Bench	Remanded	vii. - 217
	Richard Chambers	Seditious ſpeeches	C. S.	Impriſoned	xi. — 118
	Sir John Elliot Denzil Hollis Benjamin Valentine	Seditious ſpeeches in Parl.	King's Bench	Commitment	vii. - 242
1630. 6 Car. I.	Lord Uchiltrie	Calumny	Edinburgh	Perpetual impriſonment	vii. - 259
	Doctor Leighton	Libel	C. S.	Whipped, pilloried, &c.	xi. - - 120
	Earl Bedford Earl Clare Earl Somerſet Sir Robert Cotton John Selden Oliver St. John	Seditious writing	C. S.	Proceedings ſtayed	xi. — 121
1631. 7 Car. I.	Lord Audley	Rape and ſodomy	High Steward	Beheaded	i. 385 vi. Ap. 5
	Laurence Fitzpatrick Giles Broadway	Rape and ſodomy	King's Bench	Executed	i. — 396
	Lord Rea and Dav. Ramſay	Appeal of treaſon	Chivalry	No combat	xi. - 124
1632. 8 Car. I.	Henry Sherfield	Breaking church window	Star-chamber	Commitment, &c.	i. — 399
1632-3. 9 Car. I.	William Prynn Michael Sparkes William Buckner	Libel	Star-chamber	Impriſoned, pilloried, &c. Pilloried, fined, &c. Impriſoned and fined	i. - - 418
	Sir Thomas Layton Sir David Fowlis Henry Fowlis	Traducing of ſtate	Star-chamber	Diſmiſſed Fine, commitment, &c. Commitment and fine	xi. — 131
1634. 10 Car. I.	Lord Balmerino	Libel	Scotland	Pardoned	i. - - 429
1637. 13 Car. I.	John Baſtwick, M. D. Henry Burton William Prynn	Libel	Star-chamber	Loſs of ears, fine, &c. The ſame The ſame and ſtigmatiſed	i. — 481
	John Hampden	Ship-money	Exchequer	Judgment	i. 505 vi. Ap. 5
	John Lilburne John Wharton	Sedition	C. S.		vii. — 285
1638. 14 Car. I.	Thomas Harriſon, clerk	Reflecting on a judge	King's Bench	Fined 50,000l. &c.	i. 720 vi. Ap. 10
	David Williams	Murder	O. B.	Burnt in the hand	xi. — 534 n.
2640. 16 Car. I.	Earl Strafford	Treaſon	H. L.	Beheaded	i. - - 723
	Lord Keeper Finch	Treaſon	Parliament	Fled	vii. — 309
1643. 19 Car. I.	Colonel Fiennes	Cowardice	Council of war	Pardoned	i. — 766
	Archbiſhop Laud	Treaſon	H. L.	Beheaded	i. - - 824
1644. 20 Car. I.	Lord Macguire	Treaſon	King's Bench	Executed	i. 949 viii. 341
	Sir Robert Spotiſwood	Treaſon	Scotland	Beheaded	i. — 961
1645. 21 Car. I. 1647. 23 Car. I.	John Morris, alias Poyntz, and his wife Iſabel Smith Leonard Darby John Harris	Forgery	H. L.	Fine and impriſonment	vii. — 317
1648. 24 Car. I.	Charles, king of England	Treaſon	H. C. of Juſtice	Beheaded	i. — 986
	CHARLES THE SECOND.				
1648. 1 Car. II.	Duke of Hamilton	Treaſon	H. C. of Juſtice	Beheaded	ii. - - 1
1649. 2 Car. II.	Colonel Lilburne	Treaſon	Com. of *Oy.* & *Term.*	Acquitted	ii. - 19
1650. 3 Car. II.	Colonel Morris	Treaſon	Juſtices of Aſſize	Executed	vii. - 320
	Colonel Andrews	Treaſon	H. C. of Juſtice	Beheaded	vii. — 323
1651. 4 Car. II.	Chriſtopher Love	Treaſon	H. C. of Juſtice	Beheaded	ii. - - 83
	John Gibbons	Treaſon	H. C. of Juſtice	Beheaded	ii. - 183
1652. 5 Car. II.	Richard Faulconer	Perjury	King's Bench	Commitment	vii. - 343
1653. 6 Car. II.	Captain Streater	Hab. Corp.	Upper Bench	Diſcharged	ii. - 195
	John Lilburne	Return from baniſhment	O. B.	Acquitted	vii. - 354
	———, his jury	Miſdemeanour	Council of State	Examined	ii. - 81
1654. 7 Car. II.	John Gerhard Peter Vowell Somerſet Fox	Treaſon	H. C. J.	Beheaded Executed Reprieved	ii. 211 viii. 366 ii. 211 viii. 365 ii. - - 211
	John Pordage, D. D.	Inſufficiency	Commiſſioners	Ejected	ii. - 259
	John Penruddock	Treaſon	Com. of *Oy.* & *Term.*	Beheaded	ix. - 534, n.
1655. 8 Car. II.	Buckner	Murder	O. B.	Burnt in the hand	vii. - - 371
1656. 9 Car. II.	James Nayler	Blaſphemy	H. of Commons	Tongue bored, &c.	ii. - - 266
	Miles Sindercome	Treaſon	Upper Bench	Died in priſon	vii. - - 371

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DATES.	NAMES.	CRIMES OR CAUSES OF ACTION.	COURTS OR PLACES OF TRIAL.	PUNISHMENTS, &c.	VOLUMES.
1658. 11 Car. II.	Sir Henry Slingſby	Treaſon	H. C. J.	Beheaded	ii. - 278
	John Hewet, D. D.	Treaſon	H. C. J.	Beheaded	ii. - 282
	John Mordaunt	Treaſon	H. C. J.	Diſmiſſed	ii. - 291
1660. 12 Car. II.	Sir Hardreſs Waller	Regicides	Com. of *Oy.* & *Term.*		- - 307
	Thomas Harriſon			Executed	- 308, 313
	William Heveningham				- 308, 396
	Iſaac Pennington			Reprieved	- 309, 390
	Henry Marten				- 309, 390
	Adrian Scroop			Executed	- 310, 324
	Gilbert Millington				- 310, 390
	Robert Tichburne			Reprieved	- 310, 390
	Owen Roe				- 310, 390
	Robert Lilburne				- 310, 399
	George Fleetwood				- 311
1660. 12 Car. II.	John Carew			Executed	- 311, 330
	Thomas Scot			Executed	- 311, 334
	Gregory Clement			Executed	- 311, 338
	John Jones			Executed	- 311, 339
	John Cook			Executed	- 311, 341
	Francis Hacker			Executed	- 311, 382
	Edmund Harvey	Regicides	Com. of *Oy.* & *Term.*		- 311, 390
	Henry Smith				- 311, 390
	John Downes				- 311, 390, 396
	Vincent Potter				- . 311, 390
	Auguſtine Garland			Reprieved	- 311, 390, 396
	Simon Meyne				- 311, 390, 396
	James Temple				- 311, 390, 396
	Hugh Peters			Executed	- 312, 357,
	Daniel Axtell			Executed	- 312, 369
	Peter Temple			Reprieved	- 312, 390, 396
	Thomas Waite			Reprieved	- 312, 390, 396
	William Hulet				- 369, 385
	Colonel Okey	Attainted		Executed	- 307 viii. 369
	Miles Corbet	Attainted		Executed	- 337 viii. 369
	Colonel Barkſtead	Attainted		Executed	- 307 viii. 369
1661. 13 Car. II.	Marquis of Argyle	Treaſon	Scotland	Beheaded	ii. 418 viii. 379
1662. 14 Car. II.	Sir Henry Vane	Treaſon	King's Bench	Beheaded	ii. — 435
	John Crook Iſaac Grey John Bolton	Refuſing oaths	Com. of *Oy.* & *Term.*	Impriſoned	ii. 463 vi. Ap. 11
	John James	Treaſon	King's Bench	Executed	ii. — 470
	Thomas Tonge George Phillips Francis Stubbs James Hind John Sellers Nathaniel Gibbs	Treaſon	Com. of *Oy.* & *Term.*	Executed	ii. — 478
1663. 15 Car. II.	Mary Moders	Bigamy	O. B.	Acquitted	ii. — 498
	Earl of Clarendon	Treaſon, &c.	Parliament	Baniſhed	viii. - 381
	Colonel John William } Turner Mary Ely	Felony and burglary	O. B.	Executed Acquitted Acquitted Acquitted	ii. 550, 554 viii. 387 ii. - 502
1664. 16 Car. II.	John Twyn	Treaſon	O. B.	Sentenced	ii. 527 viii. 386
	Thomas Brewſter Simon Dover Nathan Brooks	Sedition	O. B.	Each fined, pilloried, &c.	ii. - 527
	Benjamin Keach	Libel	Judges of Aſſize	Impriſoned, fined, &c.	ii. - 550
1666. 18 Car. II.	Lord Morley	Murder	High Steward	Diſcharged	vii. — 421
	John Grey	Murder	O. B.	Pardoned	xi. — 533
1668. 20 Car. II.	Peter Meſſenger	Treaſon	C. of Gaol Delivery	Executed	ii. - - 586
	Richard Beaſley			Executed	
	William Green			Diſcharged	
	Thomas Appletree			Pardoned	
	John Earles			Acquitted	
	William Wilks			Acquitted	
	William Ford			Acquitted	
	Richard Farrel			Acquitted	
	Edward Cotton			Executed	
	Edward Boodle			Diſcharged	
	Richard Latimer			Pardoned	
	John Sharpleſs			No evidence	
	Richard Woodward			Acquitted	
	Thomas Limerick			Executed	
	John Richardſon			Acquitted	
	Robert Hawkins Clerk	Felony	Judges of Aſſize	Acquitted	ii. — 595
1670. 22 Car. II.	William Penn William Mead	Tumult	O. B.	Acquitted	ii. - - 610

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Dates.	Names.	Crimes or Causes of Action.	Courts or Places of Trial.	Punishments, &c.	Volumes.
			King's Bench	Damages	vii. - 427, 433
1674. 26 Car. II.	Sir Samuel Barnardiſton	Parl. Election	Exchequer	Judgment reverſed	vii. - 431
			H. of Lords	Reverſal affirmed	vii. - 451
1675. 27 Car. II.	Doctor Shirley	Breach of Privilege	H. of Commons	Taken into cuſtody	vii. - 453
1676. 28 Car. II.	Francis Jenks	Seditious Speeches	Privy Council	Commitment	vii. - 467
1677. 29 Car. II.	Earl of Shafteſbury	Hab. Corp.	King's Bench	Remanded	ii. - 610
	James Mitchel	Attempt to murder	Scotland	Executed	ii. - 623
1678. 30 Car. II.	Earl Pembroke	Murder	H. of Lords	Diſcharged	ii. - - 641
	William Stayley	Treaſon	King's Bench	Fxecuted	i. 656 viii. 439
	Edward Coleman	Treaſon	King's Bench	Executed	i. - 660
	T. White, alias Whitebread			Jury diſcharged of him	
	William Ireland			Executed	
	John Fenwick	Treaſon	O. B.	Jury diſcharged of him	ii. - - 696
	Thomas Pickering			Executed	
	John Grove			Executed	ii. 696 viii. 440
	Lord Cornwallis	Murder	High Steward	Diſcharged	ii. — 726
	Earl Danby	Treaſon, &c.	Parliament	Pardoned	ii. - 7322
					ii. 760 vi. 12
1678. 31 Car. II.	Robert Green				viii. — 441
	Henry Berry	Murder	King's Bench	Executed	ii. 760 viii. 44
	Lawrence Hill				
	Samuel Atkins	Acceſſary to murder	King's Bench	Acquitted	ii. 791 viii. 443
1679. 31 Car. II.		Treaſon	Judge of Aſſize	Executed	ii. — 801
	David Lewis	Miſdemeanour	Com. of *Oy.* & *Term.*	Fined and pilloried	ii. - 806
	Nathaniel Reading				
	T. White, alias Whitebread				
	William Harcourt	Treaſon	Com. of *Oy.* & *Term.*	Executed	ii. - 830
	John Fenwick				
	John Gavan				
	Anthony Turner				
	Richard Langhorn	Treaſon	Com. of *Oy.* & *Term.*	Executed	ii. — 878
	Lord Chief Juſtice Scroggs	High Miſdemeanours	Privy Council	Diſmiſſed	vii. — 476
	Sir George Wakeman				
	William Marſhal	Treaſon	O. B.	Acquitted	ii. 917 viii. 453
	William Rumley				
	James Corker				
	Charles Kerne	Treaſon	Judges of Aſſize	Not guilty	ii. - 961
	Thomas Knox	Miſdemeanours	King's Bench	Impriſoned and fined	ii. - 971
	John Lane			Pilloried, fined, &c.	
	Leo. Anderſon, alias Munſon				
	Wm. Ruſſel, alias Napper				
	Charles Parris, alias Parry	Treaſon	O. B.	Sentenced	ii. — 994
	Henry Starkey				
	James Corker				
	William Marſhal				
	Alexander Lumſden				
	Joſeph Kemiſh				
	John Taſborough	Subornation of Perjury	King's Bench	Fined	ii. 1018 vi. Ap. 12
	Anne Price			Sentenced	ii. — 1038
	Benjamin Harris	Libel	G. H.	Fined	ii. 1039 vi. Ap. 13
	Francis Smith	Libel	G. H.	Found guilty	ii. — 1042
	Jane Curtis	Libel	G. H.	Not guilty	iii. — 1
	Sir Thomas Gaſcoigne	Treaſon	King's Bench	Not guilty	iii. — 31
	Eliz. Collier	Treaſon	King's Bench	Not guilty	iii. — 35
1680. 32 Car. II.	Earl Caſtlemaine	Treaſon	King's Bench	Guilty	iii. — 58
	Henry Carr	Libel	G. H.	Pilloried, fined, &c.	iii. — 66
	John Giles	Attempt to murder	O. B.	Ordered to be impeached	vii. — 491
	Richard Thompſon, Clerk	Complaints	Parliament	Executed	iii. 80, 89 viii. 459
	Thomas Thwing	Treaſon	Aſſizes	Not guilty	iii. 90 vi. Ap. 14
	Mary Preſſicks	Treaſon	Aſſizes	Fined, pilloried, &c.	iii. — 102
	Eliz. Collier	Libel	O. B.	Beheaded	vii. — 479
	Viſcount Stafford	Treaſon	H. L.	Removed	iii. 225, 263
	Lord Chief Juſtice Scroggs	Treaſon	Parliament	Executed	iii. - 293
1681. 33 Car. II.	Edward Fitzharris	Treaſon	King's Bench	Executed	iii. — 317
	Oliver Plunket, D. D.	Treaſon	King's Bench	Not guilty	iii. - 328
	Sir Miles Stapleton	Treaſon	Aſſizes	Sentenced	iii. — 341
	George Buſby	Romiſh Prieſt	Aſſizes	Executed	iii. — 413
	Stephen Colledge	Treaſon	Com. of *Oy.* & *Term.*	Fined	iii. — 418
	Slingſby Bethel	Aſſault and Battery	Southwark	No bill	iii. — 442
	Earl of Shafteſbury	Treaſon	O. B.	Beheaded	
	Earl Argyle	Treaſon	Scotland		
	George Boroſky	Murder	O. B.	Executed, &c.	iii. — 466
	Chriſtopher Vratz			Executed	
	John Stern			Executed, &c.	
	Count Conningſmark			Not guilty	
	William Rapley	Falſe return of Parl. writ	Aſſizes	Damages	viii. — 94, n.
	Charles Maitland	Perjury	Edinburgh	Not proſecuted	viii: 436
1682. 34 Car. II.	Earl Danby	Hab. Corp.	King's Bench	Remanded	ii. 742, 754
	Nathaniel Thompſon	Libel	G. H.	Pilloried, fined, &c.	iii. — 506
	William Pain			Fined	
	John Farewell			Pilloried, &c.	
	Lord Grey	Miſdemeanour	King's Bench	No judgment	i. 519 vi. Ap. 15
	Robert Charnock				
	Anne Charnock				

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NAMES.	DATES.	CRIMES OR CAUSES OF ACTION.	COURTS OR PLACES OF TRIAL.	PUNISHMENTS, &c.	VOLUMES.
	CHARLES THE SECOND.				
1683. 35 Car. II.	David Jones Frances Jones Rebecca Jones	Miſdemeanour	King's Bench	No judgment	i. 519 vi. Ap. 15
	City of London	Uſurpation of Franchiſe	King's Bench	Forfeiture of charter	iii. 545 vi. Ap. 16
	Thomas Pilkington Samuel Shute Henry Corniſh Ford Lord Grey Sir Thomas Player Slingſby Bethel Francis Jenks John Deagle Richard Freeman Richard Goodenough Robert Key John Wickham Samuel Swinock	Riot	*Niſi Prius*	Fined	iii. 630 vi. Ap. 40
	John Jekyll				iii. - - 662
1683. 35 Car. II.	Sir Patience Ward	Perjury	King's Bench	No judgment	iii 684 vi. Ap.42
	Captain Thomas Walcot	Treaſon	O. B.	Executed	iii. - 706
	William Hone	Treaſon	O. B.	Executed	iii. 706, 755, 766
	Lord Ruſſel	Treaſon	O. B.	Beheaded	viii. 464, 471, 471 vii. - 496
	Thomas Sandys	Infringement of Charter	King's Bench	Damages	iii. - 731
	John Rouſe	Treaſon	O. B.	Executed	iii. - 739
	William Blague	Treaſon	O. B.	Not guilty	iii. 793 vi. Ap. 45
	Colonel Sidney	Treaſon	King's Bench	Beheaded	viii. 469, 471, 476 iii. 824 vi. Ap. 45
1684. 36 Car. II.	John Hampden	Miſdemeanour	King's Bench	Fined and ſureties, &c.	iii. 856 vi. Ap. 46
	Lawrence Braddon Hugh Speke	Miſdemeanour	King's Bench	Fined and ſureties, &c.	iii. 933 vi. Ap. 46
	Sir Samuel Barnardiſton	Miſdemeanour	*Niſi Prius*	Fined and ſureties, &c.	iii. - 943
	James Holloway	Treaſon	King's Bench	Executed	
	William Sacheverel George Gregory Charles Hutchinſon John Greaves William Greaves Samuel Richards Robert Green Francis Salmon Arthur Riccards Ralph Bennet John Sherwin William Wilſon Samuel Smith Thomas Trigg Richard Smith John Hoe William Smith Joſeph Turpin Nathaniel Charnel Joſeph Aſtlin	Riot	King's Bench	Fined and ſecurity	iii. — 949, 978
	Sir Thomas Armſtrong	Treaſon	King's Bench	Executed, &c.	iii. 983 viii. 470
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1701-2. 14 W. III.	Patrick Hurley	Perjury and Conſpiracy	Ireland	Fined	v. — 389
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	Colonel Kirkby	Breach of Articles of War	Jamaica	Shot	v. — 446
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	John Spurr			Acquitted	
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	David Lindſay	Treaſon	O. B.	Reprieved	v. 508 vi. 60
	Captain Quelch	Piracy	Boſton	Executed	viii. 204, 217, 218
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1710. 9 Anne.	Daniel Damaree	Treaſon	O. B.	Pardoned	viii. - 218
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	George Purchaſe			Pardoned	viii. - - 267
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	Mary Saliſbury	Murder	Aſſizes	Acquitted	
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	Lord Widdrington			Pardoned	
	Earl Nithiſdale			Eſcaped	
	Earl Carnwath			Pardoned	
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1717. 4 Geo. I.	Earl Orford	Treaſon, &c.	H. L.	Act of Grace	vi. - 102
1718. 5 Geo. I.	Major Bonnet and others	Piracy	Charleſtown	Executed	vi. - 156
1719. 6 Geo. I.	Jeffery Gilbert, Lord C. B.	Breach of Privilege	Ireland	Taken into cuſtody	vi. - 188
	John Matthews	Treaſonable Libel	O. B.	Executed	ix. - - 680
	William Hendley, Clerk	Preaching charity ſermon	Aſſizes	Fined	x. Ap. - 86
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	John Woodburne	Maiming	Aſſizes	Executed	vi. 212 vi. Ap. 60
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1723. 10 Geo. I.	John Plunket	Treaſonable Conſpiracy	Parliament	Impriſoned	vi. - - 390
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1723-4. 10 Geo. I.	Edward Arnold	Shooting at & wounding	Aſſizes	Execution reſpited	viii. - 290
1725. 10 Geo. I.	Earl Macclesfield	High Crimes	H. L.	Fined	vi. - 477
1725-6. 11 Geo. I.	Major Oneby	Murder	O. B.	Deſtroyed himſelf	ix. - 14
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1736. 9 Geo. II.	Captain Porteous	Murder	Scotland	Executed	vi. — 763
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1743. 16 Geo. II.	Alexander Broadfoot	Murder	Briſtol	Manſlaughter	xi. — 349
	Earl Angleſea	Ejectment	Ireland	Verdict againſt him	ix. — 380
	William Chetwynd	Murder	Com. of *Oy. & Term.*	Pardoned	ix. — 527
1744. 17 Geo. II.	Earl Angleſea	Aſſault	Ireland	Fined	ix. — 336
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1746. 19 Geo. II.	Francis Townley	Treaſon	Special Commiſ.	Executed, &c.	ix. — 543 552
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1746-7.	Lord Lovat	Treaſon	H. P.	Executed	ix. 616* x. Ap. 188
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	William Owen	Libel	King's Bench	Acquitted	x. Ap. 196
	James Stewart	Murder	Scotland	Executed, &c.	x. — 40
1753. 26 Geo. II.	John Barbot	Murder	St. Chriſtopher's	Executed	x. — 139
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1764. 4 Geo. III.		Seditious Libel	King's Bench	Fined, impriſoned, &c.	xi. - 324
1765. 5 Geo. III.	John Money James Watſon Robert Blackmore	Falſe Impriſonment	King's Bench	Damages	xi. — 307
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The heralds and purſuivants with their coats diſplayed (after ſound of trumpet) publickly, in face of court, conform to the cuſtom of *Scotland* in ſentences of treaſon; and in purſuance thereto, in his majeſty's name and by his authority, cancel, tear, and deſtroy the traytor's arms, throw them in his face, trample them under foot, and ordain his arms to be expunged out of the books of heraldry, his poſterity to be ignoble and never to enjoy honour or dignity. They then go to the market-croſs of *Edinburgh*, and ſolemnly tear and cancel the

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* *BEAUCHAMP, JOHN*, i. 15. See *BRAMBRE.*

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* *BELKNAP*, Sir *ROBERT*, Lord Chief Juſtice, C. B.

Was arreſted ſitting in his place, immediately removed from his office, and ſent priſoner to the *Tower* i. 5 and n.

Tried for high-treaſon, *Feb.* 3, 1388, 11 *Rich.* II. i. 14

Confeſſes, and begs mercy i. 8. n. 14

Life ſaved, but tranſported to the village of *Dromore*, in *Ireland*, with the yearly allowance of 40l. during life, not to live as a juſtice, but as a baniſhed offender, and not to go out of town above the ſpace of two miles, upon pain of death i. 14 and n. vii. 229

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Another charge was for ſaying openly in court, "that there was a rule of law, and a rule of government; and that many things which might not be done by the rule of law, might be done by the rule of government." i. 711. See *ASHLEY*, Sir *FRANCIS*, Serjeant at Law. See alſo ii. 209. vii. 250.

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Proceedings againſt him, *Counter*, *Blackburn*, *Caſſels*, *Chambers*, and *Meldrum*, on account of the aſſaſſination plot, in king *William*'s reign x. 64. Ap.

Theſe proceedings were wrote by the major, after he had been confined a ſtate priſoner thirty-three years in *Newgate* x. 64. Ap.

Hiſtory of *Bernardi*'s life x. 64. Ap.

Served in the *Dutch* wars, loſt an eye at the ſiege of *Maeſtricht*, and ſhot through the arm x. 64. Ap.

Went to king *James* II. at *St. Germains*, and then ſent to *Ireland* x. 65. Ap.

Afterwards to *Scotland*, where he had like to have been ſeized x. 65. Ap.

Came to *London*, ſet out for *Flanders*, ſeized at *Colcheſter* x. 65. Ap.

Remained in cuſtody ſeven months, then admitted to bail x. 66. Ap.

Grand jury of *Eſſex* returned the bill againſt him *Ignoramus* x. 66. Ap.

Met captain *Rookwood*, and ſeized with him x. 67. Ap.

A proclamation, with 1000l. reward, came out againſt him; committed to *Newgate* x. 67. Ap.

Act of parliament to confine them all x. 67. Ap.

On the ſuſpenſion of the *hab. corp.* act expiring, *Blackburn*, who was alſo a cloſe priſoner in *Newgate* on account of the aſſaſſination conſpiracy, entered his prayer, at the then next ſeſſions and term, to be tried or admitted to bail; and he was bailed out and diſcharged x. 68. Ap.

Bernardi, *Counter*, *Caſſels*, *Meldrum*, and *Chambers*, make ſeveral motions by their counſel, in different reigns, to be diſcharged, but never could ſucceed x. 68. Ap.

Blackburn, after being bailed out and diſcharged, was taken up again upon the ſame account, and ſent again to _Newgate_ x. 68, 69. Ap.
Chambers, being brought up by _hab. corp._ to the court of _King's-Bench_, having entered his prayer in order to be bailed, but one of his bail refuſing to ſwear himſelf worth 500l. was remanded to _Newgate_, where he remained till his death x. 69, 71. Ap.
Captain _Counter_ was releaſed by queen _Anne_ x. 69, 71. Ap.
Meldrum died in priſon x. 71. Ap.
Bernardi's commitment to _Newgate_ by earl _Shrewſbury_, without oath x. 71. Ap.
His ſeveral petitions to the king and queen x. 71, 72. Ap.
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Bernardi died in _Newgate_ at the age of 82, after having been a ſtate priſoner above 40 years x. 76. Ap.

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* Where any queſtion in point of law ariſes, it ought to be put in the priſoner's preſence ii. 729
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* A priſoner ſhall not have any inſtruction from counſel in writing, or otherwiſe, for the management of his defence in capital caſes iii. 263
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Sir *Robert Atkyns* always thought it a ſeverity in our law, that a priſoner for his life is not allowed the aſſiſtance of a lawyer to make his defence for him, even as to fact as well as law; he knew it is ſaid, the court is of counſel for the priſoner; but for his part, he ſhould never deſire to depend upon that only; he knew what it was by experience iii. 758. See iv. 130, 174.
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Andrews, *Euſebius*
Aſhley, ſir *Francis*, ſerjeant at law
Atwood, *William*
Churchill, ſir *John*
Cowper, *Spencer*
Denton, *Thomas*
Heath, ſir *Robert*
Hudſon, *William*
Layer, *Chriſtopher*
Lechmere, *Nicholas*
Morgan, *David*
Mountague, *James*
Page, *Francis*
Peck, *Edward*
Pemberton, *Francis*, ſerjeant at law
Porter, *Charles*
Prynne, *William*
Reading, *Nathaniel*
Rotheram, *Thomas*
Saunders, *Edmund*
Sherfield, *Henry*
Wallop, *Richard*
Whitelock, *James*
Williams, *William*.

See their reſpective Names. EVIDENCE. *HAMILTON*, Duke of. KING's COUNSEL. *RUSSELL* Lord. *STRAFFORD*, Earl of.

COUNTER, JAMES. See *BERNARDI JOHN.*

COURT of the LORD HIGH STEWARDS of *ENGLAND* for the TRIAL of PEERS of this Realm.

The lord high ſteward after verdict given may take time to adviſe for any point of law; and though his office continues till judgment, it is but a commiſſion *pro hâc vice* notwithſtanding. *So reſolved by all the Judges.* i. 388

The lord high ſteward, when he ſits by commiſſion, has no vote iv. 211, 233

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During a prorogation the proceedings are always by commiſſion, before the lord high ſteward iv. 213

The lord high ſteward is ſole judge, and need not adviſe with the peers about the method or order of trial, or about a plea to the juriſdiction iv. 211, 215, 233. x. 209

All queſtions to be directed to and propounded by the lord high ſteward, in this court iv. 216

Queſtion to the judges, whether court can legally adjourn after evidence given iv. 231

The lords cannot legally adjourn or ſeparate after evidence given, till they have given a verdict, they being in nature of a jury in this court iv. 231, 232

The lords triers can aſk no queſtions of the lord ſteward in priſoner's abſence, nor can he withdraw with them iv. 232

It is not uſual for the lord high ſteward to repeat or obſerve upon the evidence iv. 246

If error be committed in the proceedings of this court, they ſhall be reverſed by error in the court of *King's-Bench* vii. 248

The diſtinction between the proceedings in the court of the high ſteward, and that before the king in parliament x. 209. Ap.

Reſolutions of all the judges of *England* in reſpect of the proceedings in this court:

1. That in this court the peers are the triers vii. 421
2. That the former are to attend upon the letter of the lord high ſteward in their ſcarlet robes, and the chiefs in their collars of *S. S.* vii. 421
3. That in caſe, after the evidence given, the priſoner withdrawn, and the peers gone to conſult of their verdict, they ſhould ſend for them, if the lord ſteward requires it, they are to go to them; but not to deliver any opinion without conference, and only openly in court vii. 421
4. That if the lord ſteward ſhould in open court demand any of their opinions, though in the abſence of the priſoner, they were to give it vii. 421
5. That the demand of any queſtion is referred to the direction of the high-ſteward vii. 421

Peers who have preſided in this court.

Buckhurſt, Thomas lord i. 197

Clarendon, Henry earl of vii. 422

Coventry, Thomas lord i. 390

Derby, Henry earl of i. 164. xi. 27

Elleſmere, Thomas lord i. 348, 351

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Norfolk, Thomas duke of xi. 5, 10, 12, 26

Nottingham, Heneage earl of ii. 725

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Arundel, Philip earl of i. 64. xi. 27

Audley, Mervin lord i. 390

Buckingham, Edward duke of xi. 4

Cornwallis, Charles lord ii. 725

Dacres, William lord xi. 10

Delamere, Henry lord iv. 211

Eſſex Robert, Southampton Henry, earls of i. 197

Morley, Thomas lord vii. 422

Norfolk, Thomas duke of i. 82

Northampton, William marquis of xi. 26

Northumberland, John duke of xi. 26

Somerſet, Robert earl of i. 351

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Lord Abbot complained that *Hugh Courtney*, chief juſtice, had confederated to give judgment againſt him; and the abbot, becauſe a lord, eſcaped puniſhment vii. 108

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* Caſes of cowardice i. 816. See *CONSTABLE JOHN. FIENNES NATHANIEL. FOGG CHRISTOPHER. KIRBY RICHARD. VINCENT SAMUEL. WADE COOPER.*

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His argument in maintenance of the ſecond article in the impeachment exhibited by the commons to the lords, againſt *Henry Sacheverel*, D. D. for preaching ſeditiouſly v. 691

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* The indictment for ſtrangling and murdering mrs. *Sarah Stout* v. 194

* The priſoners agree to join in their challenges; and are tried together v. 195

* The counſel for the king having challenged a juror, and the pannel being gone through, and there wanting jurors, mr. *Cowper* deſired the counſel for the king might ſhew their cauſe of challenge v. 195

* Mr. baron *Hatſell* was of opinion, the king's counſel ought to ſhew cauſe; but mr. *Cowper* not inſiſting on it, another was ſworn v. 195

* Mr. *Jones* opens the evidence v. 196

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* Evidence that Mr. *Cowper* was laſt in the deceaſed's company v. 197

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The infant and its mother demand the writ from the ſheriff, who was fined 200 marks for delivering it viii. 487

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* He was indicted together with *Knightley, Lowick*, and *Rookwood*, for the aſſaſſination; but beſides the overt-acts they were charged with, he was particularly charged with carrying a liſt of the conſpirators names from one to another iv. 661

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* The priſoner's irons ordered to be taken off during the trial. iv. 698

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* Captain *Porter*'s evidence of the priſoner's carrying a liſt of the conſpirators from the one to the other iv. 707
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No ſtatute of jeofail extends to criminal caſes viii. 58. See ADULTERY. MURDER. THEFT.

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It ſeems, that facts alledged as proof of inceſt would not be admitted as proof of *crim. con.* to entitle the huſband to damage on an action of treſpaſs x. 518. n.
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This puniſhment was formerly greatly dreaded, but now, from the abuſe of it, ſlighted and deſpiſed *Em.* Pref. iii.

*EXECUTIONS.

* Three gentlemen tried and fined for tampering with a priſoner at the place of execution i. 333
The trumpets were ordered to ſound, to prevent ſir *Henry Vane* being heard on his addreſſing the people on the ſcaffold, juſt previous to his execution ii. 461. See ii. 640
Execution Dock, the uſual place for the execution of pirates v. 18
Writ for the execution of ſir *John Fenwick*, in *Latin* v. 136
An account of what paſſed at the execution of ſir *William Parkyns* and ſir *John Friend*, on their being abſolved at *Tyburn* x. 43. Ap.
Mr. ſheriff *Janſſen* commended for refuſing the aſſiſtance of the military in the execution of criminals xi. 282
In foreign countries, magiſtrate always preſent at execution of ſentence, and gives directions *Em.* Pref. xii.
After a traitor had been hung ſix minutes, he was cut down, and having life in him as he lay upon the block to be quartered, the executioner gave him ſeveral blows on the breaſt; which not having the deſired effect, he immediately cut his throat; after which he took his head off, then ripped him open, and took out his bowels and heart, and threw them into a fire which conſumed them; then he ſlaſhed his four quarters ix. 552
A traitor was cut down and bowelled with great cruelty while he was alive; another was taken down from the gallows alive too, and cut up; a third broke the rope, and fell down from the gallows, and was preſently ſeized on by the executioner, his privities cut off, and his bowels taken out while he was alive; four others were executed with equal cruelty i. 141
Queen *Elizabeth* being informed of the ſeverity uſed in the above executions, and deteſting ſuch cruelty, gave expreſs orders for more favourable uſage; and accordingly other traitors were permitted to hang till they were quite dead, before they were cut down and bowelled i. 142
One of the regicides was cut down alive; for after he was opened, he mounted himſelf, and gave the executioner a box on the ear ii. 407, 408
One of the ſheriff's men, by orders, brought a regicide, that he might ſee another who had been juſt cut down and brought to be quartered; and the hangman came to him all beſmeared in blood, and rubbing his bloody hands together, tauntingly aſked him how he liked this work ii. 413
Execution in different county to that wherein crime was committed i. 197, 209, 211, 227. vi. 332. x. 378
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A parricide was thus executed in *Scotland*; he was hanged on a gibbet till dead; his tongue cut out and burnt upon a ſcaffold; his right hand cut off and affixed on a public place; and his body hung in chains iv. 304
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* One convicted of felony for impugning the queen's authority in cauſes eccleſiaſtical i. 176
* The perſon proſtituting his body in ſodomy, held guilty of felony i. 396
* If the king kills a man, 'tis no felony in him i. 104
* Felony may be tried in any county whither the thief carries the ſtolen goods iv. 349. v. 524
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FELTON, JOHN,

Though he ſtabbed a prime miniſter in the execution of an high commiſſion, and though he confeſſed the fact both before the council and court of *King's-Bench*, and juſtified it as a public ſervice to the nation, in the moſt daring and impious manner, he was yet brought to trial, without ſuperſeding any of the ordinary methods and circumſtances of juſtice vi. 408. See CONSCIENCE.

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* The introduction, ſhewing how the bill of attainder came to be brought in v. 40
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* He inſiſts that they ſhould ſecure him that his confeſſion ſhould not be made uſe of againſt him; which they decline v. 40
* He deſires time to recollect himſelf, which they refuſe him; and vote a bill of attainder v. 41
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* Counſel and ſolicitor aſſigned ſir *John* v. 42
* Agreed that the ſerjeant with the mace ſhould ſtand by the priſoner at the bar during the hearing v. 43
* The bill read v. 44
* Mr. ſerjeant *Gould* opens the charge in the indictment, and ſhews the methods uſed by ſir *John* to protract his trial v. 44
* Mr. ſerjeant *Lovel*, recorder, ſhews the nature of their evidence v. 45
* Sir *John*'s counſel deſire time for their defence v. 46
* And are allowed till the *Monday* following v. 57
* Reſolved, that the counſel for the bill may examine witneſſes as to the treaſons contained in the indictment, as well as to the allegations in the bill v. 57
* The indictment againſt ſir *John* read v. 58
* *Porter* produced, to prove the facts laid v. 58
* Sir *John*'s counſel oppoſe *Porter*'s being examined as to my lady *Fenwick*'s practiſing with him about his evidence; for that what the wife ſays or does can be no evidence for or againſt her huſband v. 59
* And for that there was no ſuggeſtion in the bill, of *Porter*'s being tampered with by ſir *John* himſelf v. 60
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* Sir *John*'s counſel oppoſe the calling a grand juryman to give an account of the evidence *Goodman* gave, to induce them to find the bill againſt ſir *John* v. 72
* Which is over-ruled without debate v. 72
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* What is ſworn againſt the priſoner at the trial of another, is no evidence againſt him v. 73
* But a priſoner may make uſe of what was ſworn at another trial in his defence v. 74

* Reſolved, that the record of *Cook*'s conviction be read v. 76
* Sir *John*'s counſel oppoſe the calling a juryman to depoſe what evidence *Goodman* gave at *Cook*'s trial v. 76
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He does not agree that *Forteſcue* was ever lord chancellor of *England* i. 683
Lord *Finch* procured the opinions of the judges, in the caſe of ſhip-money, by ſolicitation; and they were injoined ſecrecy by him, on his procuring their hands to them; theſe he delivered to the king; by his procurement, a letter was directed from his majeſty to the judges for their delivering their opinions i. 700, 706
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* His arraignment in the *King's Bench* for high-treaſon; with his plea, and the counſel's argument thereon, in *Eaſter* term, 1681, 33 *Car.* II. iii. 224
* Proceedings in parliament relating to him iii. 224. See vi. 408
* The grand jury doubt whether one who is impeached for high-treaſon may be indicted for it iii. 227
* The court reſolve that he might be indicted, though the commons had impeached him generally; and voted he ſhould not be tried by any inferior court iii. 228
* The indictment read iii. 228
* *Fitz-harris* offers a plea in paper, that he is impeached for the ſame treaſon iii. 228
* The court aſſign him counſel, and give him time to amend his plea iii. 229
* A rule made, that his counſel and his wife might come to him iii. 230
* He is examined concerning the murder of *Godfrey* iii. 230
* *Fitz-harris* puts in another plea to the juriſdiction of the court iii. 234
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* He ſhews there was no precedent of the king's counſel being put to demur in a capital caſe before iii. 235

* Mr. attorney demurs to the plea iii. 237
* The priſoner joins in demurrer iii. 237
* Time is given the priſoner's counſel to maintain the plea iii. 240
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* He doubts if the king can pardon one impeached iii. 242
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* The chief juſtice, mr. juſtice *Jones*, and mr. juſtice *Raymond*, of opinion the plea was inſufficient; mr. juſtice *Dolben* doubted iii. 261
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* The priſoner pleads not guilty iii. 261
* He has time to prepare for his trial till next term iii. 262
* *Fitz-harris* brought upon his trial in *Trinity-Term*, *June* 9, 1681 iii. 263. See iv. 165
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* The indictment for a treaſonable libel, called "The true *Engliſhman* ſpeaking plain *Engliſh*" iii. 265
* Mr. *Heath* opens the indictment iii. 266
* Mr. attorney opens the evidence iii. 267
* The king's witneſſes called iii. 267
* Evidence that *Fitz-harris* prompted *Everard* to write the pamphlet iii. 267
* Papers delivered to the priſoner in court; which the king's counſel object to iii. 269, 272
* *Smith* ſwears he over-heard *Fitz-harris* dictate to *Everard* iii. 270
* Which is confirmed by ſir *William Waller* iii. 272
* The priſoner calls his witneſſes iii. 277
* *Oates* depoſes that *Everard* ſaid this was a deſign of the court, and the libel was to be conveyed into the Whigs pockets iii. 277
* Evidence that ſir *William Waller* ſaid, the king was in a great paſſion with him, and ſaid, he had broken all his meaſures by diſcovering *Fitz-harris* iii. 278
* A petition of mrs. *Fitz-harris* to his majeſty, and the king's letter to the duke of *Ormond* concerning them, read in court iii. 280
* Lord *Howard*'s evidence iii. 280
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* The ducheſs of *Portſmouth* ſubpœnaed by the priſoner as a witneſs; ſhe is deſired to ſtand up while ſhe gives her evidence iii. 283
* Mr. *Fitz-harris* enters upon his defence; complains of his cloſe confinement, that he had not an opportunity of preparing for his defence; intimates that his witneſſes concealed their knowledge; and affirms that the money he received of the government was for ſecret ſervice, and not in charity, as the witneſſes depoſed iii. 283
* Mr. ſolicitor ſums up the evidence; he takes notice, that the priſoner's defence conſiſted in ſome inſinuations that he compoſed this libel by the king's directions iii. 284
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* He ſhews the improbability that the king ſhould be in a deſign to blacken his *own* family, and incite a rebellion againſt himſelf iii. 287
* The jury doubt whether they may try this matter, the commons having voted that it ſhould not be tried by any inferior court iii. 288
* But the court tell them, they are only to try the fact. As to the plea to the juriſdiction, that is the buſineſs of the court, and they have determined that matter already iii. 288
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* Mr. ſolicitor moves for judgment; but the court tell him, they will take time for that iii. 289
* Sentence paſſed upon the priſoner iii. 290
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* Another writ, of the ſame date, to the ſheriff of *Middleſex*, to receive *Fitz-harris*, and cauſe him to be executed according to the ſentence iii. 291
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* *FLEETWOOD, GEORGE* ii. 302. See REGICIDES.
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* *GREAVES, WILLIAM* iii. 978. See *SACHEVEREL WILLIAM.*

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Mr. *Hoffman*'s letter to ordinary of *Newgate* concerning *Gregg*, with the anſwer x. 82. Ap.

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* *GREY, FORD* Lord,

* *Robert Charnock*, *Ann Charnock*, *David Jones*, *Frances Jones*, and *Rebecca Jones*, their trial on an information by the attorney-general, for a miſdemeanour, in ſeducing and carrying away the lady *Henrietta Berkeley*, from her father the earl of *Berkeley*, being under 18 years of age, and under his government, and ſoliciting her to commit adultery with the ſaid lord *Grey*, 34 *Car.* II. 1682 iii. 519

* Sir *Robert Sawyer*, attorney-general, and mr. *Finch*, ſolicitor-general, open the evidence iii. 520, 521

* Evidence of lady *Arabella Berkeley* iii. 522

* And of the counteſs of *Berkeley* iii. 523

* Evidence of lady *Harriet*'s being moved from place to place iii. 527

* Mr. *Williams*'s ſpeech for the defendants iii. 533

* Lord *Grey*'s own account of the affair iii. 535

* My lord *Grey* committed till he produced the lady *Henrietta* iii. 535

* The lady *Henrietta* admitted to be ſworn as a witneſs in this cauſe, though it was ſtrongly oppoſed by the king's counſel, her evidence tending to excuſe her unlawful love, &c. iii. 539

* She denies upon her oath that ever my lord *Grey* adviſed her to, or had any hand in her eſcape, or knew any thing of it iii. 539

* Lady *Henrietta* being aſked who aſſiſted her to make her eſcape, it is ruled by the court, that if he was no party to the information, ſhe was not bound to diſcover him; for though one is ſworn to ſpeak the whole truth, that is to be underſtood only in relation to the point in iſſue iii. 540

* And ruled, that if the court will aſk her no queſtions, ſhe is not to tell a ſtory of herſelf iii. 540

* The chief juſtice, in ſumming up the evidence, tells the jury, the charge was double. (1.) The ſoliciting the lady to unlawful love. (2.) The carrying her away from her father, under whoſe tuition ſhe was iii. 541

* There having been a writ *de homine replegiando* iſſued againſt my lord *Grey* for the lady *Henrietta*, ſhe is examined in court whether ſhe is under any reſtraint iii. 543

* To which ſhe anſwering, ſhe was not, the lord chief juſtice orders her to be delivered to her father the lord *Berkeley* iii. 543

* Whereupon ſhe affirmed ſhe was married to one *Turner*; and judge *Dolben* held, they could not diſpoſe of another man's wife iii. 544

* My lord *Grey*'s counſel inſiſts on his being diſcharged from his impriſonment, the lady being produced; to which the court agreed. *Per cur.* no judgment could be given that term, there being not four days left iii. 543

* Mr. juſtice *Dolben* queſtions whether the court had power to commit my lord *Grey* on the *homine replegiando*, he being a peer iii. 543

* The perſon eſſoigned is properly the plaintiff in a *homine replegiando*; and the court directed my lord *Grey* ſhould give ſecurity to anſwer the lady's ſuit upon that writ iii. 543

* Which he did, and is admitted to bail iii. 543

* The lord *Berkeley* demands his daughter again; and there being a ſcuffle about her in the hall, the chief juſtice ordered a tipſtaff to carry her and *Turner*, her pretended huſband, to the *King's-Bench*: but the laſt day of the term the court ordered her to be diſcharged iii. 544

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* One may be indicted and tried here for treaſon committed in *Ireland* iii. 293

* Facts may be proved to be done either before or after the time laid in the indictment iii. 394

* The indictment interpreted to alien priſoners in their own language iii. 467

* Where the priſoner apprehends the indictment to be vicious, he muſt either plead ſpecially, or demur to it before he pleads the general iſſue iii. 795, 796

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* If a man commit treaſon in ſeveral counties, he may be indicted in any of them; and the facts committed in every county may be given in evidence iv. 640

* The grand jury need not find according to the bill preſented them; but may preſent the bare matter of fact to the court, who will put it into form: and there needs no *billa vera* to be indorſed; for that ſignifies no more than owning what the court has drawn up iv. 670

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* No exceptions can be taken to an indictment after a jury ſworn, by virtue of 7 *W.* III. chap. 3. iv. 677

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INQUISITION in the *EXCHEQUER.* See *BATHURST CHARLES.*

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Mr. ſolicitor-general *Yorke* obſerved on earl *Ferrers*'s trial, that in ſome ſenſe every crime proceeds from inſanity; all cruelty, all brutality, all revenge, all injuſtice, is inſanity; that there were philoſophers in ancient times who held this opinion as a ſtrict maxim of their ſect, which opinion is right in philoſophy, but dangerous in judicature; it may have an uſeful and noble influence to regulate the conduct of men, to controul their impotent paſſions, to teach them that virtue is the perfection of reaſon, as reaſon itſelf is the perfection of human nature; but not to extenuate crimes, nor to excuſe thoſe puniſhments which the law adjudges to be their due x. *513. See *ARNOLD EDWARD. BATEMAN CHARLES. BRADSHAW JAMES. FERRERS* Earl of. LUNATIC. MADMAN. *NON COMPOS MENTIS.*

* INSURRECTION. See TREASON.

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Reſolved by all the judges, that on a trial by peers, the priſoner cannot challenge any that are returned on his jury vii. 421. See RESOLUTION of all the JUDGES of ENGLAND.

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Of the diſcretion of judges in inflicting the puniſhments of fine, impriſonment, pillory, or whipping *Em.* Pref. xi.

By a law in one of the wiſeſt of the *Grecian* governments, no man bred up to merchandize ſhould be admitted into any office of judicature, till he had quitted that employment ten years at leaſt vi. 596

The judges not in ſcarlet on the duke of *Hamilton*'s trial ii. 16

The judges in 1571 and 1662, complimented iii. 775

A quotation from lord *Bacon*'s "Advancement of Learning" concerning the judges iii. 763

Judges of 10 *Rich.* II. proſecuted i. 1

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Judges aſſuming to themſelves a legiſlative power, formerly held high-treaſon vii. 489

The judges of *Car.* II. illegally and partially impoſed fines on offenders favouring papiſts vii. 483

Reſolved by all the judges, that act 4 *Hen.* VIII. chap. 8. concerning *Richard Strode*, was a particular act of parliament vii. 217

Anſwers of the judges to ſome queſtions put to them, concerning offences committed by members of parliament in parliament vii. 218

Where the judges agree, the lord chief juſtice gives the opinion of the court, and in matters of moment, he uſually gives the reaſon vii. 6

The judges are accounted the fathers of the law i. 199, 510. vii. 303

The judges ought not to give their opinion before-hand, of any criminal caſe that may come before them judicially ii. 36. n. 439. v. 747, 748

The judges ſpeak upon their oaths, and therefore muſt deliver their judgments according to their conſciences i. 638. ii. 466

The judges muſt not give their judgments according to policy, or rules of ſtate, nor convenience, but only according to law ii. 466

Mr. baron *Gregor* ſworn as a witneſs in a cauſe vii. 580, 597

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Diſcretion of judges in inflicting puniſhment on ſmall crimes and miſdemeanours, defined *Em.* Pref. xi.

Judges not to give counſel to priſoners i. 171, 189

The opinion of the major part of them is conſidered as the act of the whole court i. 646

A great deal of blood was ſhed by judges governed by *James* II.'s evil counſellors, againſt all law, the perſons ſuffering not being allowed to plead in their own defence v. 749

If a man, according to ſincerity, give judgment, though he differs from another judge, it is no injuſtice vii. 109. See *DYER* ſir *JAMES.*

Judges commiſſion at *New-York* v. 421. ix. 280

Judges ſhould beware of hard conſtructions and ſtrained inferences x. 56. n.

The judges were ſecretly aſked their opinion reſpecting ſir *Edward Hale*'s proſecution; and ſuch as were not for the court were turned out vii. 616. n.

Some of the above judges were weak and ignorant to a ſcandal vii. 616. n.

They gave judgment for ſir *Edward* without argument, as of courſe vii. 616. n.

The judges of the court of *King's-Bench*, 26 *Car.* II. were a ſet of as learned judges as ever were before or ſince viii. 109

The judges concurred in opinion, that the approbation of the marriages of the king's grand-children, and alſo of the preſumptive heir to the crown, in whatever degree related to the king, belonged to his majeſty; but to what other branches of the royal family this prerogative extended, they could not aſcertain xi. 295

Lord chancellor *Elleſmere* ſays, that power and might of ſome potent perſons oppreſſed juſtice and faithful judges in *Richard* the ſecond's time, for expounding the law ſoundly and truly xi. 99, 101

Formerly the judges in caſes of doubt or difficulty conſulted the privy-council xi. 101

The judges are a kind of council of the king's by oath and ancient inſtitution xi. 112

Three judges were of opinion, that the lord keeper was bound to give judgment according to the opinions of the majority of judges by him called to his aſſiſtance; but ſeven judges (and among them lord chief juſtice *Holt*), that he was not bound by ſuch majority of opinions, but was at liberty to give judgment according to his own xi. 159, 160

Judges are the priſoner's counſel vi. 224

The judges of *Geo.* I. complimented vi. 409

If judges take upon themſelves to mould an unlawful power into a convenient authority by new reſtrictions, this is not a judgment, but legiſlation xi. 321

It is a matter of impeachment for any judge to affirm a thing law to bind the whole kingdom, by a declaration that ſuch is his opinion xi. 322

The judges of *Hen.* VII. were learned men, and the three chiefs of the privy-council xi. 2

Not more upright judges than in 34 *Eliz. A. D.* 1592 vii. 140

Ten thouſand pounds damages recovered for calling a judge traitor, and that too after defendant had been fined 50,000l. impriſoned, &c. i. 772

None ſhould be preferred to the office of a judge, but ſuch whoſe abilities and integrity may be ſafely depended upon *Em.* Pref. vi.

Judges who have been cenſured, arreſted on the bench, proſecuted, impriſoned, removed, executed, or otherwiſe proceeded againſt, or puniſhed for mal-practice or crimes, arranged in alphabetical order.

Belknap ſir *Robert*
Berkley ſir *Robert*
Bramſtone ſir *John*
Burgh ſir *William*
Carey ſir *John*
Coke ſir *Edward*
Crawley ſir *Francis*
Davenport ſir *Humphry*
Denham ſir *John*
Doderidge ſir *John*
Dudley Edmund
Finch ſir *Heneage*
Finch ſir *John*
Fulthorpe ſir *Roger*
Gilbert Jeffery
Heath ſir *Robert*
Herbert ſir *Edward*
Holloway ſir *Richard*
Holt John
Hyde ſir *Nicholas*
Jefferies ſir *George*
Jones ſir *Thomas*
Jones ſir *William*
Montague William
North ſir *Francis*
Pemberton ſir *Francis*
Powel ſir *John*
Saunders ſir *Edmund*
Treſilian ſir *Robert*
Trevor ſir *Thomas*
Vernon ſir *George*
Walcot ſir *Thomas*
Weſton ſir *James*
Whitelocke ſir *James*
Wright ſir *Robert*
Wythens ſir *Francis*

See their NAMES for particulars. See *ASHBY* and *WHITE. JAY* and *TOPHAM. DE BRUCE.* COLLARS of S. S. RESOLUTIONS of the JUDGES. ROBES.

*JUDGMENT.

* Judgment pronounced on lord *Bacon* by the houſe of lords in his abſence, upon his repreſentation that he was ſick, and not able to attend i. 387

* No judgment given the ſame term the trial was, becauſe there were not four days of the term remaining iii. 544

* No judgment to be pronounced after an outlawry for high-treaſon; but only a rule for execution iii. 944

* The judgment againſt *Pilkington*, & al. reverſed in parliament iii. 659

* A week's time given a defendant convicted of perjury to move in arreſt of judgment iv. 94

* It is in the diſcretion of the court to paſs what judgment they pleaſe on one convicted of perjury, ſaving life and member iv. 104

* Where an indictment is removed into the *King's-Bench*, judgment ought not to be given till four days after conviction; if there be ſo many days remaining in the term iv. 779

* The contrary proceeding, in *Stayley*'s caſe, cenſured iv. 779

Inſtance of a priſoner not being aſked why judgment of treaſon ſhould not be pronounced, till he had appriſed the court of the omiſſion. See *AUDLEY, THOMAS* Lord.

Copy of the judgment as it is entered upon record againſt *John Hampden*, in the caſe of ſhip-money i. 695, 696. vi. 9. Ap.

Judgment in treaſon muſt be in uſual form, or the king loſes his forfeitures, &c. iii. 213

Judgment cannot be entered up when court is divided in opinion v. 570, 571

Of mute judgments in *Weſtminſter-Hall* iv. 169, 172

The manner of pronouncing judgments in *Scotland* ii. 1111

If a man hath judgment to be hanged, and the ſheriff do behead him, it is murder ii. 209. v. 126

Inſtance of priſoner being aſked why he ſhould not have judgment three ſeveral times previous to the court pronouncing it ix. *747, *749, *750

Judgment of impriſonment to commence from and after determination of impriſonment, to which defendant was before ſentenced for another offence, is good in law. So reſolved by the judges xi. 334

The execution may vary from the judgment iii. 215. iv. 129. See *GRAY* Lady *JANE. HOWARD CATHARINE*, Queen to *Hen.* VIII. *LISLE* Lady *ALICIA. MORE* Sir *THOMAS. SALISBURY* Counteſs of. *STAFFORD* Lord Viſcount.

Though the judgment in felony is always, "to be hanged by the neck," yet the party may be beheaded, for that is no part of the ſentence iv. 129. See *AUDLEY MERVIN* Lord. *SOMERSET* Duke of.

*JURISDICTION.

* A plea to the juriſdiction, the party ought to be ready to maintain preſently iv. 214

* Whoever executes the judgment of a court in a cauſe where the court has no juriſdiction, is puniſhable ii. 328

* The courts of *Weſtminſter* may judge of privilege of parliament, where it is incident to a ſuit the court is poſſeſſed of; but not of a matter ariſing originally in parliament ii. 620

* A court cannot bail, where they have not juriſdiction of the cauſe ii. 620

If party pleads in chief, he cannot afterwards plead to the juriſdiction iv. 167

Court of *Common-Pleas* has not ordinarily juriſdiction in criminal caſes ix. 309

The pope had no juriſdiction in *England* in the time of the *Britons* xi. 71. See *JOHN* King of *ENGLAND*

Plea to the juriſdiction of the court of *King's-Bench*, that party ſtood impeached by the commons for the ſame treaſon iii. 228

The juriſdiction of the privy-council a limited juriſdiction; and upon their commitment, the grounds and cauſes of it ought to appear vii. 126

The court of *King's-Bench* declare, they have juriſdiction to puniſh offences committed in parliament vii. 247

Reſolved in parliament to be a breach of privilege, and illegal vii. 251

Difference between pleading to the juriſdiction, and in bar viii. 3

Where there is a plea to the juriſdiction, becauſe the court cannot examine the fact, they ſwear to their plea viii. 3

Juſtification by virtue of acts of parliament does not exclude the king's courts from their juriſdictions viii. 5

Where ſeveral courts may have ſeveral juriſdictions of the ſame fact, notwithſtanding there may be diverſity of judgments viii. 112, 118. Se COURT. PLEA.

*JURORS and JURY. See GRAND JURY.
* A jury impriſoned and fined for giving a verdict contrary to the opinion of the court i. 78. xi. 3.
* Twenty-four only returned upon a pannel to try a caſe of high-treaſon i. 182
* By a general verdict a jury take upon them the point of law as well as matter of fact ii. 69
* A printer tried for high-treaſon in printing, is allowed to have half his jury of bookſellers or printers ii. 530. v. 530
* The ſame jury ſworn and charged with the priſoners again ii. 537
* A juryman ſuffered to whiſper the judge in open court ii. 553
* A juryman threatened for ſaying he could not in his conſcience find the priſoner guilty ii. 553
* Jurors fined for going contrary to evidence, and ſent to *Newgate* ii. 616
* This proceeding afterwards adjudged illegal ii. 553
* Jurors diſcharged of priſoners after the evidence given for the king, without giving a verdict ii. 715, 831, 953. ix. 572
* This proceeding condemned iv. 673
* Juryman who knows any thing of the cauſe, ſhall give his evidence in court ii. 809
* Jury can take no papers out of court with them that have been produced in evidence, but what are under ſeal, without priſoner's conſent ii. 828. iii. 100. iv. 396. v. 517
* One attainted of felony and pardoned, cannot be of a jury iii. 44
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NON COMPOS MENTIS.

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PROBYN, Mr. Juſtice,

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*PROOF. See EVIDENCE. WITNESSES.

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See *ARMSTRONG* Sir *THOMAS.*
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BATEMAN CHARLES.
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GAUNT ELIZABETH.
HARRIS BENJAMIN.
LANGHORNE RICHARD.
LISLE LADY.
PILKINGTON THOMAS.
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VANE Sir *HENRY.*
WILMER.

PROSTITUTION.

Perſon proſtituting himſelf guilty of felony, as well as the actor i. 396

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PROVERBS.

A very wiſe chancellor affirmed, that proverbs were the wiſdom of a people x. 208. Ap.

*PROVOCATION. See MURDER.

**PRYNNE, WILLIAM,* Eſq.

* His trial in the *Star-Chamber* in *Hilary* term, 1632-3, 9 *Car.* I. for writing and publiſhing a libel, intitled, *Hiſtriomaſtix*; or, a Scourge for Stage-players, &c. as alſo the trial of *Michael Sparkes* for printing, and *William Buckner* for licenſing, the ſaid libel; and of four others concerned in printing part of it i. 418

* The libel cenſures all manner of plays and recreations as unlawful, and caſts reflections on the king, queen, and court, &c. for allowing them and being preſent at them i. 418

* The keeping of feſtivals does not pleaſe this author i. 418

* *Prynne*'s anſwer to the information i. 419

* *Buckner*'s anſwer i. 419

* *Sparkes*'s anſwer i. 419

* Mr. attorney-general opens and enforces the charge i. 420

* Muſic, dancing, church-ceremonies, and mèn and women's hair offends Mr. *Prynne.* He inſinuates that we are returning to paganiſm, and perſuades people to fly their country i. 420

* *Prynne* affirms that he would rather die than put on his maid's clothes i. 421

* King *Charles*'s reign compared with *Nero*'s i. 422

* Mr. *Atkyns* and Mr. *Holbourn*, of counſel for *Prynne*; their arguments in his defence i. 422

* Mr. *Herne*'s argument i. 423

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* Mr. ſolicitor obſerves, that this was the man who had ſeduced the reſt, who ſaid, they acted in the fear of the Lord; and that his execution might be a means to bring ſome of them to their ſenſes; that his death would preach much better than his life had done, and might in ſome meaſure vindicate the pulpit from that diſhonour he had brought upon it ii. 367
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* The chief baron directs the jury, and tells them, that this being the perſon who had the care of the execution, and ſigned the warrant to the executioner, it was not to be doubted but he was guilty of imagining the king's death ii. 385

* *Hacker* is convicted ii. 385

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* *Robert Lilburn* brought upon his trial ii. 394

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* Dr. *Henchman*'s ſpeech in defence of dr. *Sacheverell*, as to the charge in the firſt article v. 728

* The doctor's counſel being about to produce ſome paſſages in the Homilies, &c. in maintenance of the doctrine the doctor had delivered, the managers retire to conſider if they ſhould admit of this ſort of evidence; and being returned, they did agree, that the paſſages the doctor's counſel had collected out of the Homilies and other books, ſhould be read; and they were proved to be juſtly tranſcribed by Mr. *Trapp* v. 729

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* The doctor's counſel deſire the paſſages they had collected might be read: the managers admit, that the paſſages out of the Homilies, and the book called, "The Erudition for any Chriſtian Man," might be read; but as to others, deſire they may produce the books and papers themſelves; to which the doctor's counſel conform v. 730

* Seventh day of the trial v. 752

* Mr. *Dodd*'s argument in defence of the doctor, as to the charge contained in the ſecond article, concerning the toleration v. 752

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* Eighth day of the trial v. 775

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* The doctor's counſel move, that he may have leave to ſpeak for himſelf, after the managers have replied; which the managers oppoſe, and inſiſt, that if the doctor have any thing to ſay in his defence, he may offer it before they reply v. 784

* Dr. *Sacheverell*'s ſpeech in his defence v. 784

* Ninth day of the trial v. 790

* Sir *Joſeph Jekyll*'s argument, by way of reply to the doctor's defence, as to the charge contained in the firſt article, concerning the reſiſtance uſed at the Revolution v. 791

* Mr. ſolicitor-general's reply to the doctor's defence of the charge in the firſt article v. 798

* Mr. *Lechmere*'s animadverſions on ſome expreſſions let fall by the doctor's counſel v. 802

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* He takes notice of the mob having demoliſhed ſeveral meeting-houſes during the trial, which he imputes to the doctrine contained in the doctor's ſermons v. 812

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* Reſolved by the lords, that by the law and uſage of parliament, in proſecutions by impeachments for high crimes and miſdemeanours, by writing or ſpeaking, the particular words ſuppoſed to be criminal, are not neceſſary to be expreſsly ſpecified in ſuch impeachments v. 828

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* The biſhop of *Lincoln* (dr. *William Wake*) his ſpeech to the houſe of lords, *March* the 17th, at the opening of the ſecond article, &c. v. 844

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The regicide, gloried in the fact, and deſired it might be inſcribed on his tomb ii. 335. See ii. 334. REGICIDES.

SCOT, Sir *WILLIAM*,
Hunney was impriſoned, judged, fined, and ranſomed, for complaining to king *Edw.* III. that ſir *William Scot*, chief juſtice, had awarded an aſſize contrary to law vii. 109. See ix. 287.

**SCOTLAND.*
The commiſſion of *Mary* queen of *Scots*, to try *James* earl *Bothwell*, for the murder of her huſband *Henry* earl *Darnley*, king of *Scots* i. 77
* The method obſerved in the trials of criminals there i. 429. ii. 623. iii. 441, 1095. iv. 283
Scotſmen admitted to give evidence in *England*, even before the Union ii. 11
A nation of great learning and eloquence, and wherein very conſiderable advantages are allowed priſoners, not enjoyed in *England* *Em.* Pref. i.
The manner of *Scotland* is, that when a gentleman is hanged with a man of meaner quality than himſelf, the gentleman hath the honour of the higher gibbet, and thinks himſelf much wronged if he be not ſo diſtinguiſhed vii. 91
Shan O'Neale, a bloody deſperate rebel, was hewn in pieces by the *Scots* viii. 350
By the laws of *Scotland*, *compeared* ſignifies appeared; *pannel*, priſoner or defendant; *purſuers*, counſel againſt the priſoner; *procurators in defence*, counſel for defendant; *aſſize*, jury; *aſſoilzie*, acquit ix. 26. n.
The ſtatute of ſtabbing (1 *Jac.* I. chap. 8.) was enacted in the time of king *James* I. when many animoſities aroſe between the *Engliſh* and the *Scotch*, who, uſing daggers, were accuſtomed to ſtab ſeveral of the *Engliſh ex improviſo*, which could not have been done by a flat ſword, the uſual weapon of the *Engliſh*; therefore this ſtatute was deſigned to ſecure defenceleſs people from ſurprize, ſuppoſing whoever ſtruck would be prepared ix. 534. n. 535. n.
Proceedings relating to a plea, that a native of *Scotland* ought to be tried according to the laws of that kingdom, by virtue of the act of Union, in *England* ix. 567
By the law of *Scotland*, in all criminal purſuits, the defender, or his advocate, is always the laſt ſpeaker, except in caſes of treaſon or rebellion x. 106. n.
Of appeals from *Scotland* to *England* x. 520. n. See
ARGYLE Earl of.
ARGYLE Marquis of.
ARMS.
BAILLIE DAVID.
BAILLIE ROBERT.
BALMERINO Lord.
BALMERINOTH Lord.
BEHEADING.
BOTHWELL Earl.
CARNEGIE JAMES.
EXECUTION.
GOWRIE, JOHN Earl of.
GREEN THOMAS.
INDICTMENTS.
JURY.
LINDSAY DAVID.
LOGAN ROBERT.
MAITLAND CHARLES, Lord HALTON.
MITCHELL JAMES.
NAIRN CATHARINE.
OGILVIE JOHN.
OGILVIE PATRICK.
PORTEOUS JOHN.
POSTNATI.

SCOTS, MARY Queen of.
SPOTISWOOD Sir *ROBERT.*
SPROT GEORGE.
STANSFIELD PHILIP.
STEWART ARCHIBALD.
STEWART JAMES.
STIRLING JAMES.
UCHILTREE Lord.

SCROGGS, Sir *WILLIAM*, Lord Chief Juſtice of the Court of *King's-Bench*,
Sums up the evidence, and paſſes ſentence on the trial of *Stayley*, convicted for ſpeaking treaſonable words in *French* ii. 659
His directions to the jury on *Coleman*'s trial for treaſon ii. 689
Makes a ſpeech to the priſoner before ſentence ii. 693
Tells him, that whoever brings in popery, conſequently brings in a foreign authority ii. 693
That the actor or agent is anſwerable for the conſequences of all ill actions ii. 693
His directions to the jury on the trial of *Ireland* and others, for treaſon ii. 719
Directs the jury againſt *Green* and others, for murder ii. 785
His directions to the jury on the trial of *Thomas White* or *Whitebread*, and others, for treaſon, in conſpiring the death of the king, and to ſubvert religion and government ii. 875. See ii. 832, 861
He admits on the trial of *Langhorne*, for treaſon, that a witneſs may be confronted by another, to prove what the witneſs ſwore at another trial relating to the priſoner, was falſe ii. 900
His directions to the jury ii. 906. See iii. 222. vii. 485.
His directions to the jury on the trial of *Kerne*, for treaſon ii. 961
Directs the jury to find *Bromwich* guilty of treaſon, if they believe him from circumſtances, without the evidence of two poſitive witneſſes, to be a prieſt ii. 968
Directs the jury on the trial of *Anderſon* and others, for treaſon ii. 1000
Sat on the trial of *Harris*, for a libel ii. 1037
Speech on that trial ii. 1038
Pronounced ſentence of fine, pillory, and ſureties for good behaviour, and would have added whipping, had it not been for mr. juſtice *Pemberton* ii. 1040. See iii. 219. vii. 483.
The ſeditious libel for which *Francis Smith* was convicted, in 1679, 32 *Car.* II. reflected chiefly on lord chief juſtice *Scroggs* ii. 1040. See iii. 220.
The impriſonment of *Smith* makes part of one of the articles of impeachment againſt the chief juſtice, for treaſon vii. 487
The trial of mrs. *Curtis*, for publiſhing a libel reflecting chiefly upon his lordſhip ii. 1042. See iii. 219.
Her impriſonment makes another part of one of the articles of impeachment againſt the chief juſtice, for treaſon vii. 487
Directs the jury on the trial of earl *Caſtlemaine*, for treaſon iii. 55
In his direction to the jury on the trial of *Henry Carr*, for a libel, ſhews his reſentment at noiſe and humming made in court iii. 63
The proceedings againſt *Carr* make the ſubſtance of one of the articles of impeachment againſt the chief juſtice vii. 486, 487
Tells the jury, they are not to expect ſuch ſtrict proof in this as in common caſes iii. 63
That preſumptive evidence is often admitted even in capital caſes iii. 63
That it has been reſolved and ſubſcribed by all the judges, when his majeſty demanded their opinions concerning the regulation of the preſs, that to print or publiſh news books, or pamphlets of news, without authority, was illegal, and diſcovered a manifeſt intent to a breach of the peace, though no ſcandal in them iii. 64
That if there were no ſcandal, the author ought to be convicted for publiſhing ſuch books without authority; that alone being illegal iii. 64
Cenſures the folly of the age in being ſo fond of news-papers iii. 64
Says, it was ridiculous for the author to hope court of juſtice would not underſtand what he deſigned all the reſt of the world ſhould iii. 64
That if jury found defendant guilty of fact, court would judge whether it implied malice, about which jury were not to trouble themſelves iii. 64
That jury, by finding defendant guilty, do not ſay upon their oaths abſolutely that he is the author, but that they believe him to be ſo iii. 64. See iii. 219. vii. 478. n. 482.
Said, he verily believed *Langborne* died innocently, whom he had condemned himſelf iii. 222. vii. 485
The articles of high miſdemeanours exhibited againſt him to the king and council by captain *Bedloe* and dr. *Oates* vii. 476
His anſwer to them vii. 478, 479
His ſpeech, occaſioned by the many libellous pamphlets publiſhed viii. 457
Proceedings againſt him vii. 479
Parliamentary reſolution to impeach him iii. 224. iv. 166. vii. 486
Other articles of impeachment againſt him vii. 488
Speeches in parliament thereon vii. 488
His anſwer to them vii. 490
He was removed from being chief juſtice, but with all marks of favour and reſpect, and allowed a penſion for life iii. 224. vii. 490
Never thought fit for his eminent place viii. 488. See *RADLEY RICHARD. TASBOROUGH JOHN.*

* *SCROOP, ADRIAN* ii. 324. See REGICIDES.

* SEAL. See GREAT SEAL.

SEAMEN.
The expedient of a voluntary regiſter for ſeamen attempted in *William* the third's reign, had no effect xi. 350. See PRESSING.

* *SEATON, ARCHIBALD* v. 630. See *STIRLING*, & al.

SECRETARY of STATE.
Commitment by ſecretary of ſtate illegal, and never practiſed till 1678, 29 *Car.* II. iv. 555, 557
Secretaries of ſtate, when they commit, are conſidered as common juſtices of the peace xi. 304
A ſecretary of ſtate is not a conſervator of the peace *ex officio*, and therefore not within the equity of the ſtatutes in favour of juſtices of the peace xi. 319, 320
He has not power to commit for any offence under treaſon xi. 319
The hiſtory of this officer xi. 317
Secretary of ſtate's law clerk has no more authority to examine perſons and papers than a common juſtice of peace's clerk xi. 320
His warrant for apprehending a libeller xi. 302. See *ENTICK JOHN*, Clerk. *KENDALL. WILKES JOHN.*

SEDITION.
The meaning of the word ſedition, and what it implies in law vii. 220, 223, 225, 231. See
ELLIOT Sir *JOHN.*
JENKES FRANCIS.
KNIGHTLEY Sir *RICHARD.*
LIBELS.
LILBURNE JOHN.
PRYNNE WILLIAM.
SACHEVERELL HENRY, D. D.
TUTCHIN JOHN.
UCHILTREE Lord.
WILKES JOHN.

SEDLEY, Sir *CHARLES*, Bart.
Was indicted for expoſing himſelf naked in a balcony in *Covent-Garden*, to a multitude of people x. 94. Ap.
Court of *King's-Bench* told him they were the *cuſtos morum* of the king's ſubjects, and would puniſh ſuch actions committed againſt all modeſty x. 94. Ap.
He confeſſed the indictment; and the court, conſidering he was a gentleman of an ancient family in *Kent*, and his eſtate incumbered (not intending his ruin, but his reformation), fined him only 2000 marks, to be impriſoned a week, and to be of good behaviour for three years x. 94. Ap.

SEDUCTION.
Record of proceedings againſt a peer for debauching his wife's ſiſter vi. 16. Ap. See *GREY FORD* Lord.
Indictment lies for ſeducing ſervant from maſter's ſervice *Em.* Pref. x. n.

SEIZURE of PAPERS.
Warrant for the ſeizure of papers cannot be juſtified in the caſe of a ſeditious libel xi. 307, 312, 320, 323
No lord chief juſtice, except *Scroggs*, ever aſſumed the authority of ſeizing papers xi. 321
The ſeizure of papers is illegal xi. 321
The reaſon iv. 174, 175. xi. 323. See *ENTICK JOHN*, Clerk.

SELBY, JAMES, Serjeant at Law,
His ſpeech before evidence on the trial of *Coke*, counſellor at law, on the maiming act vi. 213

SELDEN, JOHN,
His argument on *habeas corpus* in *B. R.* brought by perſons impriſoned for refuſing to lend money upon commiſſions for loans vii. 121. See *DARNELL* Sir *THOMAS.*
His ſpeech relating to the liberty of the ſubject vii. 148
His argument on a conference with the lords on the ſame ſubject vii. 155
Precedents of perſons committed by the king's command, bailed vii. 157
Precedents *è contra* anſwered vii. 159
Copies of the records of the precedents cited vii. 162
Earl *Suffolk* charged with ſpeaking ſcandalouſly of mr. *Selden*, member of the houſe of commons, and one of the managers of the conference; and proceedings thereon vii. 182
Speech concerning the propoſitions delivered by the lords to the king vii. 187
About the bill concerning *magna charta* vii. 191
His argument on *habeas corpus* againſt return vii. 229
Proceedings againſt him in *Star-chamber*, *May* 29, 1630, 6 *Car.* I. for publiſhing a ſeditious writing xi. 121. See *BEDFORD* Earl of.

* *SELLERS, JOHN* ii. 478. See *TONGE*, & al.

SENTENCES.
Againſt *William Prynne*, for writing and publiſhing *Hiſtriomaſtix*:
That the book be burnt by the hand of the hangman; that mr. *Prynne* be put from the bar, and be for ever incapable of his profeſſion; that the Society of *Lincoln's-Inn* do put him out; that the Univerſity of *Oxford* do degrade him; that he do ſtand in the pillory in *Weſtminſter* and *Cheapſide*; that he loſe both his ears, one in each place; that he have a paper on his head, declaring, it is for an infamous libel againſt both their majeſties, ſtate, and government; that he be fined 5000l. [10,000l. i. 428.] to the king; and that he be perpetually impriſoned i. 424, 426, 427, 428
To be reſtrained from writing, neither to have pen, ink or paper i. 426
To be branded in the forehead, ſlit in the noſe, and his ears cropped i. 428
Againſt *Thomas Buckner*, for licenſing the ſaid book, that he be impriſoned, and fined 50l. to the king i. 425, 426
Againſt *Michael Sparkes*, for printing and ſelling the ſaid book, to be fined 500l. to the king; to ſtand in the pillory in *Cheapſide* i. 425, 426, 428
Another againſt *William Prynne*, for ſeveral libels; to loſe his ears in *Palace-yard*, *Weſtminſter*; to be fined 5000l. to his majeſty; and to perpetual impriſonment in a remote part of the kingdom; to be ſtigmatized in the cheeks with two letters (*S.* and *L.*) for a ſeditious libeller i. 486, 497, 500, 501
Againſt *John Baſtwick*, doctor of phyſic, and *Henry Burton*, clerk, for ſame offence, ſame puniſhment, except *ſtigmatizing* i. 486, 499, 500, 502, 505
Blaſphemer ſentenced to be bored through the tongue, &c. ii. 272

To paſs ſentence on day of conviction is a violent and precipitate proceeding iv. 779
Sentence of the Eccleſiaſtical Court deemed of no force, although not before controverted for 1475 years xi. 246
Sentence in Spiritual Court againſt a marriage in ſuit of jactitation of marriage, not concluſive evidence in indictment for polygamy xi. 262. *So reſolved by all the judges of* England.
Effect of ſuch ſentence may be avoided, by proving the ſame fraudulent or colluſive xi. 262. *So reſolved by all the judges of* England.
Sentence of nullity, and ſentence in affirmance of a marriage, are concluſive evidence on a queſtion of legitimacy ariſing incidentally upon a claim to a real eſtate xi. 261. *So reſolved by all the judges of* England.
Sentence in cauſe of jactitation is, upon a title in ejectment, evidence againſt a marriage; and ſo it is in perſonal actions, founded immediately on a ſuppoſed marriage xi. 261. *By all the judges of* England.
A direct ſentence in a ſuit upon a promiſe of marriage, againſt the contract, admitted evidence againſt ſuch contract, in an action upon the promiſe for damages xi. 261. *So reſolved by all the judges of* England.
Sentence of nullity is concluſive evidence in a perſonal action againſt a defence founded upon a ſuppoſed coverture xi. 261
Elizabeth Gaunt was *ſentenced* to be *hanged* for *treaſon* iv. 160
King *Charles* the firſt was ſentenced to be *beheaded* for *treaſon* i. 1040
See EXECUTIONS. JUDGMENTS. See alſo PUNISHMENTS; and the ſame article in the Alphabetical and Chronological Tables.

SERMONS.
Doctor *Binkes*'s ſermon on 30th of *January*, 1701-2, cenſured by the lords viii. 81
Doctor *Sacheverell*'s ſermon. See *SACHEVERELL HENRY*, D. D.
Some paſſages in *Hugh Latimer*'s ſermon, touching lord *Sudley*'s death vii. 10

SERVANTS. See MASTER AND SERVANT.

SEVEN BISHOPS.
Their caſe of the greateſt concernment and conſequence that ever was in *Weſtminſter-hall* iv. 320, 321, 342
This caſe, as to a libeller being bound to find ſurety of the peace, denied to be law xi. 304, 305
All the counſel for the defendants were lovers of liberty, and the greateſt lawyers of the age xi. 304
Powell was the only honeſt judge of the four who ſat on that trial xi. 304, 305
The counſel on both ſides in this cauſe were the ableſt of their time, and few times have produced abler xi. 319

SEYMOUR, Sir *EDWARD*,
His ſpeech in the cauſe of *Aſhby* and *White* viii. 103

SEYMOUR, Sir *FRANCIS*,
His ſpeech in parliament, concerning perſons impriſoned for not paying the loan vii. 140

SEYMOUR, Lord *SUDLEY*,
Proceedings in parliament againſt him, for high-treaſon, 3 *Ed.* VI. vii. 1
Marries the queen dowager, and endeavours to be made governor of the king's perſon vii. 1
Articles of high-treaſon againſt him vii. 2
Duke of *Somerſet*'s letter to ſir *Thomas Hobby*, declaring the traitorous proceedings of the admiral vii. 2
Some of the council go to him in the *Tower*, to deſire his anſwer to the charge vii. 4
The admiral anſwers three of the articles, but would go no farther vii. 5
The act for his attainder vii. 6
The warrant for his execution vii. 10
Some paſſages out of biſhop *Hugh Latimer*'s ſermons, concerning the admiral's manner of dying vii. 11

SHADWELL,
Lady *Ivy*'s trial for great part of it vii. 571

SHAFTESBURY, *ANTHONY* Earl of.
He was committed to the *Tower* by the houſe of lords during the king's pleaſure, or that of the houſe, for moving a queſtion in parliament about the legality of a prorogation ii. 616. n.
* His caſe on a motion in the *King's-Bench* to be admitted to bail, the 27th and 29th of *June*, 1677, *Trin.* Term, 29 *Car.* II. ii. 616
* His commitment by the lords for contempts in general; which his counſel urge is an illegal commitment ii. 617
* And that its being by the houſe of peers, made no difference ii. 617
* And that the court of *B.R.* might examine parliamentary matters ii. 617
* The king's counſel make a reply ii. 620
* The earl makes a ſpeech in anſwer to the attorney and ſolicitor general ii. 621
* Mr. juſtice *Jones* delivered his opinion, that though the commitment was ill, it could not be examined here; and that the earl could not be bailed or diſcharged here ii. 622
* Mr. juſtice *Wild* of the ſame opinion ii. 622
* As was ſir *Richard Raynsford*, lord chief juſtice ii. 622
* And mr. juſtice *Twyſden*: but none of them declared what their opinions were in caſe the ſeſſion had been concluded, but mr. juſtice *Wild*; who ſaid, in that caſe, that the earl ought to have been diſcharged ii. 622
* Proceedings at the *Old-Bailey*, on an indictment for high-treaſon preferred againſt him, *Nov.* 24, 1681, 33 *Car.* II. iii. 418. See iv. 183
* The grand jury ſworn iii. 418
* The lord chief juſtice *Pemberton*'s charge to them iii. 418
* He tells them, that words would not amount to treaſon within 25 *Edw.* III. any more than a deſign to impriſon the king; but that by the 13 *Car.* II. words tending to ſuch a deſign were treaſonable iii. 419
* That two witneſſes to every overt-act are not neceſſary iii. 419
* That if there appear a probability of the party's guilt who is indicted, it is a ſufficient inducement to find the bill iii. 419
* The king's counſel move, that the evidence may be given to the grand jury in court iii. 420
* The grand jury inſiſt, that they ought to examine the witneſſes in private, being bound by their oaths to keep the king's ſecrets, and it being the conſtant practice ſo to do iii. 420
* The chief juſtice tells them, their debates indeed ought to be in private, but anciently the evidence was given in court iii. 420
* The grand jury ſtill inſiſt they are bound to keep the king's ſecrets; and the court tell them, the caſe is altered, where the king waives that matter iii. 421
* The indictment iii. 421
* A paper found in my lord *Shafteſbury*'s cuſtody given in evidence againſt him, being an aſſociation for excluding the duke of *York*, and deſtroying the king's regular forces; wherein the ſubſcribers bind themſelves to obey ſuch officers as the majority of the parliament ſhall appoint; and in the interval of parliament, ſuch officers as a majority of the ſubſcribers ſhall appoint iii. 424
* *Booth*'s evidence, of his being appointed by my lord *Shafteſbury* to aſſiſt in ſurpriſing the king, if he ſhould not agree to the demands of the parliament of *Oxford* iii. 426
* Other evidence to the ſame purpoſe iii. 428
* The grand jury retire to conſider what queſtions to aſk the witneſſes iii. 432
* They deſire to know if any of the witneſſes are indicted; but are told it is not their buſineſs to examine to the credibility of the witneſſes: but if they know any thing of them themſelves, they may conſider of it iii. 432
* The grand jury put their queſtions to the witneſſes iii. 433
* The king's witneſſes in danger of being knocked on the head by the populace iii. 435, 436
* Having withdrawn ſome time, they return the bill *ignoramus*; at which the people ſhout iii. 441
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SHARPE, Doctor *JOHN*. See *COMPTON* Doctor *HENRY*.
* *SHARPLESS*, *JOHN* ii. 585. See *MESSENGER*, & al.

* *SHERFIELD*, *HENRY*, Eſq.
* Proceedings againſt him in the *Star-chamber*, for breaking a painted glaſs-window in a church, 8 *Car.* I. i. 399
* The information againſt him i. 399
* In his anſwer he owns the fact, and juſtifies it i. 399
* Alledges that it was a ſuperſtitious picture, and taken down by order of the veſtry i. 400
* Depoſitions of the king's witneſſes read i. 401
* The defendant's reply i. 403
* Mr. attorney's anſwer i. 407
* The commiſſioners differ in opinion as to the ſentence: the ſpeech of lord *Cottington* for a ſevere one i. 408
* Sir *Robert Heath* for a mild one i. 409
* Sir *Thomas Richardſon*, the ſame i. 410
* Secretary *Windebanke*, for a ſevere one i. 411
* Secretary *Cook* and ſir *Thomas Jermyn*, for a mild one i. 411
* Sir *Henry Vane*, for a ſevere one i. 411
* Sir *Thomas Edmonds*, for a mild one i. 412
* Dr. *Laud*, biſhop of *London*, for a ſevere one i. 412. See 895.
* Lord *Falkland*, and earl of *Devon*, for the ſame i. 414
* Viſcount *Wimbleton*, and earl of *Dorſet*, for a mild one i. 414
* Earl of *Arundel*, for a ſevere one i. 415
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* Dr. *Neale*, archbiſhop of *York*, for a ſevere one i. 416
* Lord keeper, for a mild one i. 417
* His ſentence i. 418
Cenſure of *Robert Sherfield* for defacing a church-window, one of the charges againſt archbiſhop *Laud* i. 895

SHERIFFS OF *LONDON*.
Whether common-hall bound to elect perſons drank to by lord-mayor, ſheriffs? iii. 651, 652
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Grand juries returned by ſuch as are ſheriffs in fact, but not in right, illegal iv. 172
The convictions on the preſentments of ſuch grand juries are illegal and void iv. 172. See viii. 464, 471. * *PILKINGTON*, & al.
* *SHERWIN*, *JOHN* iii. 949, 978. See *SACHEVERELL WILLIAM*.

SHIP MONEY.
The king's writ in the caſe of ſhip money i. 510. vi. 5. Ap.
The judgment therein cenſured by the houſe of lords i. 716
Copy of the judgment as entered on record i. 695. vi. 9. Ap.
Property was much invaded by impoſing ſhip money, which at firſt was light and eaſy, but in progreſs of time was encreaſed, according as it was found the nation would bear it; and at length it was juſtly feared that it would become as burthenſome as the impoſitions on the *French* nation by the *French* king; and yet when the civil wars broke out, the majority of the nation took part with the king iv. 165. See *BATES JOHN*. *HAMPDEN JOHN*.

SHIRLEY, Doctor,
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* The counſel againſt him reply, that to accept any office without conſent of the parliament, is criminal i. 965
* And his ſigning this commiſſion a proof of his framing or adviſing other acts of ſtate againſt them, to diſturb the public peace i. 965
* That his joining the traitor, *James Graham* (the earl of *Montroſe*), was a taking up arms againſt his country i. 965
* Which is high-treaſon by an act of parliament in 1584 i. 963, 966
* Sir *Robert* rejoins i. 966
* Inſiſts that he was promiſed quarter upon ſurrendering himſelf i. 968
* Is anſwered, that it is not in the power of any private man in the army to give quarter to an oppoſer of the ſolemn league and covenant, as he had been i. 969
* And if quarter were to be allowed to other priſoners, yet not to him, whom both parliaments of *Scotland* and *England* had excepted from pardon i. 970
* Sir *Robert* inſiſts further, that the benefit of quarter given is ſecured to all priſoners by the laws of arms, and of all nations, as well in civil as in foreign wars i. 970
* Otherwiſe a door would be opened to all manner of cruelty i. 971
* And no clauſe in the covenant could oblige to go contrary to the laws of war or of nations i. 972
* That the queſtion is not of pardon, but of quarter already granted, for ſecuring his life i. 973
* His reaſons why he cannot enter upon any other defence till this be diſcuſſed i. 977
* The report from the commiſſioners for the proceſs to the parliament againſt him i. 978
* He is declared guilty, and condemned i. 979
* Is going to ſpeak to the people, but ſilenced by the provoſt of the town, at the inſtance of a zealous miniſter of the kirk i. 984
* His ſpeech delivered in writing i. 984
* The ſaid miniſter's inſult, and the priſoner's mild and magnanimous behaviour i. 985
* Sir *Robert* is beheaded i. 985

SPRATT, Doctor *THOMAS,* Biſhop of *Rocheſter*,
Proceedings againſt him before the lords of the privy council, 1692 viii. 37. See vi. 425
Arreſted at *Bromley* viii. 37
His papers ſeized, and his houſe examined by the clerk of the council viii. 37
Carried to his own houſe under a guard of ſoldiers viii. 37
Examined concerning an aſſociation for reſtoring king *James* viii. 38
His ſpeech to the council viii 39
Writes to lord *Nottingham*, and is diſcharged viii. 39
Receives a letter from lord *Nottingham*, to attend him at his office viii. 39
Is examined in the preſence of one *Blackhead* viii. 40
Blackhead charges the biſhop with receiving and anſwering a letter from one *Robert Younge* viii. 40
The biſhop examines *Blackhead* himſelf viii. 41
The biſhop's ſecretary examined viii. 42
Remembers *Blackhead*'s bringing a letter from one *Hookes* viii. 42
Blackhead confeſſes he brought the biſhop a letter from one dr. *Hookes*, and not *Younge* viii. 42
The biſhop is again diſcharged viii. 43
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And took it away again ſince the biſhop's confinement viii. 46
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Younge and *Blackhead* confronted, *Younge* denies all viii. 47
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* *SPROT, GEORGE,*
* His trial in *Scotland*, for conſpiring with the earl of *Gowrie* to murder king *James* I. i. 310
* He confeſſes before the privy council his being privy to two letters between the earl of *Gowrie*, and laird of *Reſtalrig*, relating to the conſpiracy i. 310
* At his trial his confeſſion is read againſt him i. 312
* He abides by his confeſſion, and is condemned i. 313
* His execution i. 314
* After he had hanged a pretty while, he clapped his hands together aloud three times i. 314

* *SPUR, JOHN* v. 465. See *SWENSDEN.*

SQUIRES, MARY The Gipſey,
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* *STAFFORD, WILLIAM* Viſcount,
* His trial on an impeachment for high-treaſon before the houſe of peers, 1680, 32 *Car.* II. iii. 101
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* Mr. *Treby*'s ſpeech iii. 109
* The managers call their witneſſes to prove the plot in general iii. 109
* The records of the attainders, and convictions of thoſe concerned in the popiſh plot, produced as evidence of it iii. 120
* Second day of trial iii. 122
* The lord *Stafford*'s counſel admitted to hear the evidence; but not to ſtand ſo near as to prompt him iii. 122
* *Dugdale* ſworn a ſecond time, when he came to give a particular evidence againſt the lord *Stafford* iii. 123
* The priſoner permitted to have a clerk to take notes for him iii. 123
* *Dugdale* ſwears poſitively that the priſoner conſented to the reſolution on the king's death (at which there was a great hum) iii. 124
* *Oates* ſworn again, depoſes, that my lord wrote letters and contributed money towards carrying on the plot iii. 126
* *Turbervile*'s evidence of my lord's ſoliciting him to aſſaſſinate his majeſty iii. 127
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* The managers produce the affidavit my lord deſires iii. 137
* A peer may give evidence, though he be a judge in the cauſe iii. 141
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* Endeavours to prove him forſworn in a former trial iii. 150
* A journal of the houſe of lords read, as evidence for the priſoner iii. 152
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* *Dugdale*'s examination taken by the juſtices, as it was entered on the lords journal, read as evidence for the priſoner iii. 156
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* Mr. *Powle*'s ſpeech at the ſumming up the evidence iii. 200
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* Whether thoſe large allowances made *Oates*, *Bedloe*, &c. were not ſome objection to their teſtimony iii. 202
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* The judges deliver their opinions, that two witneſſes to every overt-act are not neceſſary; but one to one overt-act, and another to another, is ſufficient iii. 204
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* The ſixth day iii. 205
* The lord *Stafford* petitions the lords to be heard again iii. 206
* He repeats ſome points of law he had inſiſted on before iii. 206
* The priſoner declares his opinion of the ſeveral plots charged on the papiſts ſince the Reformation iii. 207
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* Thirty-one find the lord *Stafford* not guilty, and fifty-five guilty iii. 211
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* The king iſſues a writ to the ſheriffs to execute the priſoner, by cutting off his head only iii. 214
* *Slingſby Bethel* and *Henry Corniſh*, ſheriffs, apply to the lords for their direction as to the execution, who declare the king's writ ought to be obeyed iii. 215
* The ſheriffs alſo apply to the commons iii. 215
* Who concur in opinion with the lords iii. 215
* Lord *Stafford*'s ſpeech at execution iii. 215
* He is beheaded iii. 215

STAGE-PLAYERS. See *HISTRIOMASTIX.*

STAMFORD, Lord.

In lord *Stamford*'s caſe, in king *James* the ſecond's reign, *A. D.* 1685, where there was one poſitive and a ſtrong circumſtantial evidence, yet the lords thought that not ſufficient to find him guilty vi. 427. See *DELAMERE* Lord.

STAMFORD, Sir *WILLIAM.*

This judge's book miſled lord *Coke* vii. 150
A judge of great authority vii. 182

* *STANDSFIELD, PHILIP*, Son of Sir *James Standsfield*, of *New Milns*, near *Edinburgh*,

* His trial, as well for high-treaſon, as the murder of his father, *Feb.* 6, 1688, 4 *Jac.* II. iv. 283
* The indictment, in which are crimes of different natures iv. 283
* The priſoner's counſel anſwer the charge iv. 285
* His majeſty's advocate replies to the defence, and opens the evidence iv. 287
* The priſoner's counſel rejoin iv. 290
* The jury, conſiſting of fifteen perſons, are ſworn, and the evidence is given iv. 292
* Proof of the priſoner's drinking confuſion to the king; which in *Scotland* is high-treaſon iv. 293
* Of his curſing his father; which is there puniſhed with death iv. 293
* Circumſtantial evidence admitted, of his being the author of his father's murder iv. 295
* The ſurgeons who inſpected the corpſe give their reaſons why they believe ſir *James* was not drowned, but ſtrangled iv. 297
* The college of phyſicians of the ſame opinion iv. 297
* Two infants permitted to declare what they knew of the murder, before the jury, without oath iv. 300
* Sir *George Mackenzie*'s ſpeech to the inqueſt iv. 301
* The priſoner is convicted, and receives ſentence iv. 304

STANLEY, Sir *WILLIAM,*

His trial for high-treaſon, 1494-5, 10 *Hen.* VII. xi. 1
Sir *Robert Clyfford* was his accuſer xi. 1, 2
His offence xi. 1, 2
He is examined xi. 2
Reckoned the richeſt ſubject in the kingdom xi. 2
Arraigned, condemned, and beheaded xi. 2

* *STAPLETON*, Sir *MILES*, Bart.

* His trial for high-treaſon, at the aſſizes for the county of *York*, *June* 18, 1681, 33 *Car.* II. iii. 317
* The indictment removed to the *King's-Bench*; but the priſoner ſent back to *Yorkſhire* to be tried iii. 317
* The indictment for conſpiring the king's death, and the ſubverſion of the eſtabliſhed religion and government iii. 317
* A challenge offered by the king's counſel againſt a juror, becauſe he gave his dogs the names of *Oates* and *Bedloe*, the king's witneſſes; but not allowed, which would have been allowed had there been proof iii. 317
* The trial put off till next aſſizes, for want of jurors iii. 318
* The trial comes on at the ſummer aſſizes iii. 318
* Sir *Thomas Stringer*'s ſpeech before evidence iii. 318
* The king's witneſſes called iii. 319
* They gave evidence, firſt of the plot in general iii. 319
* *Bolron*'s evidence againſt ſir *Miles* in particular iii. 320, 321
* Sir *Miles*'s defence iii. 322
* Mr. juſtice *Dolben* directs the jury, and tells them, there being no records of conviction produced againſt the king's witneſſes, they ought to be deemed competent witneſſes iii. 328
* Mr. baron *Gregory*'s direction to the jury iii. 328
* Sir *Miles* is acquitted iii. 328

* *STAR-CHAMBER.*

The court of *Star-chamber* was by common law, confirmed by ſtat. 3 *Hen.* VII. chap. 1. and diſſolved by ſtat. 16 *Car.* I. chap. 10. *Em.* Pref xii.
Priſoner laid in irons by command from the *Star-chamber* vii. 271
* Difference among the commiſſioners as to a ſentence in this court, and their ſpeeches i. 408, &c.
Judgments given in the court of *Star-chamber*, eſpecially in caſes of libels, are good law at this day ix. 310
Lord chief juſtice *Holt* declared, that *B. R.* poſſeſſed all the lawful power the *Star-chamber* had ix. 310
Sir *Edward Coke* ſays, that the *Star-chamber* is a moſt ancient and honourable court ix. 310
Mr. *Weſt*, lord chancellor of *Ireland*, author of "A Diſcourſe concerning Treaſons and Bills of Attainder;" and alſo of "An Enquiry into the Manner of creating Peers," ſpeaks much in commendation of this court ix. 310
Sir *Thomas Mallet*, one of the juſtices of *B. R.* wrote a treatiſe on this court, and obſerves therein, that it was the moſt ancient of any court of juſtice, and the mother court of the kingdom ix. 312, 313
There is an original manuſcript treatiſe concerning the *Star-chamber* in the *Britiſh Muſeum* xi. 329
Stat. 3 *Hen.* VII. chap. 1. was the foundation of the court of *Star-chamber* xi. 337. See *BASTWICK JOHN.*
BEDFORD Earl of.
CHAMBERS RICHARD.
DAVISON.
FOWLIS Sir *DAVID.*
LEIGHTON Doctor.
PRIEST WILLIAM.
PRYNNE WILLIAM.
SHERFIELD HENRY.
SAINT JOHN OLIVER.
TALBOT WILLIAM.
WHITELOCKE JAMES.

STARKEY, HENRY ii. 1010. See *ANDERSON*, & al.

STATE.

In ancient times, more eſpecially in the reign of *Henry* VIII. to be accuſed of a crime againſt the ſtate, and to be convicted, were almoſt the ſame thing xi. 10

STATE LAW.

The ſhip-money judges were impeached for holding, that ſtate-neceſſity would juſtify the raiſing money without conſent of parliament, and that the king was judge of that neceſſity i. 711. xi. 323. See *BERKLEY* Sir *ROBERT.*
The king himſelf has no more prerogative, than the judges have authority, to declare that the law may be violated for reaſon of ſtate xi. 323
Lord chancellor *Bacon*, when attorney-general on earl *Somerſet*'s trial, told the noble priſoner, on his wiſhing a witneſs was preſent, whom he named, as he could clear up many things that appeared obſcure, that if he was preſent he could not be ſworn for reaſons of ſtate i. 364
The lord chief juſtice, ſir *Nicholas Hyde*, is ſaid to have delivered in effect this judgment from the bench, that for ſeveral reaſons of ſtate the king may do or act contrary to law ii. 202
Lord chief juſtice *Camden* obſerved, that with reſpect to the argument of ſtate neceſſity, or a diſtinction that has been aimed at between ſtate of-

fences

fences and others, the common law does not underſtand that kind of reaſoning, nor do our books take notice of any ſuch diſtinctions xi. 322
That ſerjeant *Aſhley* was committed to the *Tower* by the lords, only for aſſerting in argument that there was a law of ſtate different from the common law xi. 323
That the conſtitution does not allow of reaſons of ſtate to influence the judges xi. 330

STATE PRISONERS.

Much humanity and relief is ſhewn and uſed towards ſtate priſoners in diſtreſs in *France*, under an abſolute and arbitrary government; and much oppreſſion is ſuffered to be practiſed againſt them in *England*, a free and chriſtian nation x. 76. Ap.
Whether it be lawful to commit ſtate priſoners to the cuſtody of meſſengers iv. 556, 557
Lord chancellor *Parker* was againſt ſetting ſtate priſoners in the pillory x. 92. Ap. See *BASTILE. NEWGATE.* TREASON.

STATUTE LAW.

Criminal caſes very much depend on ſtatute law *Em.* Pref. i.
The beſt expoſitor of ſtatutes is the conſtant received practice, ever ſince they were made *Em.* Pref. i.
The judges are the interpreters of the ſtatute law *Em.* Pref. i, vi.
Statute law wants reducing into a leſs number of acts *Em.* Pref. xv.
The intent of the law-makers in the preface of the ſtatute, is always to be conſidered in conſtruing the act i. 174
Statutes to be conſtrued according to the true intent of the legiſlature i. 650
By ſtat. 1 *Hen.* VI. chap. 10. proviſo as to declaratory treaſons in ſtat. 25 *Edw.* III. ſtat. 5, chap. 2, is repealed i. 761
Reaſon for making ſtat. 6 *Edw.* VI. concerning outlawry in treaſon iv. 198, 199
The preamble of an act is as the key to open the mind and meaning of the law-makers ii. 348, 465. v. 517
No crime of what nature or magnitude ſoever, can fall within the purview of a penal ſtatute, but ſuch as is identically the ſame in every circumſtance with that deſcribed by the words of the ſtatute itſelf vi. 223, 224
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Statutes in reſtraint of trade to be conſtrued literally vi. 417
A private act of parliament, though printed in an authentic collection of ſtatutes, diſallowed, if not examined with the record vi. 417
All penal laws are to be conſtrued favourably for the benefit of the ſubject, and not to be extended beyond the letter vi. 622
When a ſtatute appoints a penalty for doing a thing, which was no offence before, and appoints how to be recovered, it ſhall be puniſhed by that means, and no other vi. 622, 741
The parliament roll is the original and warrant for the ſtatute roll, and therefore of greater authority vi. 735
Statutes of jeofails extend not to criminal or other cauſe, where the king is party viii. 58
Statutes that preſcribe new forms of trial, to be punctually complied with viii. 349
Statutes that take away clergy, are to be taken by equity x. 436
If a ſtatute is made ſuppletory to the common law, in a ſimilar caſe, and takes away clergy, it muſt be conſtrued liberally x. 436
The preamble of an act is ſuppoſed to contain the whole ſubſtance, extent, and meaning of the act xi. 251
All ſtatutes *in pari materiâ* are to be conſtrued alike xi. 260
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Stat. *de attinctis* vi. 708
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Statute of *Marlebridge*. A miſtake in chap. 26 of that ſtatute rectified, and its true meaning explained by lord chief juſtice *Holt* ix. 61, 62
Stat. *Merton*, chap. 7 iv. 188. n.
Stat. *de Scandal. Magnat.* Writ of inquiry on this ſtatute iii. 987. See *SCANDAL. MAGNAT.*
Stat. of ſtabbing. All the judges were of opinion, that ſtat. 1 *Jac.* I chap. 8, of ſtabbing, was only a declaration of the common law, and made to prevent the inconveniences of juries, who were apt to believe *that* to be a provocation to extenuate murder, which in law was not vii. 421, 422. ix. 533. n.
Stat. 1 *Jac.* I. chap. 8, was enacted, when many animoſities aroſe between the *Engliſh* and *Scotch*, who uſing daggers were accuſtomed to ſtab many of the *Engliſh ex improviſo*, which could not have been done by a flat ſword, the uſual weapon of the *Engliſh*; therefore this ſtatute was deſigned to ſecure defenceleſs people from ſurprize, ſuppoſing that whoever ſtruck would be prepared ix. 534. n. 535. n.
Stabbing with a tobacco pipe, and with an halberd, hath been adjudged to be a ſtabbing within the ſtatute, *by Glynn, ch. j.* ix. 535. n.
So hath with a candleſtick, *that* being adjudged a weapon *drawn*, by *Maynard*, ſerjeant ix. 535. n.
This is a good law, and to be interpreted ſtrictly, by *Glynn, ch. j.* ix. 535. n. See *CHETWYND WILLIAM.*
COWLAND JOHN.
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1 *John*, chap. 7 vii. 120

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9 *Hen.* III. chap. 19 vii. 148, 202
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20 *Hen.* III. chap. 7 iv. 188. n.
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20 *Edw.* I. chap. 1 ii. 201
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2 *Edw.* III. chap. 2 ii. 200
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20 *Edw.* III. chap. 1 ii. 201. vi. 734
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* That by the 1 *Hen.* VI. 10, the proviſo as to declaratory treaſons, in the 25 *Edw.* III. is repealed, and no man hath been declared a traitor, either by king or parliament, ſince that ſtatute, except he had offended againſt the letter of ſome ſtatute i. 761
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TREASON.
The excellency of the *Engliſh* laws conſiſts particularly in caſes of treaſon *Em.* Pref. iii.
Of the progreſſive legal improvements in caſes of treaſon *Em.* Pref. v.
If priſoner committed for treaſon be not indicted next term or ſeſſions after commitment, having duly entered his prayer, he ſhall on laſt day of term or ſeſſions be admitted to bail, unleſs it appear to court on oath that the king's witneſſes could not then be produced; and then, if not indicted and tried ſecond term or ſeſſions after commitment, he ſhall be quite diſcharged *Em.* Pref. v.
Party accuſed of treaſon may demand copy of indictment, names of jurors and witneſſes, and aſſiſtance of counſel in points of law, as well as in matters of fact, proceſs for witneſſes, and every ſpecies of treaſon muſt be proved by ſome overt-act, and that by two witneſſes *Em.* Pref. vi.
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If a man commit treaſon *May* 20, and ſell his lands *May* 5, and after is indicted that he did commit the treaſon *May* 1, which goes before the ſale, and after is found guilty of this indictment, he who is to loſe the land cannot deny this verdict, and ſay, the treaſon was committed *May* 20, though it concern him for all he hath. By lord chief juſtice *Coke* i. 338
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* Words tending to perſonal hurt of prince, will amount to overt-act of treaſon ii. 304, 349, 354. iii. 1055. (See Id. 87.) iv. 593, 656
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To doubt or heſitate in a point of allegiance, is direct treaſon ii. 314
Treaſon cannot be pardoned by implication ii. 350
Encouraging traitor treaſon ii. 365, 594
Said, that had the Protector *Cromwell* taken upon himſelf the name of king, it ſeems that no treaſon could have been committed againſt the king *de jure*, not in poſſeſſion ii. 455
To write or print, that if the king abuſes his power, the people may reſiſt and take up arms againſt him, is treaſon ii. 544
Judges of opinion, that charge againſt earl *Clarendon* was not treaſon; with their reaſons ii. 556
Impeachment for treaſon generally not cauſe for committing a peer ii. 568. See IMPEACHMENTS.
Priſoner tried at bar for treaſon, illegally receives ſentence the ſame day ii. 659. iv. 779
Judgment in treaſon muſt be in uſual form, elſe the king loſes his forfeitures, &c. iii. 213
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Jefferies, on colonel *Sidney*'s trial, ſaid, it was reſolved by all the judges of *England*, that if I buy a knife of *J. S.* to kill the king, and one witneſs proves I bought a knife, and another proves that I bought it for that purpoſe, they are two witneſſes of an overt-act within ſtatute of *Edw.* VI. iii. 818
Sir *John Hawles* ſays, it is fit to know who the judges were who gave the above reſolution, if it were but for the authority of the caſe, for he doubts the reaſon of it would convince no man; they might as well have reſolved, that eating or drinking, or the moſt ordinary acts of a man's life, were an overt-act of treaſon iv. 198
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General account of treaſonable plot may be given in evidence, though it does not immediately affect priſoner iii. 798. ix. *671
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* *John Turner*, *William Turner*, *Mary Turner*, and *Ely Turner*, their trial for burglary, at the *Old Bailey*, the 15th, 16th, and 19th of *Jan.* 1663, 15 *Car.* II. ii. 502
* The indictment for breaking open the houſe of *Francis Tryon*, and robbing him of jewels and money to the value of ſeveral thouſand pounds ii. 502
* Colonel *Turner* complains his goods were ſeized on by the ſheriffs, and they had taken poſſeſſion of his houſe: the ſheriffs anſwer, they have only left a ſervant in the houſe for ſecurity of the goods, till they ſee whether he is convicted or acquitted ii. 503
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* If the priſoner can find ſecurity, that the goods be forth-coming, the ſheriff ſhall take his hands off ii. 504
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* And part of the money, which he owned to be mr. *Tryon*'s ii. 508
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* Evidence, that *Mary* and *Ely Turner* brought ſome of the money to a neighbour's houſe ii. 510
* A particular ſeal to one of the bags given in evidence ii. 511
* A ſtool brought for him to ſit on in the court ii. 512
* Mr. *Tryon* ſwears he believes *William Turner* was one of the men that robbed him ii. 515, 516
* Colonel *Turner*'s defence ii. 516
* He ſays he found the thieves, and perſuaded them to deliver up the goods and money, upon promiſe that their lives ſhould be ſaved ii. 517
* He calls his witneſſes, who ſay little or nothing to the purpoſe ii. 521
* The other priſoners defence ii. 523
* The lord chief juſtice directs the jury ii. 524
* He tells them, that *Mary Turner*, the wife, cannot be convicted as acceſſary to a felony committed by her huſband ii. 524
* That all the accomplices in burglary are guilty of burglary, though they do not all enter the houſe ii. 524
* That if one comes in by day, and opens the door to others in the night, and they come in and rob the houſe, they are all guilty of burglary ii. 526
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* *TUTCHIN, JOHN,*

* His trial on an information for a libel, at *Guildhall*, *Nov.* 4, 1704, 3 *Annæ* v. 528
* A juryman owns he had always condemned mr. *Tutchin*'s writings; and deſires to be excuſed v. 530
* The king's counſel, after ſome debate, conſent to it v. 530
* *Howe* the printer's evidence, of his agreement with *Tutchin* for the copy, &c. v. 532
* Debates between the counſel, whether the proof be ſufficient to read the papers v. 533
* The papers read v. 535, 539
* *Tutchin* holds, *people may call their princes to account, and depoſe them* v. 536
* Mr. *Montague*'s ſpeech for the defendant v. 538
* Mr. attorney's obſervation on the evidence for the queen v. 540
* It may be a libel, though no particular perſon be reflected on v. 540
* Mr. attorney charges mr. *Montague* with juſtifying *Tutchin*'s principles, as to the power of the people v. 540
* And ſays, he ſhall proſecute any man who maintains ſuch doctrine v. 540
* The chief juſtice *Holt* directs the jury v. 541
* The defendant is found guilty of publiſhing, but not of writing, *The Obſervators* v. 542
* The defendant's counſel move in arreſt of judgment; for that the *diſtringas* was *teſte*'d the day after the return of the *venire*, and ſo a diſcontinuance of proceſs v. 543
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* Sir *Thomas Powys* and mr. attorney-general, their reply v. 564
* Mr. juſtice *Gould* held it was amendable by the common law; but not by the ſtatute v. 568
* Mr. juſtice *Powys* is of opinion, it might be amended v. 569
* Lord chief juſtice, and mr. juſtice *Powell*, *contra* v. 569
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* An error in point of ſkill not amendable, though miſpriſions or miſtakes were v. 570
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* *TWYN, JOHN,* Printer,

* His trial for high-treaſon, and the trials of *Thomas Brewſter*, *Simon Dover*, and *Nathan Brooks*, for a miſdemeanour, the 20th and 22d of *February*, 1663-4, 15 *Car.* II. ii. 528
* The indictment againſt *Twyn*, for printing a ſeditious and treaſonable libel, entitled, *A Treatiſe of the Execution of Juſtice*, &c. ii. 528. See vi. 330
* The indictment againſt *Dover*, for printing a libel, called, *The Speeches and Prayers of ſome of the late King's Judges*, &c. ii. 529
* The indictment againſt *Brewſter*, for printing and uttering the ſaid libel, called, *The Speeches and Prayers*, &c. ii. 530
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Quaker cannot be a witneſs in appeal ix. 122. n.

Form of oath to be adminiſtered to a witneſs upon a *voire dire* ix. *639

A witneſs being ſworn in chief inſtead of upon a *voire dire*, occaſioned great altercation ix. *645

Lord chancellor *Hardwicke*, as lord high ſteward on lord *Lovat*'s trial for treaſon, ſaid, that at common law, where a witneſs is produced by the plaintiff to be ſworn, the oath to give evidence in chief is adminiſtered to him, unleſs defendant objects to his competency, and then he may be examined touching that objection, upon a *voire dire*; but after the witneſs has been ſworn in chief, if any objection is then made to him, he may be aſked the ſame queſtion by virtue of his oath in chief, as he might have been aſked upon a *voire dire*; but, after the witneſs has been examined by defendant reſpecting the objection, and denied it upon oath, it is not uſual to permit defendant to call a witneſs to prove it, in order to prevent his being a witneſs, unleſs agreed to by the other ſide ix. *645, 646*

If ſeveral objections are had to a witneſs, they cannot be all made at once ix. *651

An attainted perſon is not a good witneſs, unleſs he has been pardoned ix. 652*

Where a witneſs is produced, he is to be ſworn in chief, unleſs there be ſome objection to his competency, and then he is to be ſworn upon a *voire dire*; after he is ſworn in chief, the party who produces him aſks him ſuch queſtions as he thinks proper, after which the other party is at liberty to croſs-examine him, either to the matter of fact concerning which he has been examined, or any other matter whatſoever, that ſhall tend to impeach his credit, or weaken his teſtimony, provided the queſtions be legal ix. 670. *See *VOIRE DIRE*.

To call witneſſes after the reply, is irregular ix. *743

A witneſs is to give his evidence, and not his opinion x. *523, *539

Standing in the pillory no exception to the competency of a witneſs x. 42. Ap.

Member of corporation, though he votes, is a legal witneſs in the election of mayor x. 150. Ap.

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But not allowed to examine them in caſes of treaſon ix. 638*

If a ſurgeon was voluntarily to reveal ſecrets come to his knowledge in the way of his profeſſion, to be ſure, he would be guilty of a breach of honour, and of great indiſcretion; but to give information of them in a court of juſtice, which by the law of the land he is bound to do, will never be imputed to him as any indiſcretion whatever xi. 243

Surgeon hath no privilege to avoid giving evidence in a court of juſtice xi. 243

Surgeon has no privilege where it is a material queſtion, in a civil or criminal cauſe, to ſay that his introduction to the parties was in the courſe of his profeſſion xi. 243

A witneſs objects to diſcloſing any thing communicated to him in confidential truſt in his profeſſion xi. 243

A peer of the realm makes a like objection xi. 246

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Witneſs permitted to have what he depoſed read over to him xi. 247

Depoſition of witneſs read to him, at his requeſt xi. 247

Witneſs not permitted to withdraw, though at the requeſt of the party's counſel againſt whom he was produced xi. 248

No inſtance of a witneſs not attending at the bar to be examined *vivâ voce*, has been permitted in any manner whatever to give his evidence out of court, ſo as to be reported into the court, and ſtand as evidence on the trial. By lord *Camden*, and ſo reſolved unanimouſly by the houſe of lords xi. 253

The legal protection of attornies from giving evidence againſt their clients, is as to what is revealed to them by their clients, in order to take their advice or inſtructions, with regard to their defence. By lord *Mansfield* xi. 253

It has often been determined, that as to fact, an attorney or counſel has no privilege to withhold his evidence if there is a doubt; even if he ſwears to an anſwer in chancery, he cannot protect himſelf from ſwearing whether that is his client's hand or not, or to his having ſworn it, or the execution of a deed; it does not come within the objection to an attorney's revealing the ſecrets of his client. By lord *Mansfield* xi. 253

One poſitive witneſs ſufficient by the civil law. See MAXIMS.

So by the law of *Scotland*. See *SCOTLAND*.

But not by the law of *England*. See *DELAMERE* Lord. EVIDENCE. *STAMFORD* Lord.

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A woman not permitted to wear her hat at her trial i. 339

* *WOODBURNE, JOHN,*

* His trial with *Arundel Coke*, Eſq. on the 22 and 23 *Car.* II. commonly called The *Coventry* Act, for Felony, at *Suffolk* aſſizes, 13 *Mar.* 1721, 8 *Geo.* I. vi. 212

* The indictment charging him as principal, and *Coke* as acceſſary, in disfiguring Mr. *Edward Criſpe* vi. 212. vi. 60 Ap.

* Mr. Serjeant *Selby* and Mr. ſerjeant *Branthwayte*, their ſpeeches before evidence vi. 213

* Mr. *Criſpe*'s evidence of his being aſſaulted vi. 214

* The ſurgeon's evidence of the nature of the wounds vi. 215

* Evidence of *Woodburne*'s confeſſion that he did the fact vi. 215

* Evidence of *Moon* and *Carter*, that Mr. *Coke* endeavoured to perſuade them to murder a man vi. 216

* Mr. *Raby*'s application of the king's evidence vi. 217

* *Woodburne* owns the fact; but ſays he was drawn in by *Coke* vi. 218

* The jury are told, that *Woodburne*'s ſtory is not evidence againſt *Coke* vi. 218

* Mr. *Coke* urges in his defence, that his intent was not to maim, but to kill vi. 219

* He deſires counſel may be aſſigned him vi. 219

* Which is refuſed, it being a queſtion of fact, and not of law vi. 219

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* The king's counſel reply vi. 224

* The priſoner's exception diſallowed vi. 228

* Lord chief juſtice pronounces ſentence of death upon them vi. 228

* They are executed vi. 228

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He was convicted of foul corruption vi. 566. vii. 109. See xi. 46, 53

* *WOODWARD, RICHARD* ii. 585. See *MESSENGER*, & al.

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* Words held to amount to an overt-act of treaſon i. 74. iv. 593, 658

* Any words or actions diſcovering a treaſonable intention againſt the prince's life, held to be overt-acts of treaſon i. 101. iii. 207, 1056

* Whether writing the treaſonable words another dictates may be deemed an overt-act of the writer's treaſonable imagination? ii. 350

* Treaſonable words ſpoken in *French* ii. 656

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* In an action for words, the *colloquium* and *averment* ought to be proved, to maintain the action iii. 1059

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